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JUL 13 2010  
King County Prosecutor  
Appellate Unit

NO. 64579-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

T.K.,

Appellant.

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

The Honorable Leroy McCullough, Judge

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REPLY BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ARGUMENT IN REPLY

THE TRIAL COURT DID NOT FIND T.K. GUILTY AS AN ACCOMPLICE.

The State does not argue that the evidence was sufficient to convict T.K. as a principal and therefore appears to concede it was not. Instead, relying on comments in Judge McCullough's oral decision, the State argues that T.K. was convicted as an accomplice. This is incorrect.

As discussed in the opening brief, Judge McCullough's written findings and conclusions unambiguously find T.K. guilty as a principal. They indicate that *T.K.* caused bodily harm to K.F., this was accompanied by substantial pain that caused considerable suffering, and *T.K.* acted with criminal negligence. CP 9-10. There is no mention of accomplice liability or the standards that apply for accomplice liability.

Citing State v. Bynum, 76 Wn. App. 262, 884 P.2d 10 (1994), review denied, 126 Wn.2d 1012 (1995), the State argues that this Court can look to Judge McCullough's oral ruling and notes that he indicated T.K. was part of "a group activity" and "the parties [were] acting in concert." BOR at 3, 4, 7 (citing RP 140).

As an initial matter, it is not clear this portion of Judge McCullough's oral decision is a finding of accomplice liability. It was difficult, based on the trial testimony, to determine which individual did what during the altercation. In finding that there was a group activity, the group acted in concert, and T.K. was part of the group that kicked and hit M.S., Judge McCullough may have intended no more than to find that T.K. engaged in both hitting and kicking rather than intending to enter a broader finding of guilt under a theory of accomplice liability.

In any event, however, the State's reliance on Judge McCullough's preliminary oral decision is improper. Bynum merely stands for the proposition that where the court's written findings fail to address all essential elements of the crimes charged, the reviewing court can rely on a comprehensive oral decision that includes the missing findings. See Bynum, 76 Wn. App. at 265-266. There is nothing missing from Judge McCullough's written findings in T.K.'s case. He found her guilty as a principal and entered all necessary findings for that theory of liability.

An oral decision "is no more than a verbal expression of [the judge's] informal opinion at the time. It is necessarily subject to further study and consideration, and may be altered, modified, or

completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.” Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). An inconsistent oral finding cannot be used to impeach the written findings. Id.; see also State v. Martinez, 76 Wn. App. 1, 3 n.3, 884 P.2d 3 (1994) (unincorporated oral decision can be used to interpret but not to impeach written findings and conclusions), review denied, 126 Wn.2d 1011 (1995); State v. Bryant, 78 Wn. App. 805, 812-813, 901 P.2d 1046 (1995) (appellate court may not consider oral decision that is inconsistent with trial court’s written findings and conclusions).

There is nothing in Judge McCullough’s written findings and conclusions indicating he found T.K. guilty as an accomplice. There is no mention of the word “accomplice” or any of the standards that apply under that theory of liability. It is true that accomplice liability is not an element or an alternative means of committing a crime. State v. Teal, 152 Wn.2d 333, 338, 96 P.3d 974 (2004). Principal and accomplice liability are, however, different theories of liability requiring different considerations. See RCW 9A.08.020(3) (defining elements of complicity); State v. Jackson, 137 Wn.2d 712, 726, 976 P.2d 1229 (1999) (refusing to

find accomplice liability where issue not advanced, argued, or briefed by prosecution). And there is no indication accomplice liability was a consideration in Judge McCullough's ultimate determination of guilt. Rather, Judge McCullough's written findings that T.K. caused the harm that led to substantial pain and considerable suffering demonstrate she was convicted solely as a principal.

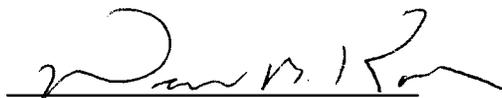
B. CONCLUSION

There is insufficient evidence to sustain T.K.'s conviction as a principal. For all of the above reasons, and those contained in T.K.'s opening brief, this Court should reverse her assault conviction.

DATED this 13<sup>th</sup> day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051  
Attorneys for Appellant

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYRA KUSACK  
507 L STREET SE  
AUBURN, WA 98002

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JULY, 2010.

x *Patrick Mayovsky*