IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66038-1-I
Respondent,	)	DIVISION ONE
v.	)	
ROBERT TAYLOR, JR.,	)	UNPUBLISHED
Appellant.	)	FILED: March 5, 2012

Cox, J. — Robert Taylor, Jr. appeals his conviction for delivery of a controlled substance. He argues that there was insufficient evidence to link him to the crime. Taylor also argues that an officer's testimony was improperly admitted hearsay that also violated his Sixth Amendment right to confrontation. We hold that there was sufficient evidence to convict Taylor of the crime. Further, we hold that the violation of Taylor's Sixth Amendment right to confrontation was harmless beyond a reasonable doubt. We affirm.

In 2010, Seattle police initiated a "buy and slide" anti-drug trafficking operation. During such an operation, police employ an undercover officer to buy drugs from street-level drug dealers. Instead of immediately arresting the seller after the purchase, police wait to arrest him so as not to alert other sellers of the operation.

Officer Erin Rodriguez was working as the undercover buyer in the

operation. She testified at trial that on the night in question she made eye contact with Taylor, and asked him where she could “get a 20?” Taylor signaled to Officer Rodriguez to follow him down the street and then handed her a rock of crack cocaine in exchange for $20. Due to the buy and slide protocol, Taylor was not immediately arrested. Instead, Officer Donald Johnson, and three others, working on the operation’s “arrest team,” made contact with Taylor approximately four blocks from the drug buy. The officers handcuffed Taylor and photographed him, stating that he was under investigation for a “car prowl.” They did not arrest or search him at the time.

Taylor was later arrested and charged with one count of violation of the uniform controlled substances act. At Taylor’s trial, Officer Rodriguez identified him as the individual from whom she bought cocaine on the night in question. She also identified Taylor from the photograph taken by the “arrest team.”

A jury convicted Taylor as charged. He appeals.

SUFFICIENCY OF THE EVIDENCE

Taylor argues that the State produced insufficient evidence to prove that he was, in fact, the individual who sold Officer Rodriguez crack cocaine. We disagree.

Where a party challenges the sufficiency of the evidence, we review the evidence to determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime.[1] In applying this test in

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[1] State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

a criminal case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant.[2] We defer to the trier of fact on issues of witnesses credibility and persuasiveness of the evidence.[3]

Violation of the uniform controlled substances act by delivery of a controlled substance requires the State to prove beyond a reasonable doubt that, on a specific alleged date, the defendant delivered a controlled substance in the State of Washington.[4]

Here, the element at issue is whether Taylor was who delivered narcotics to Officer Rodriguez. Officer Rodriguez identified Taylor as the individual from whom she bought narcotics. She also identified him as the person in the photograph taken by Officer Johnson. She testified that when she made the drug buy from Taylor she was "[m]aybe about a ruler's width" away from him. It is for the jury to determine witness credibility and persuasiveness of evidence.[5] The jury did so in this case.

Here, Taylor argues that Officer Rodriquez came into contact with many different drug dealers over the two-week buy and slide operation. He also

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[2] State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993).

[3] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[4] RCW 69.50.401(1); State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993).

[5] Thomas, 150 Wn.2d at 874-75.

claims that her interaction with the person she claims was Taylor was brief. Consequently, Taylor contends that Officer Rodriguez's independent identification of him was not evidence sufficient for a reasonable juror to find him guilty beyond a reasonable doubt. This argument fails to overcome the rule that all reasonable inferences must be drawn in the State's favor. The jury believed Officer Rodriguez's identification. That is sufficient evidence to convict.

HEARSAY AND CONFRONTATION CLAUSE VIOLATIONS

Taylor contends that the trial court abused its discretion by admitting hearsay testimony. Further, he argues that this violated his Sixth Amendment right to confrontation. We agree with both contentions, but hold that each was harmless under the respective appropriate standard.

Hearsay is "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted."[6] It is not admissible unless an exception applies.[7] While a statement may be offered to describe a declarant's then-existing state of mind,[8] such information must be relevant to a material issue in the case.[9] Otherwise, such testimony is hearsay.[1]

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[6] ER 801(c).

[7] ER 802.

[8] ER 803(a)(3).

[9] State v. Johnson, 61 Wn. App. 539, 540, 811 P.2d 687 (1991); see also State v. Aaron, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990); State v. Stamm, 16 Wn. App. 603, 610-12, 559 P.2d 1 (1976).

Generally, out-of-court statements repeated by testifying law enforcement officers are hearsay unless they demonstrate the officer's state of mind, where the officer's state of mind is relevant to a material issue in the case.[11]

In State v. Johnson,[12] this court held that a police officer's recounting of information provided by a non-testifying informant was hearsay. During trial, an officer testified that the police had information that a house was the location of drug dealing, that the defendant would be at the residence, and that she was involved with drug trafficking.[13] We held that the officer's testimony was inadmissable because the legality of the search and seizure was not at issue and, as such, the challenged testimony could only have been admitted as hearsay.[14] We cited this court's opinion in State v. Aaron,[15] where this court held that:

> If the legality of the search and seizure was being challenged, . . . the information available to the officer as the basis for his action would be relevant and material. However, the officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make "determination of the action more probable or less probable than it would be without the evidence." Accordingly, the dispatcher's statement was not relevant for another purpose.[16]

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[1] Johnson, 61 Wn. App. at 540.

[11] See id. at 548.

[12] 61 Wn. App. 539, 811 P.2d 687 (1991).

[13] Id. at 544.

[14] Id. at 548.

[15] 57 Wn. App. 277, 787 P.2d 949 (1990).

"'The admission of hearsay frequently raises concerns under the Confrontation Clause.'"[17] Under the Sixth Amendment, an accused has the right to confront witnesses bearing testimony against him.[18] In Crawford v. Washington,[19] the United States Supreme Court held that the admission of out-of-court testimonial statements violates a defendant's rights unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[2] But "nontestimonial" hearsay is not subject to the confrontation clause and is admissible, subject only to the rules of evidence.[21] We have held that hearsay testimony by a police officer that connects the accused to the crime is a violation of a defendant's Sixth Amendment right to confrontation.[22]

We review a violation of the Confrontation Clause de novo. [23] In contrast,

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[16] Id. at 280 (quoting ER 401).

[17] State v. Lee, 159 Wn. App. 795, 815, 247 P.3d 470 (2011) (quoting State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007), abrogated on other grounds by State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010)).

[18] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

[19] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[2] Id. at 68.

[21] State v. Pugh, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009) (citing Davis v. Wash., 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

[22] See Johnson, 61 Wn. App. at 549.

[23] State v. Lee, 159 Wn. App. 795, 815, 247 P.3d 470 (2011) (citing State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007)).

we review challenges to the admission of evidence for an abuse of discretion.[24] A decision is an abuse of discretion if it is outside the range of acceptable choices given the facts and the applicable legal standard.[25] Whether or not a statement is hearsay is a question of law that we review de novo.[26]

Here, over defense objection, Officer Johnson testified that "[w]e were given a clothing description" and that he was "looking for a male black [sic] who had on a black knit cap, wearing glasses . . . [b]lack leather jacket and a hoodie, gray hoodie, underneath the black jacket."[27] This was an accurate description of Taylor on the day in question. The court ruled that this evidence was not hearsay because it was simply establishing "what individual they were looking for to stop." But Officer Johnson's state of mind was not at issue, nor did his testimony make "'determination of the action more probable or less probable than it would be without the evidence . . . .'"[28] Thus, it was relevant only for the truth of the matter asserted: to connect Taylor to Officer Rodriguez's drug buy.

The State argues that Johnson and Aaron are distinguishable because, in both, the testimony at issue implicated the defendant. Here, Officer Johnson's

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[24] State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995).

[25] In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

[26] State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

[27] Report of Proceedings (July 20, 2010) at 77.

[28] Aaron, 57 Wn. App. at 280.

testimony served the same function: it linked Taylor to the individual described by the drug buy team and thus directly to the crime.

The State argues that the trial court properly recognized that the testimony was not offered for the truth of the matter asserted but, rather, to explain why the officers pursued a particular person. We rejected such an argument in Johnson. There, we noted that:

> the disputed testimony . . . went beyond merely establishing that officers came to the scene because of 'information received', and pointed to the defendant with information connecting her to a crime. It would have been sufficient to explain police presence at the scene for Lieutenant Barker to testify that police had a search warrant for the residence. There was no need [for] further [testimony]. . . . These latter statements were simply hearsay.[29]

Similarly, here, Officer Johnson could have testified, as he did initially, that he was given a clothing description and location to explain why he took the action he did. The testimony was inadmissible hearsay.

Officer Johnson's hearsay testimony was also testimonial, violating his Sixth Amendment right to confrontation. Taylor did not have an opportunity to cross-examine the persons whose statements the officer repeated. It thus violated his Sixth Amendment rights.[3]

HARMLESS ERROR

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[29] Johnson, 61 Wn. App. at 547 (internal citations and quotation marks omitted).

[3] See State v. Jasper, 158 Wn. App. 518, 526, 245 P.3d 228 (2010) (quoting Crawford v. Wash., 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

A constitutional error is harmless if "the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error."[31] We look to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt.[32] "If there is no 'reasonable probability that the outcome of the trial would have been different had the error not occurred,' the error is harmless" under that standard.[33] In contrast, an evidentiary error by the trial court such as admission of hearsay testimony is harmless unless, within reasonable probability, the outcome of the trial would have been materially different.[34]

Here, Taylor contends that Officer Johnson's testimony was not harmless, both under the constitutional error test and under the less stringent standard for reviewing an evidentiary error. We disagree.

Given Officer Rodriguez's testimony, there is no reasonable probability that the outcome would have been different had Officer Johnson's hearsay testimony not been admitted. Officer Rodriguez identified Taylor as the individual who sold her cocaine, and identified Taylor as the individual in the

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[31] State v. Anderson, 171 Wn.2d 764, 770, 254 P.3d 815 (2011) (citing State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)).

[32] Id. (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

[33] State v. Mason, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

[34] State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)); see also State v. Zwicker, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

photo taken later that night by Officer Johnson's team. Consequently, the violation of Taylor's constitutional right was harmless beyond a reasonable doubt.

Likewise, the error is harmless under the nonconstitutional standard.

STATEMENT OF ADDITIONAL GROUNDS

We do not address appellant's pro se statement of additional grounds separately because his arguments are adequately addressed in his appellate counsel's brief.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Grosse, J.

Spear, J.