Supreme Court No. 89438-8
COA No. 69467-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.N. (d.o.b. 11/28/96),

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
JUVENILE DIVISION

The Honorable Barbara Mack

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

D.N. was the juvenile appellant in Court of Appeals No. 69467-7-I, decided September 16, 2013. Appendix A.

B. COURT OF APPEALS DECISION

D.N. seeks Supreme Court review of Court of Appeals decision (issued September 16, 2013) affirming the juvenile court's order finding him guilty on two counts of first degree robbery, where the court committed evidentiary error, where the written findings are inadequate to support the conviction of D.N. for robbery as to count II because the court did not find that D.N. knowingly assisted in a taking by force, and where the evidence at the adjudicatory hearing was insufficient to find D.N. guilty of robbery as to count II. CP 8, CP 26-35.

C. ISSUES PRESENTED ON REVIEW

1. At D.N.'s adjudicatory hearing, the juvenile court admitted portions of the complainant Parrish's police statements as substantive evidence under the "past recollection recorded" hearsay exception, where he did not have sufficiently inadequate memory of the matters, as required by ER 803(a)(5). Did the juvenile court abuse its discretion?

2. Did the juvenile court abuse its discretion in admitting the

speculative opinion testimony of Mr. Parrish in the absence of personal knowledge?

3. Are the juvenile court's written findings and conclusions inadequate in the absence of a determination on the ultimate issue that D.N. had the required complicity *mens rea* of assistance provided with knowledge of the specific crime charged?

4. Must the findings be remanded for revision where there is insufficient evidence of the missing element of knowledge?

5. Was the evidence insufficient to convict D.N. of being an accomplice to robbery, where there was no evidence that he knew that another member or members of the group would take Ms. Fournier's cell phone and punch her, thus committing forcible robbery. Must the court's entry of judgment based on the finding of guilt be reversed?

D. STATEMENT OF THE CASE

1. <u>Charging and adjudicatory hearing</u>. D.N., age 15, is incarcerated at Echo Glen Children's Center, following his charging and conviction on two counts of first degree robbery. These charges were based on claims by Brandon Parrish and Tawney Fournier, who themselves commenced the interaction with D.N. and others when, seeking to buy drugs, *they* approached a group of

young people, improperly and wrongfully asking these children if they had any. Allegedly, the Respondent D.N. grabbed money out of Mr. Parrish's hand, and another of the group of young people snatched Ms. Fournier's cell phone from her hand, as a third person punched Fournier. CP 1-7.

On the day of the incident, Brandon Parrish, a young male individual, became intoxicated by drinking beer, and then he and Tawney Fournier went to the Kent Transit Center. Parrish contacted a group of seven or eight young persons, attempting to purchase marijuana from them. 9/24/12RP at 126-34. He testified that the group told him he and Fournier could purchase some marijuana, but they needed to go over to an alley near Pioneer Avenue to do so. 9/24/12RP at 126-29. Tawney Fournier stated that the persons in the group were having light conversation as they walked in that direction. 9/24/12RP at 198. Once at the alley, Parrish claimed, when he pulled money out of his pocket, someone swiped the cash out of his hand and ran. 9/24/12RP at 134.

Tawney Fournier testified that Brandon started chasing after the male who took his money. 9/24/12RP at 202, 207. At the same time this happened, Fournier testified, "they" suddenly took Ms. Fournier's cell phone out of her hand and punched her in the eye.

9/24/12RP at 202-04. Fournier did not remember if the phone was forcefully grabbed. 9/24/12RP at 205. She did not know which male or males took the cell phone from her and punched her, which caused her to fall and suffer injury. 9/24/12RP at 215-18.

Mr. Parrish could not identify the Respondent D.N. as the person who grabbed the money out of his hand, because all of the youths looked the same to him and he was not certain. 9/24/12RP at 138. However, he stated that he chased after that particular person, through the Transit Center, in an attempt to get his money back. 9/24/12RP at 137-39.

Phyllis Cratic, a transit officer, saw a commotion in the area and recognized some of the persons she observed. She approached a white male who had chased down a black male, whom the officer recognized as D.N. 9/24/12RP at 59-63. When Officer Cratic approached them, the white male started uttering statements claiming robbery, as DN was unsuccessfully trying to open a blade on a folding knife. 9/24/12RP at 63-64. D.N. allegedly said to the white male, "I'm going to cut you." 9/24/12RP at 67-68.

D.N. then ran from the white male again, and the white male again chased after him. 9/24/12RP at 75. As the pair approached

a gas station, Mr. Parrish was able to get the male in a headlock and briefly hold him. 9/24/12RP at 146-47. However, the person somehow pulled free, and when he did, he opened a blade on the knife and wielded it in the direction of Mr. Parrish's stomach. 9/24/12RP at 147-51. He told Mr. Parrish, "Back off," before continuing to run away, toward a gas station. 9/24/12RP at 151-53.

Police responding to Officer Cratic's 911 call smelled alcohol on Mr. Parrish. 9/25/12RP at 256.

D.N. was recognized by another transit officer the next day, and he was arrested. 9/28/12RP at 280-82 (testimony of Kent police officer David Ghaderi). D.N. told Officer Ghaderi that the white male had attacked him near the Transit Center, and protested that he had not committed any criminal conduct. 9/28/12RP at 294-95 (testimony of Officer Ghaderi). At the adjudicatory hearing, D.N. testified that he was approached by Mr. Parrish, who was stumbling and asking everyone in the area if he could buy any drugs. 9/28/12RP at 369-71, 378-79. At some point, D.N.'s sister seemed to have been given money by Mr. Parrish, and Parrish demanded methamphetamine from D.N. 9/28/12RP at 378. When D.N. told Parrish that he did not have any drugs and that he was not associating with him, Mr. Parrish began screaming, and hit or

grabbed D.N. multiple times around his neck. 9/24/12RP at 378-80. D.N. escaped and ran, but Mr. Parrish again charged and attacked him; D.N. briefly tried, unsuccessfully, to open his knife to ward Parrish off. 9/28/12RP at 381-84.

A business proprietor, Kevin Gemmell, testified that when he looked in the direction of the alley near Pioneer Avenue, the white male was hitting D.N. 9/24/12RP at 108-09, 115.

2. Decision.

(a). Count 1. The juvenile court found D.N. guilty of first degree robbery of Mr. Parrish, finding that he was the person who took cash from Parrish, that he used force or threat of force to retain the property or to flee the crime, and that he was armed with, and displayed what appeared to be, a deadly weapon. 10/8/12RP at 459-60; CP 26-33.

(b). Count 2. The court stated it was a "more difficult" issue whether D.N. was guilty of first degree robbery of Ms. Fournier, based on accomplice liability for the taking of her cell phone and the forcible punch by others. 10/8/12RP at 460. However, the court found that the taking of Parrish's money and Fournier's cell phone was a planned "group effort" in which the youths led the two complainants to the alley. Regarding complicity

for Ms. Fournier being punched, the juvenile court stated that D.N. "was with a group and somebody in that group punched her in the eye[.]" 10/8/12RP at 461. In its oral ruling, the court concluded that D.N. was an accomplice to the crime of robbery in count II, and that the offense was first degree robbery based on infliction of injury. 10/8/12RP at 460-61; see also CP 8.

3. Findings. The juvenile court entered written findings of fact and a legal determination that the incidents, including the taking of Fournier's cell phone were part of a pre-planned and discussed "group effort," rendering D.N. an accomplice. See CP 26-33 - Finding of fact 7 (finding that "the group members were seen by Parrish and Fournier talking amongst themselves" as the whole group of people walked toward the alley); Finding of fact 31 (finding that the "members of the group . . . followed the Respondent and Parrish as they ran toward the gas station"); Finding of fact 42 (finding that the black youths stayed together "talking amongst itself" and acting "as a group" and followed the chase of D.N. by Parrish, and that the acts were a group effort that was discussed and pre-planned by the group). See assignments of error at Part B., supra.

The trial court later denied D.N.'s motion for arrest of judgment at the disposition hearing. CP 9-11 (motion), CP 12-17 (State's response), 1/24/12RP at 469-70 (ruling).

D.N. was given a standard range juvenile disposition. CP 18-21. He appealed. CP 22-25. The Court of Appeals rejected D.N.'s arguments raised on appeal. Decision (Appendix A).

E. ARGUMENT

1. THE JUVENILE COURT COMMITTED CUMULATIVE EVIDENTIARY ERROR REQUIRING REVERSAL AND A NEW ADJUDICATORY HEARING.

Review is warranted where the juvenile court's evidentiary rulings were contrary to ER 803(a)(5) and the evidence rules prohibiting speculative opinion by lay witnesses, and decisions of this Court and the Court of Appeals, cited herein, interpreting the meaning of the applicable evidence rules. RAP 13.4(b)(1) and (2).

a. <u>The trial court abused its discretion by erroneously admitting hearsay under ER 803(a)(5) where the witness did not have insufficient memory to be able to testify about the matter.</u> The trial court committed evidentiary error by permitting the State to introduce portions of Brandon Parrish's prior police statement as substantive evidence under the ER 803(a)(5)

exception for "past recollection recorded." The first of these was an assertion that the entire group of youths followed Mr. Parrish as he chased after the one of them who swiped his money. 9/24/12RP at 149-50. The prosecutor also read to the jury Mr. Parrish's statement in which he said that one of the group pushed the robber off of him when he got him in a headlock. 9/24/12RP at 154. These statements were crucial to the juvenile court's determination that there was a "group effort" to take property from Ms. Fournier, thus rendering D.N. guilty under accomplice liability as to count II.

However, the statements were hearsay. Hearsay is generally not admissible. ER 802; see ER 801(a),(c). Under the exception established by ER 803(a)(5), a court may permit a party to read a testifying witness' prior statement about a matter into the record – as substantive evidence – if the witness cannot remember the incident, but can recall that whatever he said about it would be accurate. Here, however, the witnesses did not have inadequate memory of the incident, and the prosecutor's misuse of the ER 803(a)(5) exception allowed the State to simply introduce prior statements of the witness about the incident, when the witness's recall of the incident was deemed inadequately helpful to the State's case.

First, Brandon Parrish testified that during the chase of the robber, he was briefly able to put the robber in a "head lock." 9/24/12RP at 146. At some point, the robber freed himself from Parrish, and then pulled out the knife. 9/24/12RP at 144-47.

Over objection, under ER 803(a)(5), the court permitted the State to read into the record the part of Mr. Parrish's contemporaneous police statement in which he said of the robber:

> His friend was with him. His friend pushed me off of him.

9/24/12RP at 150. This was error. The prosecutor had asked Mr. Parrish if anybody had intervened when he got the robber on the ground. Referring to his police statement which had been used to refresh his memory of the incident, Parrish said, "[i]t says there that his friend pushed me off of him." 9/24/12RP at 148.

Mr. Parrish stated he did not "recall that." 9/24/12RP at 148. This is inadequate. ER 803(a)(5) allows a prior statement to be read into the record when the witness cannot remember the incident, not simply when the witness cannot recall the details of an incident in the way that the prosecutor believes the witness has previously done in more inculpatory detail. ER 803(a)(5) provides the following are not excluded hearsay:

> **(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). D.N.'s counsel properly and correctly objected that Mr. Parrish had not indicated a "lack of memory" regarding the incident. 9/24/12RP at 149. This is a fundamental requirement of the rule. State v. Alvarado, 89 Wn. App. 543, 551-52, 949 P.2d 831 (1998); State v. White, 152 Wn.App. 173, 183, 215 P.3d 251 (2009)

Here, Mr. Parrish did recall the incident. He recalled that he chased the robber and that they both exited the alley. 9/24/12 RP at 13-44. He recalled that he caught up to the robber and put him in a headlock, successfully getting him down on the ground. 9/24/12RP at 147. Mr. Parrish recalled that when the robber got free of him, he then pulled out the knife. 9/24/12RP at 144-1-45. The Rule was not satisfied.

Similarly, the State was permitted to read the portion of Mr. Parrish's police statement in which he asserted that a number of the youths came toward him and the robber when the robber pulled

out a knife, suggesting group effort. 9/24/12RP at 157. But again, Mr. Parrish had not stated that he did not recall the incident. He testified about the incident in great detail during his lengthy testimony at the adjudicatory hearing. When the prosecutor asked him if he remembered if any of the group of youths converged on the location where he was confronting the robber, Parrish stated: "No, I don't recall that." 9/24/12RP at 155. The State was then allowed to read Mr. Parrish's contrary prior police statement to the jury as substantive evidence, over objection. 9/24/12RP at 155-57.

None of this satisfies ER 803(a)(5). D.N. contends that the case of State v. Floreck is helpfully applicable where there, a witness, Mazza, admitted making certain statements in her police statement, but said she could not remember other assertions on the recorded tape. State v. Floreck, 111 Wn. App. 135, 138-39, 43 P.3d 1264 (2002). The trial court allowed the prosecutor to introduce her taped statement under ER 803(a)(5) as substantive evidence inculpating the defendant. State v. Floreck, at 139. The Court of Appeals reversed, because the witness's merely spotty or partial memory did not constitute "insufficient recollection" under ER 803(a)(5). Floreck, at 137-39.

D.N. contends that the prosecutor used ER 803(a)(5) to elicit, as substantive evidence, statements previously made by the witness that comported more closely to the State's theory of the case and the evidentiary picture of *accomplice liability* that it wanted to portray. D.N. argues that the juvenile court abused its discretion. See also 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.28, at 83 (5th ed.2007).

b. The trial court erroneously permitted Parrish to testify to his speculative opinion that the group of youths all clearly knew each other. Next, the court, over D.N.'s objection that the solicited testimony would be "speculation," allowed Mr. Parrish to testify that the group of youths, of which D.N. was one, obviously knew each other. 9/24/12RP at 131-32. After overruling D.N.'s objection, the court allowed Parrish to testify that the youths "absolutely" knew each other, and to further claim:

> You could obviously – Any outsider would be able to obviously tell that these individuals knew each other.

9/24/12RP at 131-32. D.N. contends that the juvenile court's evidentiary ruling was an abuse of discretion.[1]

[1] D.N.'s "speculation" objection preserved the error for appellate challenge. RAP 2.5; see State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008) (witnesses are "not permitted to speculate or express their personal

First, Evidence Rule 602, entitled "Lack of Personal Knowledge," bars a witness from testifying "to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Under ER 602, a witness may therefore only testify concerning facts within his personal knowledge. State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). Here, Mr. Parrish had no personal knowledge that the group of youths knew each other or were associating for a shared purpose.

Additionally, under Evidence Rule 701, opinion testimony by lay witnesses is "limited to those opinions or inferences which are . . . rationally based on the perception of the witness." Here, D.N. was merely speculating, and offering an improper lay opinion. Notably, the testimony solicited by the State was effectively Mr. Parrish's opinion regarding the guilt of the accused, which is improper. State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008). D.N. argues that Mr. Parrish was improperly allowed to opine that the group of youths absolutely and obviously knew each

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beliefs about the defendant's guilt or innocence"); State v. Warren, 134 Wn. App. 44, 58-59, 138 P.3d 1081 (2006) (addressing error of detective's ER 701 lay opinion testimony based on defendant's objection to "speculation"). Additionally, the nature of the objection was clear from the context. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987).

other, which was crucial to the juvenile court's determination of accomplice liability on count II.

c. Cumulative prejudice. Non-constitutional evidentiary errors require reversal if, "within reasonable probability, [they] materially affected the outcome of the trial." State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Here, reversal is required because, within reasonable probabilities, the outcome of count II would be different absent the erroneously admitted evidence which supported a finding of a "group effort" that included the Respondent. D.N. appeared to have friends or companions that day that participated in taking property. Unfortunately, a member of the group punched Ms. Fournier, and at the same time her phone was taken. The court's evidentiary errors were used as support for the court's ultimate determination that all of this was a group effort, allowing it to find D.N. criminally liable as an accomplice for the taking of Fournier's cell phone, and the punch of Fournier by some person which elevated that taking to a robbery. The multiplicity of errors thus had a cumulatively prejudicial effect, requiring reversal. State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

2. THE FINDINGS AND EVIDENCE WERE INSUFFICIENT TO FIND D.N. GUILTY AS AN ACCOMPLICE TO ROBBERY IN COUNT II.

Review is warranted where the evidence was constitutionally inadequate under the Fourteenth Amendment and the State Constitution, and the Court's findings were inadequate under State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) and State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002) . RAP 13.4(b)(3) and RAP 13.4(b)(1).

a. The evidence was insufficient. "Evidence is sufficient to support an adjudication of guilt in a juvenile proceeding if any rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt." State v. Echeverria, 85 Wn. App. 777, 782-83, 934 P.2d 1214 (1997) (citing, *inter alia*, State v. Green, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980)). Judgments entered in the absence of sufficient evidence violate Due Process. U.S. Const. amend. 14; Wash. Const. art 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In count II, D.N. was found guilty as an accomplice to the robbery of Tawney Fournier's cell phone. CP 26-35. Under RCW 9A.56.190, robbery requires that the taking of personal property

from another's person must be accomplished "by using immediate force, violence, or fear of injury." Additionally, a person is guilty as an accomplice if he "solicits, commands, encourages . . . or aids" another in committing the crime, if he does so "[w]ith knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a)(i)(ii).

To be liable as an accomplice, "a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged." State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889 (2002); see also State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69 (2005) (stating that "it is also clear now that the culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge"); State v. Cronin, 142 Wn.2d 568, 578, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 510-513, 14 P.3d 713 (2000).

In the present case, the trial court did not find that D.N. had the required mental state of knowing assistance in the crime of robbery. In its written findings, the juvenile court concluded that D.N. was an accomplice to robbery because "[t]he Respondent or another intended to commit theft of the property" (the cell phone),

and force was used to obtain or retain possession of the property. CP 26-33 (Conclusions of Law 3(a) to (g)).

This determination is inadequate, and ultimately the evidence in total was insufficient to make the required, but missing, finding of complicity. The State did not show that D.N. was a knowing accomplice to the crime of robbery. Importantly, this is not a case of an accused simply being held liable for a more serious *degree* of robbery than that which he knowingly aided. The present incident does not involve a robbery by snatching, that was simply elevated to first degree robbery by virtue of the fact that Ms. Fournier was injured by the punch. Although a simple taking can be a robbery, the force used must be more than simply that necessary to physically remove the property from the person's hand. State v. Austin, 60 Wn.2d 227, 232, 373 P.2d 137 (1962); W. LaFave & A. Scott, Criminal Law § 8.11(d) at 781 (2nd ed.1986).

Thus in State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002), the Court of Appeals reversed a robbery conviction because the "to-convict" instruction, like the juvenile court's findings in D.N.'s case here, failed to include the necessary element of knowledge of the crime. It was important to the Court's decision that the prosecutor in Grendahl had argued the accused could be

guilty of robbery based on intent to commit theft, if accompanied by force employed by another. Grendahl, 110 Wn. App. at 910.

Here, the prosecutor similarly contended that D.N, to be guilty, must have intent to commit theft and the defendant "must have known that a robbery took place." 9/28/12RP at 411-12 (State's closing argument). This is incorrect, *and the juvenile court's inadequate findings followed.* D.N. could not be convicted of robbery as an accomplice where he intended merely that the principal commit theft. State v. Grendahl, 110 Wn. App. at 910; Trout, 125 Wn. App. at 410. This Court should reverse.

b. Inadequate findings. As argued, the juvenile court's findings in the present case are inadequate. Under JuCR 7.11(d), the juvenile court must make a finding on every ultimate fact necessary to guilt. State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). Substantial evidence must support a bench trial court's findings of fact, and those findings must support the court's ultimate conclusions of law. State v. Madarash, 116 Wn. App. 500, 509, 66 P.3d 682 (2003); Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

Where evidence exists to support a finding on an ultimate fact, the appellate court may remand inadequate findings for the

entry of a proper finding. However, if no evidence exists to support the necessary finding, the Court of Appeals should reverse. Alvarez, 128 Wn.2d at 19; State v. Head, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). D.N. argues that the Court of Appeals cited authority does not validate the juvenile court's oral ruling as a finding that D.N. did have the knowledge of robbery to render him an accomplice, and cannot make up for the inadequate written findings which do not include the required finding of the knowledge element. BOR, at pp. 31-32 (citing State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994) (missing element may be remanded **if** oral ruling as to element was comprehensive and includes findings on all elements). This Court should reverse count II for insufficiency of the evidence.

F. CONCLUSION.

D.N. respectfully asks this Court accept review and reverse the judgment and sentence of the Juvenile Court.

Dated this 16 day of October, 2013.

Respectfully submitted,

Oliver R. Davis – WSBA 24560
Washington Appellate Project
Attorneys for Petitioner

Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. D.L.N. (D.O.B. 11/28/1996), Appellant.	No. 69467-7-I DIVISION ONE UNPUBLISHED OPINION FILED: September 16, 2013

LEACH, C.J. — D.L.N. appeals his convictions for two counts of robbery in the first degree, the second as an accomplice. He asserts the trial court erred in admitting hearsay evidence and lay opinion testimony. He also challenges the sufficiency of the evidence and the adequacy of the trial court's written findings under JuCR 7.11(d). Finding no error, we affirm.

Background

On April 17, 2012, around 5:00 p.m., Brandon Parrish and his girl friend, Tawney Fournier, approached a group of six to eight individuals near the Kent library. Parrish "asked them about some pot." Some of the individuals said that they had marijuana and asked Parrish and Fournier to follow them to the Kent Transit Center about two blocks away to make the transaction. The group walked together to the transit center, with Parrish and Fournier walking together an "arm's length distance" behind them. Parrish and Fournier saw the group

members talking among themselves but could not hear their discussion. When they arrived at the transit center, the group members asked Parrish to take out his money to buy the marijuana. When Parrish took out a twenty dollar bill and a ten dollar bill, D.L.N. grabbed them and fled. Parrish immediately ran after him.

As D.L.N. grabbed the money from Parrish's hand, someone in the group also took Fournier's phone from her hand, and a different person punched her in the eye, causing her to fall to the ground. When Parrish caught up with D.L.N. near the transit center and demanded his money back, D.L.N. threatened him with a knife. Transit center security guard Phyllis Cratic intervened between them, and D.L.N. fled. Cratic called 911 and reported a robbery. Parrish caught D.L.N. again, and D.L.N. again pulled out a knife and waved it near Parrish's gut. Parrish then returned to Fournier. D.L.N. left the scene. At no time did D.L.N. ask for Cratic's or the police's help against Parrish or deny having Parrish's money.

The following day, April 18, 2012, police arrested D.L.N. They recovered a knife from D.L.N., which Cratic identified as the knife D.L.N. displayed the previous day. Following the arrest, D.L.N. waived his Miranda[1] rights and agreed to speak with Officer David Ghaderi. D.L.N. told Ghaderi that someone took money from Parrish and that he (D.L.N.) grabbed it and handed it off and that he

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

pulled his knife in self-defense when Parrish attacked him. D.L.N. later denied admitting to a crime or committing one.

After a fact finding hearing, the court found D.L.N. guilty as charged of two counts of robbery in the first degree: the first count for robbing Parrish and the second count as an accomplice in the robbery of Fournier. The court imposed a standard range sentence of 103-129 weeks on each count, to be served consecutively.

D.L.N. appeals.

Analysis

Recorded Recollection

D.L.N. argues that the trial court abused its discretion by admitting hearsay evidence under ER 803(a)(5) when the witness did not have insufficient memory to be able to testify fully about the matter. When the prosecutor questioned Parrish during fact finding, Parrish could not remember certain details of the day of the robbery and was unable to refresh his memory by reviewing his statement to police made two days after the incident. First, Parrish was unable to recall if anyone intervened after Parrish wrestled D.L.N. to the ground after chasing him, though he remembered other details of the incident. Second, Parrish did not remember if anyone followed him to the location where D.L.N. displayed the knife. The court allowed the prosecutor, over defense counsel's objection, to read into the record, "for substantive purposes," sentences from Parrish's statement to police about the details that Parrish could not recall.

D.L.N. argues that in admitting this hearsay, the court "committed evidentiary error" in violation of ER 803(a)(5).

Although hearsay is generally inadmissible,[2] ER 803(a)(5) provides an exception to the hearsay rule for

> [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'[s] 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.

(Emphasis added.)

ER 803(a)(5) excludes a recorded recollection from the hearsay rule and allows its admission when

> (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's memory, and (4) the record reflects the witness's prior knowledge accurately.[3]

We review the admission of statements under ER 803(a)(5) for abuse of discretion.[4] "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court."[5]

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[2] ER 802.

[3] See State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009) (citing State v. Mathes, 47 Wn. App. 863, 867-68, 737 P.2d 700 (1987)).

[4] White, 152 Wn. App. at 183.

[5] White, 152 Wn. App. at 183-84.

D.L.N. first argues that Parrish did not have an insufficient recollection of "the matter" and thus cannot satisfy ER 803(a)(5)'s second requirement. D.L.N. asserts that ER 803(a)(5) allows reading a prior statement into the record only when the witness cannot remember the incident, and "not simply when the witness cannot recall and express the details of an incident in the way that the prosecutor believes the witness has previously done, and that the State deems most inculpatory." During fact finding, Parrish remembered his altercation with D.L.N. but could not recall details he gave police two days after the incident but five months before the adjudicatory hearing. He testified that he could not recall these details, even after reviewing his prior statement to police. D.L.N. does not dispute that the State established ER 803(a)(5)'s other three requirements.

D.L.N.'s argument lacks merit. ER 803(a)(5) provides an exception in cases where a witness cannot testify "fully" because of the gap between statements taken shortly after the incident and the witness's testimony at trial. A showing of incompleteness of recollection is sufficient to admit a statement under the rule. Because Parrish could not recall the details of the events "fully and accurately," the trial court properly admitted the evidence.

D.L.N. relies principally on State v. Floreck[6] to argue that the trial court should have excluded Parrish's earlier statement because Parrish had sufficient memory of the statement's subject. The court in Floreck, however, excluded the

[6] 111 Wn. App. 135, 43 P.3d 1264 (2002).

witness's statement not because of memory issues, but because the witness testified at trial that she lied in her earlier statement.[7] Thus, because the difference between the witness's trial testimony and an earlier taped statement could not be attributed to insufficient memory, ER 803(a)(5) did not apply.[8] Here, Parrish does not disavow his earlier statement, and insufficient memory explains his inability to testify fully to the events described in his earlier statement. Floreck is inapplicable.

Because a reasonable person could have found that all four requirements of 803(a)(5) were satisfied, we conclude that the court did not abuse its discretion in admitting this evidence.

Opinion Testimony

D.L.N. next contends that the trial court erred in allowing Parrish to testify to his opinion that the group members clearly knew each other. This testimony supported the State's theory of group planning and effort necessary to prove accomplice liability. D.L.N. argues that this testimony violated ER 602, because Parrish did not have personal knowledge of these matters, and ER 701, because he was "merely speculating."

ER 701 limits the testimony of nonexpert witnesses 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'[s] testimony or the determination of a fact in issue, and (c)

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[7] Floreck, 111 Wn. App. at 139-40.
[8] Floreck, 111 Wn. App. at 139-40.

> not based on scientific, technical, or other specialized knowledge within the scope of rule 702.[9]

Trial advocates must lay a proper foundation for opinion testimony,[10] but the trial court has wide discretion to admit this testimony under ER 701.[11]

Here, the prosecutor asked Parrish, "Did it appear to you, based on your observations, that they knew each other, or not?" Parrish responded, "Absolutely," based on his observation that "they were all in a clique together, all talking amongst each other. . . . Any outsider would be able to obviously tell that these individuals knew each other."

The trial court did not err in admitting Parrish's testimony. The testimony was rationally based on his perceptions and observations. It was helpful for determining a fact in issue and did not constitute Parrish's opinion of D.L.N.'s guilt.[12] It was not based on specialized knowledge. Accordingly, the court did not abuse its discretion.

Sufficiency of the Evidence

D.L.N. also challenges the sufficiency of the evidence and findings to establish his guilt as an accomplice to robbery. Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to

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[9] See State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).
[10] Montgomery, 163 Wn.2d at 592.
[11] State v. Kinard, 39 Wn. App. 871, 874, 696 P.2d 603 (1985).
[12] See Montgomery, 163 Wn.2d at 591 (listing areas inappropriate for opinion testimony at criminal trials, such as opinions as to the guilt or intent of the accused or the veracity of witnesses).

find the essential elements of the crime beyond a reasonable doubt.[13] A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence.[14] A "reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case."[15] We do not review issues of credibility or persuasiveness of the evidence.[16]

To convict D.L.N. as an accomplice to robbery in the first degree, the State was required to prove beyond a reasonable doubt that (1) D.L.N. or another unlawfully took personal property from the person of another; (2) the taking was against the person's will by the use or threatened use of immediate force, violence, or fear of injury by D.L.N. or another; (3) the force or fear was used to obtain or retain the property or to prevent or overcome resistance to the taking;[17] (4) in the commission of these acts, D.L.N. or another inflicted bodily injury;[18] (5) with knowledge that it promoted or facilitated the commission of the crime; and (6) D.L.N. solicited, commanded, encouraged, or requested another to commit it, or aided or agreed to aid another in planning or committing the crime.[19] "Aid" means all assistance, including words, acts, encouragement, or

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[13] State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed .2d 560 (1979)).
[14] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[15] State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).
[16] Fiser, 99 Wn. App. at 719.
[17] RCW 9A.56.190.
[18] RCW 9A.56.200(1)(a)(iii).
[19] RCW 9A.08.020(3)(a).

support.[20] For accomplice liability to attach, "the defendant must have knowledge of the specific underlying crime . . . , not simply knowledge of any crime, because we are not a strict accomplice liability state."[21]

D.L.N. contends that the trial court did not find he had the required knowledge that he was assisting a robbery. He cites the court's conclusion of law 3(b), "The Respondent or another intended to commit theft of the property." (Emphasis added.) In support, D.L.N. cites State v. Grendahl,[22] in which we held that the defendant could not be convicted as an accomplice to robbery if he intended that the principal commit only theft.

Grendahl is distinguishable. The defendant in Grendahl waited in a getaway car and was not present when the principal Nauditt knocked down the victim to steal her purse.[23] Nauditt's testimony was unclear about what he had discussed with Grendahl, and the jury was not presented with evidence that Grendahl knew Nauditt was planning to commit a robbery.[24] By contrast, the trial court found here that the snatching of Parrish's money, the grabbing of Fournier's cell phone, and the punching of Fournier happened in the same place, almost simultaneously. Substantial evidence shows that members of the group talked and acted together and that D.L.N. robbed Parrish. Viewing the evidence in the

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[20] State v. Ferreira, 69 Wn. App. 465, 471, 850 P.2d 541 (1993).
[21] State v. Sublett, 176 Wn.2d 58, 79 n.13, 292 P.3d 715 (2012).
[22] 110 Wn. App. 905, 910-11, 43 P.3d 76 (2002).
[23] Grendahl, 110 Wn. App. at 906.
[24] Grendahl, 110 Wn. App. at 907-08.

light most favorable to the State, a rational trier of fact could have found that D.L.N. was an accomplice to the robbery of Fournier.

JuCR 7.11(d)

Finally, D.L.N. claims that the court's findings are inadequate under JuCR 7.11(d), which requires that the juvenile court's findings state "the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision." Under this rule, the juvenile court in an adjudicatory hearing must enter formal findings of fact and conclusions of law as to each element of the offense charged.[25] The State concedes that the court did not find expressly that D.L.N. acted with "knowledge" in its written findings of fact and conclusions of law. This omission was erroneous.

When the record contains sufficient evidence to support the omitted finding, we may remand the case to permit entering further findings, if appropriate.[26] In State v. Bynum,[27] this court found that incomplete written findings did not interfere with the court's ability to review the case. We held that "in light of the [juvenile] court's comprehensive oral ruling, . . . it is unnecessary even to remand this matter to the trial court."[28]

Here, as in Bynum, we look to the trial court's oral ruling to interpret its written findings and conclusions. Although the trial court did not include an

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[25] State v. Souza, 60 Wn. App. 534, 537, 805 P.2d 237 (1991).
[26] Souza, 60 Wn. App. at 541.
[27] 76 Wn. App. 262, 266, 884 P.2d 10 (1994).
[28] Bynum, 76 Wn. App. at 265.

express written finding that D.L.N. acted with "knowledge," the judge in her oral ruling stated that the evidence supported her finding of accomplice liability, though this finding was "more difficult." The court reiterated its finding that "[t]his was a group effort," based on the findings that this group was together before, during, and after the crimes, and the two robberies took place almost simultaneously. As in Bynum, the error of omission in the written findings is "inconsequential, making remand an unnecessary administrative detail."[29]

Conclusion

Because the trial court did not abuse its discretion in admitting hearsay and opinion testimony, sufficient evidence supported the court's findings, and noncompliance with JuCR 7.11(d) was harmless error, we affirm.

Leach, C.J.

WE CONCUR:

[29] Bynum, 76 Wn. App. at 266.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69467-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Pascal Herzer, DPA
King County Prosecutor's Office-Appellate Unit

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 16, 2013