

62861-5

62861-5

NO. 62861-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

A.R.,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JUN 16 PM 4:06

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

The Honorable Steven Mura, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. On a motion for revision, the superior court erred by reviewing the commissioner's oral ruling without the required written findings and conclusions.

2. The superior court erred by considering a new issue raised sua sponte at the hearing on the motion for revision.

3. The superior court erred by entering conclusions of law 3, 4, 5, and 6.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. A juvenile court commissioner found A.R. guilty of disorderly conduct. The commissioner did not enter written findings of fact and conclusions of law following the hearing. A.R. filed a motion to revise the commissioner's decision. The superior court reviewed the transcript of the hearing before the commissioner and then revised the verdict. Did the superior court err by reviewing the commissioner's oral ruling rather than remanding the case for the commissioner to enter written findings and conclusions as required by the revision statute, RCW 2.24.050?

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<sup>1</sup> The superior court's written findings and conclusions are attached to this brief as an appendix.

2. The commissioner concluded that A.R. yelling “all you guys are is bitches” at two young women amounted to disorderly conduct. A person is guilty of disorderly conduct when she “uses abusive language and thereby intentionally creates a risk of assault.” RCW 9A.84.030(1)(a). A.R. argued that her conduct did not create a risk of assault because no additional confrontation occurred after she yelled at the young women. The State argued, both before the commissioner and in briefing on the motion for revision, that A.R.’s statement amounted to fighting words that created a further risk of assault. The superior court rejected both the State and A.R.’s arguments and concluded that A.R. had acted as an accomplice to disorderly conduct. Did the superior court err by introducing a new theory of guilt, with different factual and legal considerations, into the proceedings on the motion for revision?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecuting Attorney charged juvenile appellant A.R. with two counts of assault in the fourth degree and one count of disorderly conduct. CP 249-50. The charges stemmed from A.R.’s presence at the scene of an after school fight between several young women. The matter went to trial in

September 2008 before Whatcom County Juvenile Court Commissioner Thomas Verge. The hearing spanned three days and included testimony from five witnesses. Commissioner Verge concluded that A.R. was not guilty of assault, but was guilty of disorderly conduct. CP 203, 241. Commissioner Verge sentenced her to 40 hours of community service, three days of work crew, and four months' community supervision. CP 244.

A.R. filed a motion to revise and stay the disposition. CP 231. On October 13, A.R. filed a second motion to revise, specifically requesting trial de novo on the disorderly conduct charge. CP 230. Superior Court Judge Steven Mura heard the motion to revise and granted a stay of disposition. CP 229. After reviewing briefing and hearing argument from both parties, Judge Mura revised the verdict. Judge Mura concluded that A.R. was not guilty of disorderly conduct as a principal, but was guilty of being an accomplice to disorderly conduct. CP 12. Judge Mura entered an order sentencing A.R. to 40 hours community service, one day of confinement to be served in jail alternatives, and three months' community supervision. CP 15. A.R. filed a timely notice of appeal. CP 3.

## 2. Trial Testimony

The charges arose from an after school fight between several young women on February 22, 2008. At that time, A.R. attended Squalicum High School in Bellingham. CP 155. On February 22, Hannah Coles had agreed to give A.R. a ride home from school. CP 158. In addition to A.R., Coles was giving a ride to four other friends. CP 159. Coles spotted two rivals, Isela and Dalia Gonzalez, walking down the street during the drive. Coles suspected that Dalia Gonzalez was the person responsible for writing racially charged graffiti about Coles in the school bathroom. CP 160.

Coles stopped her truck near the Gonzalez sisters and all occupants jumped out. CP 160. Coles confronted Dalia about the graffiti, got into a heated argument, and punched Dalia. CP 162. Dalia hit the ground and two other passengers from Coles' truck joined in the fight and began kicking Dalia. CP 162-63. A.R. was not involved in the fight with Dalia. CP 162.

Although Dalia Gonzalez claimed that A.R. was one of the people kicking her while she was on the ground, a video filmed at the scene did not show any contact between A.R. and Dalia Gonzalez. CP 76-77. The video of the fight was posted on the

Internet. CP 164. The video shows A.R. present at the fight and that she yelled at the Gonzalez sisters after the fight had broken up. CP 64-67. The video captures A.R. yelling, "all you guys are is bitches." Supp. CP \_\_ (Sub. no. 52, Findings of Fact and Conclusions of Law, at 2). Isela Gonzalez claimed that A.R. hit her in the face, causing swelling and scratches. CP 95. Yet, when the Gonzalez sisters reported the acts to the police an hour and a half later, the police report specifically states that there was no evidence of injury to either young woman. CP 50-51.

A.R. did not testify at trial. Coles appeared as a defense witness and took the stand to acknowledge that she had instigated the fight with the Gonzalez sisters and had assaulted Dalia Gonzalez. Supp. CP \_\_ (Sub. no. 52, Findings of Fact and Conclusions of Law, at 2).

During closing arguments, the prosecutor argued that A.R.'s taunting statement to the Gonzalez sisters after the fight amounted to "abusive language that created a risk of assault." CP 183. Defense counsel responded that calling the two sisters "bitches" did not amount to fighting words and did not result in further fighting. CP 197.

C. ARGUMENT

1. THE SUPERIOR COURT ERRED BY REVIEWING THE COMMISSIONER'S ORAL RULING ON THE MOTION FOR REVISION.

At the conclusion of the hearing, Commissioner Verge gave an oral ruling finding A.R. not guilty of assault, but guilty of disorderly conduct. CP 199-203. Commissioner Verge did not enter written findings of fact and conclusions of law.

A juvenile court commissioner must enter written findings and conclusions in cases appealed through the revision process. State v. Charlie, 62 Wn. App. 729, 732, 815 P.2d 819 (1991). In Charlie, a juvenile court commissioner found Charlie guilty of indecent liberties. Charlie, 62 Wn. App. at 730. Charlie moved for revision of the verdict in superior court. Charlie, 62 Wn. App. at 730. Neither the juvenile court commissioner nor the superior court judge entered written findings and conclusions. Charlie, 62 Wn. App. at 731. On appeal, this court held that the superior court must review the commissioner's written findings and conclusions, rather than simply review the commissioner's oral ruling. Charlie, 62 Wn. App. at 732.

Two juvenile court rules form the basis of the requirement that the commissioner enter written findings and conclusions.

Juvenile Court Rule 7.11(c) mandates formal findings: “The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.” JuCR 7.11(c). A commissioner has a non-discretionary duty to enter written findings and conclusions in cases appealed to the superior court: “The court shall enter written findings and conclusions in a case that is appealed. The findings shall 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) (emphasis added).

The statute governing revision of a commissioner’s ruling, RCW 2.24.050, states: “All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. . . . Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner . . . .” RCW 2.24.050. Charlie holds: “JuCR 7.11(c), in conjunction with RCW 2.24.050, requires that the juvenile court commissioner enter written findings and conclusions in cases which are appealed through the revision process.” Charlie, 62 Wn. App. at 732. Following Charlie, Commissioner

Verge's failure to enter written findings and conclusions following notice that A.R. had submitted a motion to revise was error.

The remedy in Charlie was reversal: “[U]nder the facts of this case, the errors committed throughout the process, and the appearance of unfairness in entering findings after the appellant has framed the issues in his brief, we are compelled to reverse.” Charlie, 62 Wn. App. at 733. A subsequent case from the Supreme Court has clarified that the proper remedy for a court's failure to enter written findings and conclusions as required by Juvenile Court Rules 7.11(c) and (d) is remand. State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). “An error by the court in entering judgment without findings of fact and conclusions of law is remedied by subsequent entry of findings, conclusions, and judgment.” Alvarez, 128 Wn.2d at 19.

In Alvarez, the State charged the juvenile defendant with harassment and cruelty to animals. The trial court found the defendant guilty of harassment, but failed to enter an adequate finding of fact on the “essential element of reasonable fear.” Alvarez, 128 Wn.2d at 9 (quoting State v. Alvarez, 74 Wn. App. 250, 264, 872 P.2d 1123 (1994)). On appeal, Division One remanded the harassment charge to the trial court for entry of

additional findings. Alvarez, 128 Wn.2d at 9. The Supreme Court affirmed the Court of Appeals and held that remand, rather than outright reversal, is the proper remedy. Alvarez, 128 Wn.2d at 19.

Here, the court should reverse the order on adjudication and disposition entered by the superior court and remand the case back to Commissioner Verge for entry of written findings and conclusions as required by Juvenile Court Rules 7.11(c) and (d). Written findings and conclusions are a prerequisite to review pursuant to RCW 2.24.050. Although review before the superior court is de novo, the superior court is directed by RCW 2.24.050 to consider the commissioner's findings, especially in cases where the commissioner hears live testimony. In his oral ruling, Commissioner Verge made several credibility determinations based upon what he observed at the hearing: "The credibility as to all of the witnesses presented today, other than the law enforcement officer raises great question." CP 202. Written findings and conclusions are necessary for the superior court to conduct a thorough review of the case on a motion for revision.

This court should reverse and remand the case to Commissioner Verge for entry of written findings and conclusions.

The order on revision should be vacated and reconsidered in light of the commissioner's findings.

2. THE SUPERIOR COURT ERRED BY INTRODUCING A NEW THEORY OF GUILT, WITH DIFFERENT FACTUAL AND LEGAL CONSIDERATIONS, INTO THE HEARING ON THE MOTION FOR REVISION.

In the hearing before Commissioner Verge, the State alleged that A.R. was guilty of disorderly conduct as a principal. During closing argument, the prosecutor argued that A.R.'s statement "all you guys are is bitches" was "abusive language that created a risk of assault." CP 183. A.R. argued that her statement was not disorderly conduct because it was not a challenge to fight or encouragement to fight. CP 197. Neither party discussed accomplice liability at the trial or in the briefing on the motion for revision.

During the hearing on the motion for revision, Judge Mura introduced the idea that A.R. was guilty of being an accomplice to disorderly conduct: "[W]hen all of these kids jump out of the car and make a confrontation, they're all out together as a group confronting the two girls. You can't try to piecemeal it down into little isolations each a different action. That whole car was acting in

concert.”<sup>2</sup> 2RP 9. Defense counsel was unprepared to respond to the court’s new theory of liability that A.R. had acted as an accomplice. Defense counsel stated that her understanding of accomplice liability was that A.R. would have had to take “a substantial step towards aiding and abetting in either the commission of the crime or hiding it afterwards” in order to be found guilty as an accomplice. 2RP 12. The court disagreed and read the jury instruction outlining the elements of accomplice liability for defense counsel. 2RP 12.

The court’s theory was that A.R.’s presence at the scene of the fight made her an accomplice to disorderly conduct: “You can be an aider and abettor just standing there.” 2RP 12. The State did not adopt the court’s accomplice liability argument. Rather, the State remained committed to its position that A.R. was guilty of disorderly conduct as a principal: “It would be the State’s position words such as calling somebody a bitch would provoke somebody to fight.” 2RP 21.

Judge Mura agreed with A.R.’s position that she was not guilty of disorderly conduct because the statement she yelled at the

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP is December 17, 2008; 2RP is December 22, 2008.

Gonzalez sisters was not likely to create a risk of an assault, as required by the disorderly conduct statute RCW 9A.84.030(1)(a). Supp. CP \_\_ (Sub. no. 52, Findings of Fact and Conclusions of Law, at 2). However, Judge Mura concluded that Coles' actions constituted disorderly conduct and that A.R. acted "as an accomplice to create a breach of the peace, under RCW 9A.08.020(3)(a)(i)." Supp. CP \_\_ (Sub. no. 52, Findings of Fact and Conclusions of Law, at 2). The court stated in its oral ruling: "I find that she's guilty of breach of the peace on an accomplice liability theory rather than as the principal." 2RP 24.

The superior court cannot consider new issues when reviewing a commissioner's decision on a motion for revision. In re Marriage of Moody, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). In Moody, a husband and wife filed a petition for dissolution and entered into a property settlement/maintenance agreement in 1990. Moody, 137 Wn.2d at 982. Five years later, the husband filed a motion to vacate and re-open the property settlement and maintenance agreement. Moody, 137 Wn.2d at 985. The husband presented three grounds for modification: (1) he had not received independent legal advice when he entered into the agreement, (2) a 1993 modification of maintenance was invalid because it was not

supported by additional consideration, and (3) the property settlement agreement was invalid because the husband had reconciled with his wife after signing it. Moody, 137 Wn.2d at 985. The court commissioner denied the motion, ruling that the motion was not made within a reasonable time and that none of the husband's arguments warranted re-opening of the property settlement or maintenance provisions. Moody, 137 Wn.2d at 985.

The husband filed a motion for revision in superior court. Moody, 137 Wn.2d at 985. At the revision hearing, the husband attempted to raise new issues, claiming that his wife and her attorney acted fraudulently and that the decree of legal separation and the property settlement agreement were illegal. Moody, 137 Wn.2d 985. The superior court judge refused to consider the new issues and denied the motion. Moody, 137 Wn.2d 985-86. The Court of Appeals affirmed the superior court's decision. Moody, 137 Wn.2d at 986.

The Supreme Court also affirmed, holding that the superior court correctly refused to consider new issues: "Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to evidence and issues presented to the commissioner." Moody, 137 Wn.2d at 992-93

(emphasis added); see also State v. Wicker, 105 Wn. App. 428, 433 n.15, 20 P.3d 1007 (2001) (review in superior court limited to issues presented to commissioner). The holding from Moody follows established precedent limiting the scope of review in an appellate-type proceeding. The rules of appellate procedure generally preclude an appellate court from considering new issues raised on appeal, even when the standard of review is de novo. RAP 2.5(a). Fundamentals of fairness dictate this same result.

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). And criminal liability is the same whether one acts as a principal or as an accomplice. See RCW 9A.08.020(1), (2)(c). “Principal” and “accomplice” 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).

Because the State had not raised the issue of accomplice liability in its argument and briefing before Commissioner Verge or in its response to A.R.’s motion for revision, defense counsel was

unprepared to respond to the court's argument that A.R. had acted as an accomplice. This court should hold that the superior court erred by deciding the case based on a new theory of liability raised by the court at the hearing on the motion for revision.

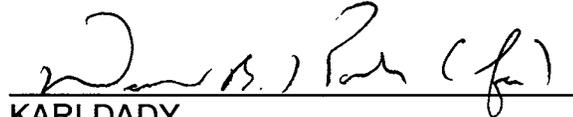
D. CONCLUSION

This Court should reverse A.R.'s order on adjudication for being an accomplice to disorderly conduct.

DATED this 16<sup>th</sup> day of June 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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## **APPENDIX**

SCANNED 3

FILED IN OPEN COURT

3.5 2009

WHATCOM COUNTY CLERK

By CW  
Deputy

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY, JUVENILE DEPARTMENT

In Reference To:	)	No.: 08-8-00304-1
	)	
	)	
ANGELICA M. REYNA,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Juvenile,	)	
	)	
	)	

THIS MATTER came before the Court for adjudication of the above-entitled matter on December 22, 2008 .Having taken evidence and having heard argument from both parties, the Court makes the following:

**I. FINDINGS OF FACT**

1. Angelica Reyna was a passenger in a vehicle driven by Hannah Coles on February 22, 2008.
2. There were six individuals in Ms. Cole's vehicle, including Stacey Esquivel, Jasmine Romero, Nayeli Romero, and Isaac Santos.
3. Hannah Coles drove up and stopped the vehicle after seeing Isela and Dalia Gonzalez walking down Maplewood Avenue.
4. Maplewood Avenue is located in the City of Bellingham, Whatcom County, Washington.
5. Angelica Reyna was the first person out of the vehicle.
6. Hannah Coles and the other occupants of the vehicle confronted Isela and Dalia Gonzalez.

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- 1 7. Hannah Coles admitted to yelling at Isela and Dalia for "talking shit" and telling them not  
2 to run. *got out of the vehicle and was*
- 3 8. The other occupants of the vehicle, including Angelica Reyna, ~~were~~<sup>was</sup> present and in  
4 support of Hannah Coles. *as evidenced by their location AND comments.*
- 5 9. Angelica Reyna, through her actions, showed her anger at Dalia and Isela Gonzalez.
- 6 10. Hannah Coles assaulted Dalia Gonzalez.
- 7 11. Angelica Reyna ~~could be seen gesturing at Dalia and Isela Gonzalez on video while~~<sup>WAS</sup> *SM*  
8 yelling, "all you guys are is bitches."

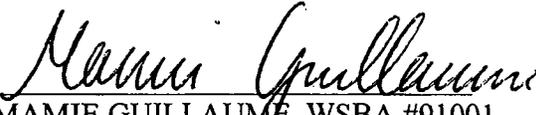
9 Based on the above Findings of Fact, this Court makes the following:

10 **II. CONCLUSIONS OF LAW**

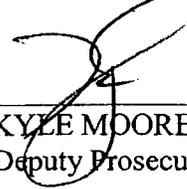
- 11 1. The Court has de novo review of this case.
- 12 2. The words spoken by Angelica Reyna on the video, "all you guys are is bitches," were  
13 not likely to create a risk of an assault, as required by RCW 9A.84.030(a).
- 14 3. However, the Court finds that Angelica Reyna was acting as an accomplice to create a  
15 breach of the peace, under RCW 9A.08.020(3)(a)(i).
- 16 4. Hannah Coles' actions, through her initial contact with Dalia Gonzalez, were disorderly  
17 conduct as defined by RCW 9A.84.030(a).
- 18 5. Angelica Reyna, with knowledge that her actions would promote the commission of a  
19 crime, encouraged Hannah Coles, as well as the others in the group, to commit disorderly  
20 conduct.
- 21 6. The Court finds that Angelica Reyna's statements on the video were additional evidence  
22 that Angelica was "more than present," and that her actions encouraged other members of  
23 the group to commit disorderly conduct.  
24  
25

1  
2 DATED THIS 5<sup>th</sup> MARCH day of ~~February~~, 2009.  
3

4  
5  
6 Copy received:

7   
8 MAMIE GUILLAUME, WSBA #91001  
9 Attorney for Juvenile

  
JUDGE STEVEN J. MURA  
Presented by:

  
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State v. A.R.  
No. 62861-5-I

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Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

A.R.  
PO Box 382  
Lyndon, WA 98264

Containing a copy of the brief of appellant, in State v. A.R., Cause No. 62861-5-I, in the Court of Appeals, Division I, for the state of Washington.

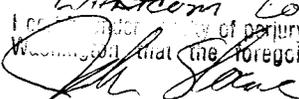
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
John Sloane  
Done in Seattle, Washington

6-16-09  
\_\_\_\_\_  
Date

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record in the above captioned cause, containing a copy of the document in question. The document is attached.

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

  
\_\_\_\_\_  
Name Done in Seattle, WA Date 6-16-09