69467-7

69467-7

NO. 69467-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

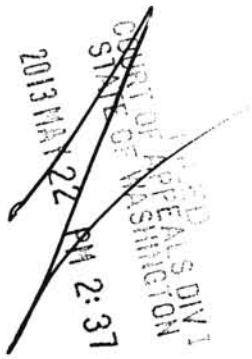
STATE OF WASHINGTON,

Respondent,

v.

DARRELL NEWBY (d.o.b. 11/28/1996),

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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2. Did the trial court properly exercise its discretion when it allowed a witness to provide a lay opinion that was based on his observations and perceptions?

3. Does the trial court's alleged abuse of discretion require reversal of the conviction as an accomplice to robbery in count II if, within reasonable probabilities, the potential errors would not have materially affected the outcome of the trial?

4. Was there sufficient evidence to convict respondent as an accomplice to the crime of robbery in the first degree in count II?

5. Are the trial court's implicit oral findings sufficient to find that respondent acted with knowledge if its written findings expressly state that both robberies were a group effort and appeared to have been discussed and planned?

6. Does the trial court's failure to strictly adhere to the requirements of JuCR 7.11(d) and its omission of the word

'knowledge' in its written findings warrant remand when the trial court's oral findings are comprehensive and do not interfere with appellate review?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On September 5, 2012, the State charged the juvenile respondent, Darrell Newby, by Second Amended Information with one count of robbery in the first degree under RCW 9A.56.200(1)(a)(i) and 9A.56.190, a second count of robbery in the first degree under RCW 9A.56.200(1)(a)(iii) and 9A.56.190, and a third count of theft in the first degree under RCW 9A.56.030(1)(b) and 9A.56.020(1)(a), based on his conduct on April 17, 2012. CP 6-7. The case proceeded to a bench trial before the Honorable Barbara Mack. RP 4. After a fact finding hearing, the court found respondent guilty as charged of two counts of robbery in the first degree. RP 459-61. The court signed written findings of fact and conclusions of law in support of its verdict on November 15, 2012. CP 26-35.

On October 24, 2012, the trial court imposed a sentence of 103-129 weeks at JRA on both counts, to be consecutive.

CP 18-21. This appeal was timely filed on October 24, 2012. CP 22-25.

2. SUBSTANTIVE FACTS

On April 17, 2012, around 5 p.m., Brandon Parrish and Tawney Fournier saw a group of individuals near the Kent library. RP 125, 195. Parrish approached the group and asked if they had marijuana. RP 127. Parrish interacted with at least two of the group members. RP 128. The conversation lasted for a couple of minutes. RP 196. Parrish was told that they did have marijuana. RP 127. However, the primary person that Parrish was talking to stated that Parrish and Fournier would need to follow the group to the nearby Kent transit center, approximately two blocks away, because 'they' wanted the purchase of the marijuana to take place there, instead of where they were presently. RP 129, 197. Parrish, Fournier, and the entire group of individuals, which numbered between six and eight, walked together towards the transit center. RP 125, 130. During the walk to the transit center, Parris and Fournier walked side by side, while the members of the group walked together. RP 130. During the walk, Parris and Fournier observed the group conversing with each other. RP 130. Some of the individuals in the

group would group together and talk, and the conversations appeared to be hushed. RP 198, 199. Despite walking near the group, Parrish and Fournier could not hear the details of the group's conversation. RP 131, 198. Based on their observations and because the members of the group were talking to each other cordially and as friends do, Fournier and Parrish believed that the members of the group knew each other. RP 131-32, 202.

Parrish, Fournier, and the group walked to the transit center and eventually stopped in front of a tattoo parlor located at the intersection of Railroad Avenue N. and E. Pioneer Street. RP 132, 134. As they all reached the transit center and tattoo parlor, Parrish was asked to pull out his money to purchase the marijuana. RP 134. All the members of the group were in front of and beside Parrish and Fournier, all an arm's length away. RP 136. Once Parrish took his money out, Fournier's cell phone was ripped out of her hand and she was punched in the face (causing her to fall to the ground). RP 202, 204. Fournier's cell phone had been in her hand during the walk to the transit center and was visible to everyone. RP 206. Fournier's cell phone was grabbed from her hand almost at the same time as she was punched. RP 205. The individual who took Fournier's cell phone was not the same

individual who punched her. RP 215. The person who punched Fournier and the person who took her phone were all part of the group that met Parrish and Fournier near the library. RP 216.

When the phone was taken from Fournier, Parrish attempted to intervene. RP 214. However, almost simultaneously, another member of the group took Parrish's money out of his hand and ran away. RP 137, 217. Parrish chased the individual who took his money as soon as the money was grabbed from his hand. RP 137. The individual who took Parrish's money was part of the group that Parrish met at the library; that individual furthermore remained with and walked with the group from the library. RP 139. When Fournier returned to her feet, Parrish was no longer there. RP 207.

Kevin Gemmell was working at the tattoo parlor, at the intersection of Railroad Avenue N. and E. Pioneer Street, on the afternoon of April 17, 2012. RP 109. His attention was drawn to a nearby scuffle between a white male and an African-American male. RP 109. As Gemmell looked in their direction, Gemmell observed a white female down on the ground, in the middle of the street, screaming and yelling. RP 112. As the female was on the ground, Gemmell then saw the African-American male run away from the scuffle, with the white male giving chase. RP 119.

Gemmell then observed both males run towards an alleyway off of E. Street Pioneer. RP 115. Gemmell also observed that a group of seven to eight individuals all followed the two males in the same direction. RP 116.

Phyllis Cratic, a transit center security officer, was working at the Kent transit center on that afternoon. RP 38. Cratic's attention was drawn to a nearby commotion, across the street from the transit center, near the same tattoo shop. RP 47. Cratic looked in that direction and observed a group of seven to ten people, consisting of one white male, later identified as Parrish, one white female, later identified as Fournier, and several African-American males and females. RP 47. Cratic recognized one of the African-American males as Darrell Newby and one of the African-American females as his sister, Salishia Newby (hereinafter 'Salishia'). RP 48.

Moments later, Cratic observed Fournier fall to the ground. RP 57. As she fell to the ground, everyone, including Newby, was standing around her. RP 58. Cratic did not see how Fournier fell to the ground. RP 57. Seconds after Fournier fell, Cratic saw Newby run from the commotion, towards Cratic's location, with Parrish running after him. RP 60. As Newby approached Cratic's location,

Cratic heard Parrish yelling 'give me back my money.' RP 63. Cratic then observed Newby stop, pull out a knife, and begin to yell at Parrish 'I'm gonna cut you.' RP 68. Cratic, who had her umbrella in her hand, intervened and told Newby 'you're not going to do that over here.' RP 69. Simultaneously, Cratic grabbed her cell phone and told Newby that she was calling 911 and that he needed to get off the premises. RP 75. As Cratic began to speak with the 911 dispatcher, Newby ran away, with Parrish chasing him. RP 75, 78. Cratic observed the other members of the group follow Newby and Parrish as they ran into a nearby alley. RP 85.

When Newby approached Cratic, who was wearing a security guard uniform, Newby never asked Cratic for help, never told Cratic he had been attacked, never told Cratic he was trying to protect himself, and never told Cratic that he was scared for his safety. RP 83. Fournier subsequently approached Cratic, complained about her face, and spoke with the 911 dispatcher. RP 86.

Parrish continued to chase the individual who took his money, identified by Cratic as Newby, down an alley and towards a nearby gas station; Parrish never lost sight of him. RP 154, 153. As they arrived near the gas station, Parrish was able to catch Newby,

bear-hug him, and take him to the ground. RP 150. A second individual arrived and pushed Parrish away, allowing Newby to stand up. RP 150. Newby jumped up, pulled a knife out, and waved it in a threatening manner near Parrish's gut region. RP 147, 151. Parrish backed away and returned to find Fournier. RP 152. Parrish remembered seeing other members of the group at the location where Newby pulled out a knife. RP 155, 157.

One block from the Kent transit center, Mark Shreve was getting gas for his car at a Chevron gas station. RP 240-41. As he was getting gas, Shreve observed two African-American males running through the gas station. RP 241. Shreve observed one white male chasing them, yelling 'the police are on their way, you need to stop.' RP 242. The two African-American males stopped and a brief tense conversation ensued with the white male. RP 244. Shreve also observed some females arrive at the location and stay nearby. RP 245. Moments later, the police arrived and Shreve observed the white male walk directly to the police officer. RP 246. Shreve also observed the same police officer speak to the group of females that had come to the scene. RP 245. The two African-American males dispersed when the police arrived. RP 243.

Officer Autumn Majack responded to the 911 calls and was dispatched to the area. RP 253. When she arrived near the gas station, at the end of the alleyway, she observed Parrish frantically waving at her, doing everything he could to get her attention. RP 254. Parrish pointed to a group of individuals who had followed him to the gas station. RP 259. Officer Majack approached the group and contacted four individuals. RP 259-60. Officer Majack immediately recognized one of those four individuals as Salishia, Newby's sister. RP 260. Officer Majack asked her what had happened and Salishia provided no information. RP 261.

The next day, Cratic was again working at the Kent transit center when she saw Newby on the premises. RP 91. Cratic called 911, officers responded to the scene, and Newby was taken into custody. RP 91-92, 282. After being transported to the police station, Detective Ghaderi read Newby his Miranda rights and juvenile warnings, and Newby indicated that he understood his rights and was willing to speak to Detective Ghaderi. RP 286-87. Newby stated that 'some white guy tried to buy meth from him,' and that another person that he knew then grabbed the money from the white guy's hands. RP 294. Newby admitted snatching the money from that individual, and giving the money to a third person.

RP 294. Newby stated that the white guy attacked him, so he pulled out a knife to protect himself. RP 294. When Detective Ghaderi then told Newby that he could not take part in a robbery and then claim self-defense, Newby changed his story. RP 295.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING HEARSAY EVIDENCE UNDER ER 803(a)(5), RECORDED RECOLLECTION, WHEN THE WITNESS EXPRESSLY STATED THAT HE DID NOT RECALL WHAT HAD OCCURRED.

Pursuant to ER 803(a)(5), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

> (5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. ER 803(a)(5).

Thus, admission of a recorded recollection under ER 803(a)(5) is proper when the following requirements are met: (1) the record

pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately. State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009). Admission of statements as recorded recollection under ER 803(a)(5) is reviewed for an abuse of discretion. Id.; see also State v. Derouin, 116 Wn. App. 38, 64 P.3d 35 (2003). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. White, 152 Wn. App. at 183-84; State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). A position no reasonable person would take is one that is manifestly unfair, unreasonable, or untenable. O'Neill v. Dep't of Licensing, 62 Wn. App. 112, 117, 813 P.2d 166 (1991).

In this case, the trial court properly admitted part of Parrish's prior statement as substantive evidence under ER 803(a)(5) because Parrish testified that he could not recall some of the critical aspects of April 17th, i.e., he did not have sufficient recollection of what happened. In the first instance when Parrish's recorded recollection was admitted, the prosecutor asked Parrish if he ever

tackled the robber to the ground. RP 145. Parrish answered that he did not recall if there was a physical interaction but that his prior statement might help him remember. RP 145. After being provided a copy of his prior statement and reviewing his statement, Parrish indicated that his memory had been refreshed and that he now remembered being able to get the robber in a headlock and that the robber was then able to jump up and get away from his grasp. RP 145-47. When the State then asked Parrish whether anyone intervened, Parrish indicated that he did not recall. RP 147. Again, the prosecutor showed Parrish a copy of his prior statement to determine whether his memory could be refreshed. RP 148. When the prosecutor asked Parrish whether his memory had been refreshed, Parrish stated 'Yes...it says there that his friend pushed me off of him.' RP 148. Since Parrish's response suggested that he might be relying on the statement, and that his memory may not actually have been refreshed, the prosecutor followed up with a second specific question and asked Parrish whether he actually remembered that his friend had pushed him. RP 148. Parrish then responded 'I don't recall that,' clearly indicating that his memory had not been refreshed. RP 148. Thus, the prosecutor then asked Parrish the required elements of ER 803(a)(5): 1) "at the time that

you gave the statement, was the incident fresh in your mind?", 2) "does the statement pertain to what you knew about at the time that the statement was given?", and 3) "does the statement accurately record what happened on that day?"; Parrish responded in the affirmative to each question. RP 148-49. The fourth element had already been met when Parrish testified that he did not remember. The prosecutor then read into the record the two sentences from Parrish's prior statement that pertained to the specific question that had been asked. RP 150. Because the prosecutor first attempted to refresh Parrish's memory with his own statement, expressly ascertained whether Parrish's memory had actually been refreshed when the matter was unclear, and subsequently laid the appropriate foundation for the admission of recorded recollection under ER 803(a)(5), the trial court did not abuse its discretion when it allowed Parrish's prior recorded recollection to be admitted for substantive evidence.

In the second instance when Parrish's recorded recollection was admitted, the prosecutor asked Parrish: "do you remember if any other group members joined you guys in that location?" RP 155. Parrish once again responded 'No, I don't recall that.' Again, the prosecutor asked the same required foundational

questions for recorded recollection and Parrish answered 'Yes' to each question. RP 155-56. Because Parrish once again expressly stated that he could not recall a specific detail of the events that occurred on April 17th, and the prosecutor subsequently laid the appropriate foundation for the admission of recorded recollection under ER 803(a)(5), the trial court did not abuse its discretion when it allowed Parrish's prior recorded recollection to be admitted for substantive evidence.

Newby's reliance on State v. Floreck is misplaced. In Floreck, a witness was arrested for a series of burglaries and, at the time of the arrest, confessed in a taped statement that she committed the crimes with Floreck. State v. Floreck, 111 Wn. App. 135, 43 P.3d 1264 (2002). At trial, however, she testified that she committed the burglaries alone. Id. She furthermore admitted making certain statements on tape but indicated that she had lied. Id. The appellate court in Floreck did not hold that the witness' statement was inadmissible as recorded recollection because the witness had "spotty or partial memory" of the event in question. Instead, the court held that the witness' statement was not admissible for substantive purposes because the witness was able to recall the burglaries; the witness was however now claiming that

she acted alone and that her prior statement had been a lie. Id. As such, the court held that she did not have insufficient recollection of the matter at hand and that her statement could not be admitted for substantive purposes. Id. In this case, there is no indication that Parrish lied or changed his account.

Newby appears to argue that ER 803(a)(5) requires that a witness have no recollection about an event in its entirety, instead of specific parts of that event, before recorded recollection may be introduced. In his brief, Newby argues that Parrish was able to testify about the incident in great detail and that Parrish had never stated that he could not recall 'the incident.' There is, however, no requirement that a witness have a complete lack of memory about an incident in its entirety before that witness' recorded recollection may be admitted, and Newby fails to cite to any case that would suggest that. Instead, under the second requirement of the recorded recollection test, a prior statement is properly admitted if the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony. State v. Alvarado, 89 Wn. App. 543, 551, 949 P.2d 831 (1998). Commentators have interpreted this requirement broadly to apply when the witness recalls the matter in a general way but cannot recall important details.

5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.28, at 83 (5th ed.2007). Thus, if a witness remembers basic details about an incident, but testified that he/she cannot remember critical aspects of the incident, the trial court does not abuse its discretion in concluding that that witness' statement meets the requirement of ER 803(a)(5). Because in both instances Parrish could not remember some of the critical aspects of the incident and a reasonable person could have taken the view adopted by the trial court, there was no abuse of discretion in admitting Parrish's recorded statements.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ALLOWED THE WITNESS TO TESTIFY THAT THE GROUP KNEW EACH OTHER WHEN HIS OPINION WAS RATIONALLY BASED ON HIS OBSERVATIONS.

Pursuant to ER 701, if a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702. ER 701. Plainly

stated, lay witnesses may give opinions or inferences based upon their rational perceptions that help the jury understand the witness' testimony and that are not based upon scientific or specialized knowledge. State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). As stated in Kinard, the trial court is further vested with wide discretion under **ER 701**. State v. Kinard, 39 Wn. App. 871, 696 P.2d 603 (1985). A proper lay opinion could include the speed of a vehicle, the mental responsibility or health of another, the value of one's own property, or the identification of a person. Id.

In this case, Parrish testified that he approached a group of six to seven individuals in order to buy marijuana. RP 126-27. Parrish indicated that he spoke with at least two of them. RP 128. A conversation ensued between Parrish and the group and 'they' indicated that they did have some marijuana. RP 128. Parrish testified that 'they' however asked him and Fournier to follow them over to the bus station. RP 127. 'They' stated that they would like to make the transaction over at the transit center. RP 129. The entire group, along with Parrish and Fournier, walked to the bus station. RP 130. During the walk, Parrish observed that while he was walking side by side with Fournier, the group was walking together. RP 130. The group was furthermore conversing with each other.

RP 130. Following this testimony, the State asked Parrish whether, "based on his observations," it appeared to him that the members of the group knew each other. RP 131. Following defense's objection, the trial court overruled the objection because the question asked for Parrish's opinion based on his observations. RP 131. The trial court further reminded defense counsel that he could cross examine the witness on his opinion and observations. RP 131. Defense never cross examined Parrish on his observations of the group's interaction.

The court properly allowed Parrish to opine that the members of the group were acquainted because his opinion was rationally based on his perception/observations. The prosecutor further limited the question that was asked to Parrish to "based on your observations, did it appear to you that the group knew each other?", as to protect the essence of ER 701.

The court also properly allowed Parrish to opine that the members of the group knew each other because his opinion was helpful for the determination of a fact in issue, i.e., whether Newby was an accomplice. Parrish's opinion was not effectively regarding the guilt of the accused. Instead, it was helpful for the trier of fact to determine a fact in issue, i.e., whether Newby was an accomplice.

In order to prove that an individual is an accomplice, one of the obvious first steps is to prove a connection between two or more suspects, i.e., proving that they at the very least knew each other. Parrish's opinion was limited to whether the group members knew each other.

In a prosecution for the crime of driving while under the influence, a police officer's testimony that a defendant was intoxicated and under the influence of alcohol is a valid lay opinion on a material factual question, if based on personal observations, and not an improper opinion as to that defendant's guilt. State v. Lewellyn, 78 Wn. App. 788, 895 P.2d 418 (1995). Although a witness may not give an opinion as to the defendant's guilt, an officer's opinion (or a lay person's opinion) that a defendant is intoxicated is based on direct observations and experience. Id. It is not a direct comment on the guilt or credibility of the witness. Id.

Parrish's opinion was based on direct observations and prior experience, and was not a direct comment on Newby's guilt or credibility. As Parrish concluded, based on the interaction between the group members and the observation that the group members stayed together, 'any outsider would be able to obviously tell they knew each other.' RP 132. Because Parrish's opinion was rationally

based on his perception, was helpful for the determination of a fact in issue, and was not based on scientific, technical, or other specialized knowledge, the court properly allowed Parrish to opine that the group members knew each other.

3. EVEN IF THE COURT HAD ABUSED ITS DISCRETION AND COMMITTED NON-CONSTITUTIONAL ERRORS, THE OUTCOME OF THE TRIAL WOULD NOT HAVE BEEN MATERIALLY AFFECTED.

The cumulative effect of trial court errors may require reversal, even if each error examined on its own would otherwise be considered harmless. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994). However, a defendant must first establish actual error before a reviewing court can measure cumulative effect. State v. Clark, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001). To determine whether cumulative error exists, the reviewing court must examine the nature of the error: multiple constitutional errors are more likely to accumulate to cumulative error than multiple non-constitutional errors. Russell, 125 Wn.2d 24 at 94. Non-constitutional errors require reversal only if, within reasonable probabilities, it materially affected the trial's outcome. Id.

In this case, even if the reviewing court finds actual error, reversal is not required because, within reasonable probabilities, the potential non-constitutional errors would not have materially affected the outcome of the trial. The trial court did not conclude that there was a group effort solely because of Parrish's opinion that the group members knew each other.

First, Fournier also testified (without objection from defense) that, based on her observations, it appeared to her that the members of the group knew each other. RP 202. More specifically, Fournier opined that the group knew each other because they spoke to each other cordially, like friends do. RP 202. She also observed that they had conversations amongst them that was 'kind of like hushed,' and that a few people would talk and then some of them would group together and talk. RP 198, 199. As such, witnesses other than Parrish also opined that the group members knew each other.

Second, Parrish was not the only witness to testify that members of the group followed him and Newby to the location where police eventually responded. Parrish was thus not the only witness who offered testimony that could allow the trial court to conclude that the group that Newby belonged to had worked

together. Cratic, Shreve, Gemmell, and Officer Majack each offered testimony that could have, on their own, allowed the trial court to conclude as such. Cratic and Gemmell testified that they observed the other members of the group follow Newby and Parrish as they ran into the alley. Shreve testified that he observed one white male (Parrish) running after two African-American males, which whom a brief tense conversation ensued. RP 241, 244. Shreve also observed some females arrive near the gas station, stay nearby, and speak to the arriving police officer. RP 245. One of those females was identified as Newby's sister, who had already been seen by Cratic with Newby at the transit center. RP 48. Shreve also testified that as soon as the police arrived, the two males left the scene. RP 243. Officer Majack confirmed that as she arrived near the gas station, Parrish pointed a group of four individuals to her and that Newby's sister was one of them. RP 259-60.

Lastly, the trial court expressly stated in its oral ruling that "what it found compelling was that this group was together," and that "this was a group effort." RP 460, 461. From the moment that they (the group) were approached at the library, they required Fournier and Parrish to follow them to the transit center. RP 460. The theft of Parrish's money, the theft of Fournier's cell phone, and

the punching of Fournier, all took place almost simultaneously. RP 468. After it all, the group did not immediately disperse; they stayed together as observed by Cratic, Gemmell, and Shreve. RP 468. Lastly, the group was conversing among themselves between the library and the Kent transit center before these nearly simultaneous offenses. RP 461. Altogether, the trial court focused on the observations made by Parrish, Fournier, Cratic, Shreve, Officer Majack, and Gemmell, and the timing of both robberies, to conclude that the group had worked together. Because the trial court had an abundance of evidence, aside from Parrish's testimony and opinion, to conclude that the group worked together, any non-constitutional errors that the court may find would not have materially affected the trial's outcome. As such, a reversal is not warranted.

4. SUFFICIENT EVIDENCE SUPPORTS RESPONDENT'S CONVICTION AS AN ACCOMPLICE TO ROBBERY IN THE FIRST DEGREE IN COUNT II.

At trial, the State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient if, taken in the light

most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. The appellate court must "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). Furthermore, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

To convict Newby as an accomplice to robbery in the first degree in Count II, the State had to prove beyond a reasonable doubt that: 1) Newby or another unlawfully took personal property from the person of another, 2) Newby or another intended to commit theft of the property, 3) the taking was against the person's

will by the use or threatened use of immediate force, violence, or fear of injury by Newby or another, 4) the force or fear was used to obtain or retain the property, 5) in the commission of these acts, Newby or another inflicted bodily injury, and 6) with knowledge that it will promote or facilitate the commission of the crime, Newby solicited, commanded, encouraged, or requested another to commit it, OR aided or agreed to aid another in planning or committing the crime. RCW 9A.56.200(1)(a)(iii), RCW 9A.08.020(3)(a). 'Aid' means all assistance whether given by words, acts, encouragement or support. State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993).

A robbery in the first degree was committed against Fournier when her cell phone was taken from her hand as she was simultaneously punched and injured. Newby argues however that there is insufficient evidence to find Newby guilty as an accomplice because there is insufficient evidence to prove that Newby had knowledge that he was assisting in the commission of the crime. As stated in Trujillo, to hold an individual liable as an accomplice, the State must prove that a person who aids in the commission of the offense had knowledge of it. State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002). However, while an accomplice must have known about the specific crime the principal was going to commit,

an accomplice need not have specific knowledge of every element of the crime committed by the principal; rather, the accomplice's general knowledge of his co-participant's substantive crime suffices for accomplice liability. State v. Carter, 119 Wn. App. 221, 79 P.3d 1168 (2003); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).

In Davis, an accomplice acting as a lookout to a robbery contested his first degree robbery conviction on the basis that he did not know that the principal was armed with a deadly weapon. State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984). Much like inflicting bodily injury, being armed with a deadly weapon elevates a robbery in the second degree to robbery in the first degree. RCW 9A.56.200. The court in Davis addressed whether the accomplice liability statute predicates criminal liability on general knowledge of a crime or specific knowledge of the elements of a crime, i.e., possession of a gun. 101 Wn.2d at 657. The court held that specific knowledge of the elements of the participant's crime was not necessary, stating "as to the substantive crime, the law has long recognized that an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Id.

While knowledge of the specific crime charged is required, there is no requirement of such specificity that one have knowledge of the particular degree of the crime. In In re the Pers. Restraint of Sarausad II, the court concluded:

> The law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder. Likewise, an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor-level assault, and need not have known that the principal was going to use deadly force or that the principal was armed.

In re the Pers. Restraint of Sarausad, 109 Wn. App. 824, 836, 39 P.3d 308 (2001).

For the same reasons, the required "specific" crime underlying robbery in the first degree is robbery (a taking by the use of force). As stated in Davis and In re Domingo, a defendant can be validly convicted as an accomplice to first degree robbery even if he did not know the principal was armed, as long as he had general knowledge that he was aiding in the crime of robbery. Davis, 101 Wn.2d at 658; In re Domingo, 155 Wn.2d 356, 364, 119 P.3d 816 (2005).

In State v. Grendahl, cited by Newby, Nauditt knocked a victim to the ground and took her wallet; Grendahl then drove Nauditt away from the scene. State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002). At trial, Nauditt testified that Grendahl knew that Nauditt's plan was to steal a purse. Id. In closing, the prosecutor expressly stated to the jury that if Grendahl was aware that a theft was going to take place, and drove Nauditt away from the scene, that Grendahl was an accomplice. Id. at 910. The prosecutor thus incorrectly stated that one could be an accomplice to robbery if he merely knew that a theft was going to be committed, i.e., without needing to be aware that force could also be used. As such, the court held that no evidence had been provided to the jury suggesting that Grendahl knew that force could have been used, and that as such Grendahl was not an accomplice to a robbery. Id.

Viewing the evidence in the light most favorable to the State in this case, there was more than sufficient evidence to show that Newby was an accomplice to a robbery. First, a robbery was committed against Fournier when her cell phone was taken from her hand by the use of force; she was simultaneously punched in the face. Second, as argued in the State's closing argument, the evidence showed that Newby knew that a taking would take place

and that force would be used. RP 428. This evidence was recognized by the court and reflected in the court's oral ruling and written findings. Weighing issues of conflicting testimony and credibility of witnesses, the court specifically held that on April 17, 2012, Newby was with a group of people. CP 26. Someone in the group agreed to sell marijuana to Parrish but indicated that Parrish and Fournier would need to follow the group to the Kent transit center. CP 27. The entire group stayed together and walked, as a group, from the library to the transit center. CP 27. During the walk, the group members were seen talking amongst themselves. CP 27. As they all reached the transit center, near the tattoo shop, Newby yanked the money out of Parrish's hand. CP 27. Someone also grabbed Fournier's cell phone from her hand and punched her in the eye. CP 28. The person who took Fournier's phone was a different person than the one who punched her. CP 28. The taking of the phone, the assault of Fournier, and the taking of the money from Parrish occurred almost simultaneously. CP 28. As Newby ran away, the members of the group that were with Newby at the library followed Newby and Parrish to the gas station. CP 31. Newby used a knife (force) against Parrish. CP 29. When the police arrived at the gas station, Newby ran away. CP 30. Newby admitted pulling

out a knife, but changed his story when asked further questions. CP 31.

The State correctly instructed the trier of fact that accomplice liability requires that the accomplice act with knowledge of the crime. RP 412. Because two victims (Parrish and Fournier) were robbed almost simultaneously, because the taking of Fournier's cell phone and the assault on Fournier was committed by two separate individuals almost simultaneously, because the group remained together during and after the entire event, and because Newby himself used force to rob Parrish, there was sufficient evidence to support, as stated by the court, that these acts appeared to have been a group effort and appeared to have been discussed and pre-planned by the group; there was sufficient evidence for the court to conclude that Newby acted with knowledge and thus as an accomplice to robbery in the first degree in Count II.

5. ALTHOUGH THE COURT'S WRITTEN FINDINGS DO NOT EXPRESSLY STATE THAT NEWBY ACTED 'WITH KNOWLEDGE,' THE ORAL FINDINGS ARE SUFFICIENT TO IMPLICITLY FIND THAT HE WAS AN ACCOMPLICE.

Under JuCR 7.11, the court must enter written findings that state the ultimate facts as to each element of the crime and the

evidence upon which the court relied in reaching its decision. JuCR 7.11(d). Under this rule, the court in a juvenile adjudicatory hearing is required to enter formal findings of fact and conclusions of law as to each element of the offense charged. State v. Souza, 60 Wn. App. 534, 805 P.2d 237 (1991). These rules make sense because the basic reason for requiring written findings and conclusions is to enable the appellate court to review the issues raised on appeal. State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

Where evidence exists to support a finding on an ultimate fact, the case may be remanded for entry of the omitted findings. Souza, 60 Wn. App. at 541. If a juvenile court enters a consistent oral ruling that is comprehensive and includes findings on all essential elements, the reviewing court may use the juvenile court's oral ruling to supplement and interpret the written findings entered by the juvenile court in order to review the issues raised on appeal. State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994) (finding that remand to enter written findings in accordance with JuCR 7.11(d) when the juvenile court entered comprehensive oral ruling amounts to an "unnecessary administrative detail" and is unnecessary). Noncompliance with JuCR 7.11(d) does not require

reversal and dismissal of the charge unless the record is devoid of evidence to support the omitted findings. Id. at 266.

In this case, the State concedes that the court did not expressly find that Newby acted with 'knowledge' in its written findings of fact and conclusions of law. However, as previously argued, there is substantial evidence in the record to support the trial court's conclusion that Newby acted with knowledge, and the court's oral rulings adequately address the (expressly) missing knowledge finding. As such, remand is unnecessary.

Knowledge can be inferred from the conduct of an individual and/or the timing of various events that that individual is involved with. Although the court did not explicitly state that Newby acted 'with knowledge,' the court implicitly held that Newby acted as such. In its oral findings and findings of fact, the court held that the acts that had been committed, including the taking of Fournier's phone and the assault of Fournier, appeared to have been a "group effort and appeared to have been discussed and pre-planned by the group." CP 31. In other words, the group members, including Newby, knew what the group was about to do, and in fact planned it. The court further expressly held that Newby was an accomplice

to the commission of the second count of Robbery in the First Degree. CP 33.

In its oral ruling, the court expressly stated that what it "found compelling about this case [was] that this group was together. From the moment they were approached at the library, they required, in order for this supposed drug deal to take place, for Fournier and Parrish to follow them to the transit center." RP 460. In addition, the court emphasized that "the two offenses -- the theft of the cell phone, punching Fournier in the eye, and the theft of the money from Parrish -- took place almost simultaneously. If the group had immediately dispersed, it might have been entirely different. But they were together." RP 460. Also, "the group was conversing among themselves between the library and the Kent transit center before these simultaneous or nearly simultaneous offenses occurred." RP 461. Altogether, these observations implicitly conclude that Newby acted with knowledge during the commission of both robberies, even if not expressly stated in the court's written findings.

Because the court's oral rulings are comprehensive and state the ultimate findings as to each element of robbery in the first degree and accomplice liability, the court's failure to strictly comply

with the requirements of JuCR 7.11(d) does not interfere with appellate review. The error is inconsequential, rendering remand to enter written findings in accordance with JuCR 7.11(d) an unnecessary administrative detail.

In the alternative, if the reviewing court determines that the court's oral ruling that the two robberies were a 'group effort' and appeared 'to have been discussed and planned' does not sufficiently imply that Newby acted with knowledge, the sufficiency of the evidence warrants remanding the matter to the trial court to enter complete findings of fact and conclusions of law.

D. CONCLUSION

For all of the foregoing reasons, this Court should affirm Newby's conviction for two counts of robbery in the first degree.

DATED this 20th day of May, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DARRELL NEWBY, Cause No. 69467-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

5/20/13

Name Pascal Herzer
Done in Kent, Washington

Date 5/20/13