

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

CORY J. FOSTER,

Appellant.

No. 41031-1-II

UNPUBLISHED OPINION

Armstrong, P.J. — Cory Foster appeals his conviction for second degree assault, arguing that the State failed to present sufficient evidence of identity. He raises additional issues in a statement of additional grounds (SAG) filed under RAP 10.10. We affirm.<sup>1</sup>

On December 8, 2009, Christopher and Amy Hellman boarded an Intercity Transit bus. They noticed a man and woman in the rear of the bus and that the man was being loud. They got off the bus at South Puget Sound Community College, as did the man and woman. The man approached Christopher and asked if he had a cigarette. Christopher replied, “Do you have a job?” Report of Proceedings (RP) at 25, 48. The man started saying that Christopher had “disrespected” him. RP at 25-27, 48-49. The man punched Christopher in the left cheek. Campus security was notified of the altercation. A campus security official, Douglas Swift, saw the man after he had struck Christopher and ordered the man to stop, but the man and woman walked away. Christopher eventually had reconstructive surgery on the left side of his face.

Intercity Transit provided the Olympia police department with video surveillance showing

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<sup>1</sup> A commissioner of this court initially considered Foster’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

the man who struck Christopher getting on and off the bus. Someone at the police department recognized the man in the video as Foster. Detective Russell Gies prepared a photographic montage that included Foster's picture. He showed the montage to Christopher and Amy, separating them when he did so. They both identified Foster as the man who had approached and then struck Christopher. Swift identified Foster as the man who he had seen with Christopher at the bus stop.

The State charged Foster with second degree assault. Before trial, he moved to dismiss under CrR 8.3(b) because the jail area in which he was being held (1) had only a speakerphone, so any communication he had with his attorney could be heard by other inmates, and (2) did not have a secure area in which he could keep his legal papers. The trial court denied the motion to dismiss.

Christopher and Amy testified as described above. They identified Foster in court as the man who struck Christopher. Swift identified Foster in court as the man he had seen with Christopher. Detective Gies testified that he showed the montage to two other possible witnesses, one of whom could not identify anyone and one of whom identified another man. Marilyn Berko, who had witnessed the man striking Christopher, could not identify the man at trial and had told police that she thought the man was dark skinned, while Foster is white.

Foster did not testify. The jury found him guilty as charged.

Foster argues that the State failed to present sufficient evidence that he assaulted Christopher. The evidence of a crime is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable

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doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

Foster contends that the evidence of identify is insufficient because it was based on photographic montages and because three witnesses either were unable to identify him or identified someone else as Christopher's assailant. But these contentions go to the credibility of the witnesses. And we do not review credibility decisions. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The State presented sufficient evidence from which a rational jury could find beyond a reasonable doubt that Foster was Christopher's assailant.

In his SAG, Foster raises six additional grounds. First, he contends his right to due process was denied because he was not granted a continuance to further investigate his CrR 8.3(b) motion to dismiss. But he does not show that he was denied a continuance or show what else needed to be investigated. His due process claim fails. Second, he contends that the trial court erred in denying his CrR 8.3(b) motion to dismiss. But unlike the situation in *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963), there is no evidence that anyone eavesdropped on any conversation between Foster and his attorney. And the jail had private interview rooms that the attorney could have requested for discussions with Foster. The trial court did not err in denying Foster's motion to dismiss. Third, he contends that Department of Corrections officers interviewed Christopher and Amy and may have influenced their identifications of him. But he presents no evidence of these interviews or how they might have influenced the identifications.

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Fourth, he contends that Detective Gies showed the montage to Christopher and Amy at the same time. But Detective Gies testified otherwise. Fifth, he contends that because Christopher did not seek immediate medical attention, it was possible that his injuries resulted from a subsequent act. But Christopher testified that his injuries resulted from being struck by Foster. Finally, he contends that the physician who treated Christopher's injuries was biased because he has testified for the trial prosecutor in past cases. There is no evidence of bias.

The State presented sufficient evidence and Foster's additional grounds lack merit. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Armstrong, P.J.

We concur:

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Quinn-Brintnall, J.

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Johanson, J.