694607-7

COA No. 69467-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

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

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
JUVENILE DIVISION

The Honorable Barbara Mack

REPLY BRIEF

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

a. <u>ER 803(a)(5) and lack of memory to be able to testify about the matter.</u> D.N. contends that under the exception established by ER 803(a)(5), a court may permit a party to read a testifying witness's prior statement about a matter into the record – as substantive evidence – if the witness cannot remember the incident, but can recall that his prior statement about it would be accurate. But in this case, the witness did not have inadequate memory of the robbery incident.

The prosecutor had asked the witness, Mr. Parrish if anybody had intervened when he, Parrish, forced the robber to the ground, a material matter where D.N., as the court found and the juvenile respondent challenges, was an accomplice as part of this larger group. Referring to his police statement which had just 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 then stated that he did not "recall that." 9/24/12RP at 148. The Respondent's characterization of this

testimony is essentially in agreement, noting that the statement came during testimony in which Parrish had been describing the events of the taking of the phone. BOR, at pp. 5, 7-8 (describing robbery and chase), and 11-13.

This testimony of "I don't recall that" is inadequate to deem the witness unable to remember the alleged robbery incident. D.N. contends that the inability to remember isolated facts of an overall incident does not authorize admission of the same factual assertions, made in the witness's prior statement, to be admitted substantively. Parrish's lack of memory of isolated details in his prior statement is inadequate to invoke this Rule, which differs from the traditional rules of impeachment. ER 803(a)(5) allows a prior statement to be read into the record – as full, substantive evidence -- when the witness cannot remember the incident, not simply when the witness cannot recall and express certain details of an incident in the way that the examining party believes the witness has previously done, and previously stated in a more inculpatory manner of the accused.

b. The cases cited by the State do not approve of application of this hearsay exception where as here, over specific objection, the prosecutor employed an untenable interpretation of the requirements of the Rule to improperly present a prior statement as substantive evidence. The State successfully introduced important, but a few isolated factual assertions that the witness did not remember about the incident, which he recalled extensively. But there is a difference between ER 803(a)(5) and refreshing a witness's memory, or impeachment matters. A witness's memory may be refreshed and he may then provide testimony. ER 612. A party is also free to impeach its own witness with prior inconsistent statements. ER 607; ER 613; State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). And a party may use such statements to demonstrate the witness's credibility. State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995). But prior statements may not be used as substantive evidence. Burke, 163 Wn.2d at 219.

The more strict requirements of admitting a prior statement substantively were not met here. See 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice

(5th ed.2007) § 803.26, at p. 81 (noting "more rigorous" requirements for admissibility under ER 803(a)(5) than for refreshed testimony under ER 612). 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).

The State's cited cases are inapposite. The case of State v. White is cited for the argument that witness Parrish was unable to provide truthful and accurate trial testimony. BOR, at p. 11. However, that case involves the issue of a witness who had not adequately avowed that his prior statement would have been given truthfully. Indeed, the statement in that case was properly admitted under the Rule where the witness testified she could not recall at all who assaulted her, but she had identified the person in her prior statement. State v. White, 152 Wn. App. 173, 178, 183, 215 P.3d 251 (2008). The present case is not comparable because Parrish remembered the robbery matter virtually thoroughly -- he merely could not recall the select few most implicatory statements that the prosecutor wanted him to remember. See also BOR, at p. 11 (citing State v. Derouin, 116 Wn. App. 38, 64 P.3d 35 (2003), which

also involved the different issue of adequate avowal of the prior statement).

The ER 803(a)(5) exception allows a prior statement to be employed substantively (where its strictures are satisfied) for a witness who cannot remember the basic facts of the incident, and prior statements that are different may be admissible to impeach, but the Rule is not an opportunity to combine the witness's most damning trial and written statements as substantive evidence. Compare State v. Alvarado, supra, at 547 ("At trial, Lopez testified that he did not recall the incident at all. He remembered that the police recorded his statements. . . . The court ruled that since Lopez testified he could not remember anything that occurred on the overpass, his statements were admissible as recorded recollections").

None of the State's cases stand for the dramatic expansion of admissibility under ER 803(a)(5) that the State's brief advocates. See also 5C Tegland, Evidence Law and Practice, § 803.28, at p. 82-83 (citing Baker v. Elcona Homes Corp., 588 F.2d 551, 555-56 (6th Cir. 1978) (police officer's prior statement inadmissible under Rule because the officer "was able to remember basically what was in the report")).

If the witness cannot remember the incident that occurred, it is appropriate to employ ER 803(a)(5). The Respondent does not refute that at trial below, Mr. Parrish did indeed recall the incident. See AOB, at pp. 5-6 (witness 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 some 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. D. N. contends that this is not a lack of memory about the matter under ER 803(a)(5).

c. The trial court erroneously permitted Parrish to testify to his speculative opinion that the group of youths all clearly knew each other. D.N. maintains that Mr. Parrish was improperly allowed to opine that the group of youths obviously knew each other, which was crucial to the juvenile court's determination of accomplice liability on count II. Appellant's Opening Brief, at pp. 14-16. D.N. relies on his Opening Brief.

d. Cumulative prejudice. These seemingly small, but significant and litigated pieces of evidence in a juvenile case with little else before the court for purposes of accomplice liability, improperly supported a finding of a "group effort" that included the Respondent and therefore supported the court's finding of guilt. D.N. appeared to have friends or companions that day that participated in taking property. Unfortunately, a member of the group punched the person he took the phone from. The improper testimony allowed the court to find D.N. criminally liable as an accomplice; D.N. argues that these individual evidence errors, and

the multiplicity of errors, require reversal and a new adjudicatory hearing. 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.

Contrary to the Respondent's contentions, every indication below shows that the bench trial court did not accurately require proof of knowledge of "the" crime of robbery, to find D.N. liable under the accomplice liability argument that was the only theory of guilt. The prosecutor erroneously appeared to argue for a verdict absent that proof. In discussing accomplice liability as to count II, the State 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 the legal argument the State placed before the court, contrary to the Respondent's contention that the State urged the court to find knowledge of a robbery for accomplice liability. See BOR, at p. 30 (citing 9/28/12RP at 412).

This legal argument was incorrect, and the juvenile court's inadequate oral and written findings followed, and they do not

adequately indicate that the juvenile court accurately required this knowledge for D.N.'s guilt. Contrary to the State's contentions, the trial court never found, in its oral ruling, or in the State-drafted written findings, that young D.N. ever pre-discussed or planned any use of force; rather, the court found that D.N. was with a group and somebody in that group punched the theft victim. 10/8/12RP at 460-61. This is not being an accomplice to "the" crime of robbery.

The authority cited by the State does not validate this 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 the State concedes 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 in juvenile findings may be remanded if oral ruling as to element was comprehensive and includes findings on all elements).

Of course, the deputy prosecutor's erroneous legal argument is not comparable to the mis-instruction of a jury, because the trial court, unlike a jury, or the prosecutor below, is presumed to know the law.

However, the court's own oral and written findings in this case raise a substantial enough concern that the correct law of complicity to robbery in this case was not correctly identified and applied. In order to be liable as an accomplice to full robbery – a taking, by use of force -- a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime of robbery.

Here, the findings, and the evidence as appellant has argued, were insufficient. Thus in the on-point case cited in the Opening Brief, of State v. Grendahl, 110 Wn. App. 905, 43 P.3d 76 (2002), the Court of Appeals reversed the 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.

Notably, it was important to the Grendahl Court's decision that the prosecutor in Grendahl had argued – just as the prosecutor did in this case -- that the accused could be found guilty of robbery based on an intent to commit theft, if accompanied by any force employed by another. Grendahl, 110 Wn. App. at 910.

The State's cases in respect of the sufficiency of the evidence issue are also inapposite. In the cases of State v. Davis,

101 Wn.2d 654, 657, 682 P.2d 883 (1984), of In re PRP of Sarasaud, 109 Wn. App. 824, 836, 39 P.3d 308 (2001), and In re Domingo, 155 Wn.2d 356, 364, 119 P.3d 816 (2005), the legal issue was whether a defendant, to be an accomplice to a particular *degree* of assault or robbery, must be aware of the elevating element, such as presence of a firearm. This case is entirely different – D.N. needed to have knowledge that he was assisting in a robbery, and the evidence was at best – *arguendo* only -- adequate only to show he was an accomplice to theft.

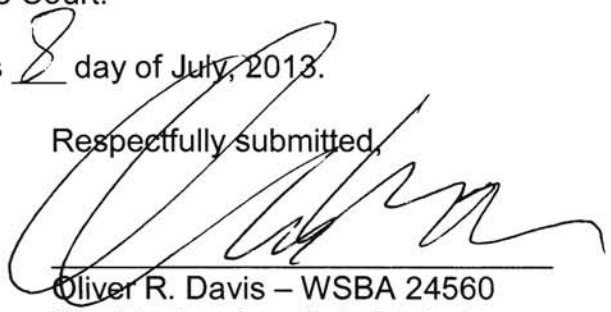
Ultimately, there is no evidence to support the necessary, but here missing, element of knowledge, remand is improper because there is no comprehensive oral ruling on knowledge. Based on the foregoing authority, this Court of Appeals should reverse D.N.'s juvenile conviction with prejudice. See also State v. Head, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998); U.S. Const. amend 14.

B. CONCLUSION.

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

Dated this 8 day of July, 2013.

Respectfully submitted,



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DIVISION ONE

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	)	NO. 69467-7-I
v.	)	
	)	
D.N.,	)	
	)	
Juvenile Appellant.	)	

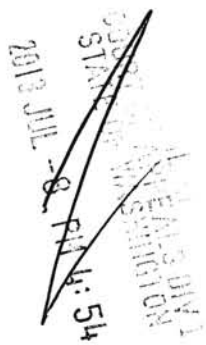
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] PASCAL HERZER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JULY, 2013.

X_____



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