

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 67113-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JONATHAN M. CERVANTES,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 23, 2012
	)	

Lau, J. — Jonathan Cervantes appeals his juvenile court conviction for second degree assault. He argues the trial court erred when it admitted a witness’s prior recorded statement under ER 803(a)(5)’s recorded recollection hearsay exception. Cervantes contends the State failed to show the foundational requirements for admissibility—insufficient recollection and prior statement’s accuracy. He also claims deficient performance by his counsel for conceding the accuracy of the prior statement requirement. Finding no error, we affirm.

**FACTS**

Oscar Daza-Flores worked at a Subway restaurant in Lake City. On May 9, 2010, Daza-Flores’ girl friend, Carolina Camacho, picked him up from work a little after 10 p.m. Daza-Flores and Camacho drove to El Rinconsito restaurant in Sea-Tac for

dinner.

Daza-Flores and Camacho arrived at El Rinconsito and parked. On the way into the restaurant, they saw Christian Cervantes<sup>1</sup> standing outside with his brother, Jonathan Cervantes, and two girls. Daza-Flores knew Christian but had never met Cervantes. Camacho testified that at that time, she knew Cervantes only by his street name, "Baby Locs." Report of Proceedings (RP) (Mar. 21, 2011) at 61. Camacho did not remember whether she or Daza-Flores said anything to the Cervantes brothers or the two girls on the way into the restaurant, but Daza-Flores testified that he spoke briefly to Christian before entering the restaurant.

Once inside the restaurant, Daza-Flores realized he had left his wallet in Camacho's car. The couple went back outside to retrieve the wallet. Daza-Flores testified that Cervantes confronted him at that point, blocking his way to Camacho's car. Cervantes held an extendable metal baton in his hand and used it to strike Daza-Flores in the ear, causing the ear to bleed. When Daza-Flores asked Cervantes what his problem was, Cervantes said, "You are a snitch" and hit Daza-Flores again in the shoulder. RP (Mar. 28, 2011) at 63. Daza-Flores testified he had nothing in his hands when Cervantes attacked him.

Camacho told Cervantes to drop the baton and fight like a man. Cervantes dropped the baton, charged at Daza-Flores with his fists closed in a fighting position, and swung at Daza-Flores. Daza-Flores testified that he did not want to fight but he

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<sup>1</sup> For clarity, we refer to Christian by his first name. We refer to Jonathan as "Cervantes."

swung back to defend himself. Cervantes and Daza-Flores exchanged several punches. Daza-Flores testified that Cervantes then picked him up and slammed him against a parked van. According to Daza-Flores, he and Cervantes fell to the ground and continued to fight until the commotion drew security guards from an adjacent casino. At that point, Cervantes complained that Daza-Flores was bleeding on him and told Daza-Flores to let go. The two separated and the fight ended.

Daza-Flores was still bleeding after the fight. Camacho and Daza-Flores drove to the hospital. Daza-Flores received stitches for injuries to his head and ear.

Both Camacho and Daza-Flores gave statements to Detective Chris Johnson a few days after the incident. In her May 13, 2010 recorded statement, Camacho said that Cervantes confronted Daza-Flores, called him a "snitch," and hit him with a black metal stick. She also said that after dropping the stick, Cervantes charged at Daza-Flores and the two punched each other.

The State charged Cervantes in juvenile court with second degree assault and intimidating a witness. At the bench trial, Cervantes and other witnesses gave testimony inconsistent with Daza-Flores' account. Cervantes testified that Daza-Flores initiated the fight. He claimed that Daza-Flores held what appeared to be a glass bottle in his hand. Cervantes testified that he feared for his safety and picked up a stick from the ground to defend himself, but he did not hit Daza-Flores with the stick.

Camacho testified that when she and Daza-Flores left the restaurant to retrieve Daza-Flores' wallet, Daza-Flores and Cervantes exchanged words. But she testified that she did not know how the fight started. She saw Cervantes hit Daza-Flores in the

ear with “[s]ome kind of stick.” RP (Mar. 21, 2011) at 65. She testified that Cervantes and Daza-Flores were hitting and punching each other, but she did not remember who approached who or who hit first. She also testified that the two men were “calling each other snitches” and reiterated that both men used the word “snitch,” but could not remember who used the word first. RP (Mar. 21, 2011) at 68. She thought Daza-Flores might have had something in his hand during the fight and stated that he commonly carried a plastic juice bottle.

The State confronted Camacho with her prior recorded statement in an attempt to refresh her memory regarding critical details of the incident. She testified she had read over the statement before trial, but she could not remember the statement.<sup>2</sup> She agreed that she made the statement closer to when the event occurred and that her memory would have been fresher a few days after the incident than at trial.

The State offered Camacho’s recorded statement at trial as a recorded recollection under ER 803(a)(5). The court initially declined to admit the entire statement, but allowed the State to ask follow-up questions. At the conclusion of Camacho’s testimony, the court revisited the ER 803(a)(5) issue. Defense counsel objected, arguing that the statement was cumulative and unnecessary. But defense counsel agreed that Camacho had not disavowed the accuracy of her prior statement:

I think what Ms. Camacho is saying is, today or yesterday, she doesn’t recall some of the events as they occurred, but she doesn’t disavow the accuracy of the statement she provided to Detective Johnson back in May of 2010. In fact, she said, “That’s what I said, I don’t remember that, but that’s what I said.” She’s

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<sup>2</sup> Camacho testified that reading her prior statement was “like reading a book. I don’t remember me actually saying this or anything.” RP (Mar. 21, 2011) at 85.

not saying that the recording is inaccurate, in fact, I think she said it was accurate, and there are many times throughout the direct examination that she took a long period of time to review the recording, specific paragraphs that the State wanted her to read, and then either read into the record or answered the direct question proposed by the State.

RP (Mar. 22, 2011) at 25. When the court asked whether the defense was conceding that the police statement was “accurate in terms of what [Camacho] recalled at the time,” defense counsel stated,

Yeah, I don’t think Ms. Camacho ever said that the recording – the exhibit that she was looking at, the transcript, I don’t think she ever said that that was inaccurate. I think she doesn’t know recall some of the things that are in that would be accurate recording transcripts.

RP (Mar. 22, 2011) at 28. In response to further questioning from the court, defense counsel clarified, “Right, [Camacho is] not disavowing that the transcript that she was shown, the State’s exhibit . . . she’s not saying that is inaccurate, she’s saying that she believes they are different now. Her memory of the incident is different now than then. So the accuracy of the statement is not in question.” RP (Mar. 22, 2011) at 29. And again, “I don’t think at all she’s disavowing the accuracy of the transcript.” RP (Mar. 22, 2011) at 32. The defense maintained that the State achieved its goals of obtaining testimony through Camacho’s memory and by showing her the statement at trial, and thus, the statement need not be admitted.

Despite defense counsel’s concession regarding accuracy, the court stated, “I think the Court, in considering this, can reasonably find that [Camacho], in effect, disavowed accuracy. I mean, she may well have phrased in terms of not remembering, but she didn’t really want to adopt any of those statements here in court when

confronted with that.” RP (Mar. 22, 2011) at 34. Both parties disagreed and defense counsel reiterated, “I don’t think that [Camacho] says that those statements were inaccurate at the time and that that was an inaccurate transcript of what occurred.” RP (Mar. 22, 2011) at 34. The court then noted, “[M]aybe it is fair to say that, certainly, the Court should respect that both counsel are agreeing that [Camacho] did not disavow the accuracy of the statements at the time that she testified to them; is that correct?” RP (Mar. 22, 2011) at 35. Both parties agreed, and the court concluded:

[Camacho] didn’t disavow the accuracy to the statements, she was saying she couldn’t remember them. She would read them, and then was able to recite, after looking at them . . . she would concede that’s what the statement says. There is no dispute it was accurate at the time she made the statement, I don’t think there is any statement that the recording was reliable, anybody arguing there wasn’t an accurate and reliable tape recording here. . . . I don’t see anything that would be contrary to the notion that the statements, when made, that these statements are trustworthy statements.

RP (Mar. 22, 2011) at 35-37. Defense counsel agreed with that analysis. The court later clarified, “[I]t is more accurate . . . for the Court to find that the [Camacho] basically stated that she could not remember the statements attributed to her,” not that she disavowed them. RP (Mar. 28, 2011) at 3. The court reviewed the statement in camera, determined that portions of it were admissible under ER 803(a)(5), and read those portions into the record. Defense counsel again objected on cumulative evidence grounds to no avail.

The court convicted Cervantes of second degree assault but found insufficient evidence to convict him of intimidating a witness. The court imposed a standard range sentence of 103 to 129 weeks of community supervision.

ANALYSIS

Trial Court's Admission of Camacho's Statement as Recorded Recollection

Cervantes contends the trial court erred when it admitted portions of Camacho's statement to Detective Johnson as a recorded recollection under ER 803(a)(5). The State counters that the trial court properly exercised its discretion in admitting the statement. In the alternative, the State contends that any error was harmless because the trial court did not rely on Camacho's statement in finding Cervantes guilty.

Although hearsay is generally inadmissible, 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' 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.

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's memory, and (4) the record reflects the witness's prior knowledge accurately. State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009). Here Cervantes challenges only the second and fourth requirements.

We review admission of statements under ER 803(a)(5) for abuse of discretion. White, 152 Wn. App. at 183. "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.

### Insufficient Recollection

Cervantes first argues that Camacho did not have an insufficient recollection of the event and thus cannot satisfy ER 803(a)(5)’s second requirement. Cervantes failed to raise this argument below and thus waives it on appeal. RAP 2.5(a); State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Further, Cervantes cites only State v. Chavez, 134 Wn. App. 657, 142 P.3d 1110 (2006), in support of this argument. The discussion of ER 803(a)(5) in Chavez is limited to the unpublished portion of the opinion. Not only is reliance on unpublished opinions improper, we generally do not consider arguments unsupported by authority or insufficiently argued by the parties. GR 14.1(a); Skamania County v. Woodall, 104 Wn. App. 525, 536 n.11, 16 P.3d 701 (2001). We decline to address Cervantes’ “insufficient recollection” argument.<sup>3</sup>

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<sup>3</sup> Even if we addressed this argument, it lacks merit. 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. Alvarado, 89 Wn. App. at 548. 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). The recording here was a taped statement made on May 13, 2010, four days after the incident. At trial, Camacho remembered basic details about the evening of May 9, 2010, but testified that she could not remember critical aspects of the incident. She could not remember who approached who outside the restaurant, how the fight started, who hit first, or who used the word “snitch” first. Nor could she remember the color or material of the “stick” Cervantes used to hit Daza-Flores. She did not remember whether Cervantes and Daza-Flores fought up against a car. In contrast, Camacho told Detective Johnson on May 13, 2010, that Cervantes held a black metal stick and started the fight by hitting Daza-Flores on the ear and calling him a “snitch.” We conclude that a reasonable person could have found that during trial, Camacho had an insufficient recollection of important details about the fight. Thus, the trial judge did not abuse his discretion in concluding that Camacho’s statement met ER 803(a)(5)’s second requirement.



Prior Statement's Accuracy

Cervantes also challenges the admission of Camacho's recorded statement under ER 803(a)(5)'s fourth requirement, arguing that Camacho disavowed the statement's accuracy at trial and thus the court erred in admitting it. Cervantes failed to raise this argument below and thus waives it on appeal. RAP 2.5(a); Robinson, 171 Wn.2d at 304. But because Cervantes alleges defense counsel provided ineffective assistance for conceding that Camacho did not disavow the statement's accuracy, we address this issue below in resolving his ineffective assistance claim.

Ineffective Assistance of Counsel

Cervantes argues that defense counsel's performance was deficient because counsel conceded at trial that Camacho did not disavow the statement's accuracy. The State contends that defense counsel properly stipulated that Camacho had not disavowed her statement and, alternatively, that Cervantes fails to show he was prejudiced by any deficient performance.

To establish ineffective assistance of counsel, Cervantes must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If a defendant fails to satisfy either prong, the court need not inquire further. There is a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Matters that go to trial strategy or tactics do not show deficient performance, and Cervantes bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. State v. Rainey, 107 Wn. App. 129, 135–36, 28

P.3d 10 (2001). To establish prejudice, a defendant must show that the outcome of the trial or ruling would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Because Cervantes' ineffective assistance claim hinges on whether defense counsel properly conceded the disavowal issue while objecting to the statement's admission on other grounds, we consider whether Camacho disavowed the accuracy of her prior statement under ER 803(a)(5)'s fourth requirement.

In State v. Alvarado, 89 Wn. App. 543, 551, 949 P.2d 831 (1998), we held that the requirement that a recorded recollection accurately reflect the witness's knowledge may be satisfied without the witness's direct verification of accuracy at trial. In such cases, "[t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement." Alvarado, 89 Wn. App. at 551-52.

Cervantes claims that Camacho disavowed the accuracy of her recorded statement because some of her trial testimony contradicted the statement. He points to three instances of contradiction. First, in her recorded statement, Camacho described Cervantes' weapon as a black metal stick with a ball on the end of it. But during trial, she testified that she did not remember the stick and also claimed she did not see the stick. Second, in her recorded statement, Camacho said that Cervantes called Daza-Flores a "snitch." But Camacho testified at trial that Cervantes and Daza-Flores

“call[ed] each other snitches” and she was “not sure who called who a snitch first.” RP (Mar. 21, 2011) at 68, 91. Finally, Camacho in her recorded statement claimed that after dropping the stick, Cervantes charged at Daza-Flores. But at trial, she testified, “I believe that’s incorrect . . . [b]ecause . . . I don’t remember [Cervantes] charging him.” RP (Mar. 21, 2011) at 94.

We recently explained that a witness does not disavow a prior statement merely by giving contradictory testimony at trial. In White, the defendant violated a no-contact order and assaulted his former girl friend. White, 152 Wn. App. at 176. The victim called 911 during the incident and identified White as her attacker. White, 152 Wn. App. at 176. The victim also gave an oral and a written statement to police. White, 152 Wn. App. at 177. At trial, the victim testified that she was attacked on the day in question but stated she was intoxicated at the time and could not remember any details. White, 152 Wn. App. at 178. She also testified that White was not present on the day of the attack. White, 152 Wn. App. at 178. When the State presented her with a copy of her signed police statement and played the 911 recording, the victim testified that she did not remember if the statements were true and did not remember calling 911. White, 152 Wn. App. at 176.

On appeal, White argued that the trial court erred by admitting the victim’s prior written statement under ER 803(a)(5). White, 152 Wn. App. at 183. Specifically, White argued that the victim disavowed her prior statements when she testified that he was not present on the day of the attack, and therefore the statement failed to meet the Alvarado test for ER 803(a)(5)’s fourth requirement. White, 152 Wn. App. at 184. We

held that even though the victim's trial testimony contradicted her prior statement, "after reading the statement on the stand, [the victim] did not disavow the accuracy of the statement." White, 152 Wn. App. at 185. And because other evidence of reliability weighed in favor of admitting the statement, it satisfied Alvarado's "totality of the circumstances" test. White, 152 Wn. App. at 186; Alvarado, 89 Wn. App. at 551-52. We emphasized that the victim made the statement on the day of the attack, signed the statement as recorded by the officer under penalty of perjury, had the opportunity to correct any errors, and the officer testified that he wrote the statement as narrated by the victim. White, 152 Wn. App. at 186.

This case is similar to White. Camacho's testimony that she did not remember who called whom a "snitch" first did not disavow the accuracy of her prior statement. Similarly, her testimony that she did not see the stick Cervantes held—while contradictory to her prior statement describing the stick—did not disavow the accuracy of that prior description. While Camacho questioned the accuracy of her prior statement that Cervantes charged at Daza-Flores, she clarified that she believed the prior statement was incorrect because she did not remember the incident. Camacho never testified that she lied to Detective Johnson in her prior statement.<sup>4</sup> See State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002) (holding that Alvarado's "totality

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<sup>4</sup> Cervantes argues that Camacho had a motive to lie when making her statement because Daza-Flores was her boyfriend at the time. This assertion is speculative and we decline to make a finding regarding the credibility or lack thereof of the witness statements. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal."). Even if Camacho had such a motive, mere capability of lying does not render prior statements inadmissible. Alvarado, 89 Wn. App. at 552-53.

of the circumstances” test was not met when the witness “specifically said that her prior statement was a lie”); Alvarado, 89 Wn. App. at 553 (witness’s prior statement lacked sufficient indicia of reliability when witness admitted it was untrue). And to the extent Camacho denies remembering the prior statement, denying recollection of a statement does not amount to disavowal of the statement’s accuracy. State v. Derouin, 116 Wn. App. 38, 46, 64 P.3d 35 (2003).

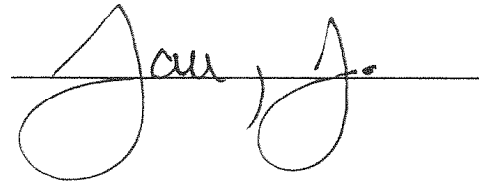
Other indicia of reliability also support admission of Camacho’s statement. After taking Camacho’s statement, Detective Johnson asked her if everything she said was true to the best of her knowledge. Camacho answered, “Yes.” RP (Mar. 28, 2011) at 8. Camacho made the statement four days after the incident and answered affirmatively at trial when the prosecutor asked if her “memory would have been fresher a few days after the event than it is now.” RP (Mar. 21, 2011) at 81. Camacho consented to simultaneous recording of her statement, and no evidence suggests the recording method was unreliable. Camacho’s statement was also corroborated by Daza-Flores’ testimony. The totality of the circumstances indicates that Camacho’s statement accurately reflected her knowledge of the incident.

Here, defense counsel’s concession that Camacho had not disavowed her statement was not deficient performance. As discussed above, the relevant portions of the statement were properly admitted under ER 803(a)(5). Camacho did not disavow the accuracy of her statement. She merely testified that she could not remember the details of the incident and, at most, gave contradictory testimony. As discussed above, giving contradictory testimony does not amount to disavowing a prior statement. White,

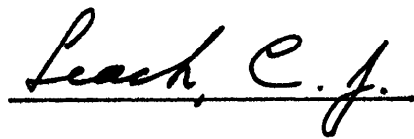
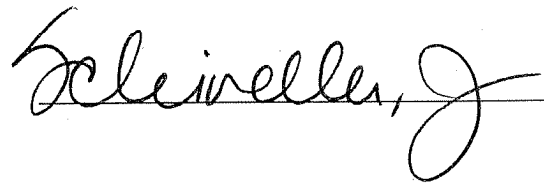
152 Wn. App. at 186. Defense counsel properly stipulated that Camacho had not disavowed her statement. It was a legitimate trial tactic to object on other grounds and concede the disavowal issue.<sup>5</sup>

CONCLUSION

Because the trial court properly admitted portions of Camacho's prior statement as a recorded recollection under ER 803(a)(5) and no deficient performance occurred, we affirm.

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WE CONCUR:

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<sup>5</sup> Cervantes also fails to show any prejudice. To the extent Cervantes argues that a proper objection likely would have been sustained because the trial court initially found that Camacho disavowed the accuracy of her prior statement and only abandoned that finding after defense counsel conceded the issue, his argument lacks merit. The trial court made no such formal finding. Rather, it engaged in a discussion with the parties and "basically work[ed] through this thinking aloud," in part because it had not anticipated addressing the issue that day. RP (Mar. 22, 2011) at 34-35. The court later considered reliability and accuracy under the totality of the circumstances test. It properly concluded that Camacho "essentially did confer accuracy at the time of making the statement" and that her trial testimony was more accurately characterized as "stat[ing] that she could not remember the statements attributed to her." RP (Mar. 28, 2011) at 3. As discussed above, the trial court correctly concluded that Camacho did not disavow the accuracy of her prior statement. The trial court's arrival at the correct conclusion does not prejudice Cervantes.