

KHN

62251-0

62251-0

NO. 62251-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROOSEVELT YOUNG, JR.,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 10 PM 4:44

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE.....	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	1
C. ARGUMENT	5
1. THERE WAS NO CONFRONTATION CLAUSE VIOLATION BECAUSE THE STATEMENT AT ISSUE IS NOT TESTIMONIAL, BUT THE ALLEGED ERROR IS ALSO HARMLESS BEYOND A REASONABLE DOUBT.....	5
2. THE STATE CONCEDES THAT YOUNG'S SENTENCE MAY POTENTIALLY EXCEED THE STATUTORY MAXIMUM.....	13
D. CONCLUSION	15

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington,
541 U.S. 36, 124 S. Ct. 1354,
158 L. Ed. 2d 177 (2004)..... 6

Davis v. Washington,
547 U.S. 813, 126 S. Ct. 2266,
165 L. Ed. 2d 224 (2006)..... 6, 7

Delaware v. Van Arsdall,
475 U.S. 673, 106 S. Ct. 1431,
89 L. Ed. 2d 674 (1986)..... 11

Washington State:

State v. Koslowski,
___ Wn.2d ___, 2009 WL 1709639 9, 10

State v. Linerud,
147 Wn. App. 944, 197 P.3d 1224 (2008),
as amended on denial of reconsideration (March 23, 2009)
..... 14

State v. Ohlson,
162 Wn.2d 1, 168 P.3d 1273 (2007)..... 7

State v. Powell,
126 Wn.2d 244, 893 P.2d 615 (1995)..... 12

State v. Sloan,
121 Wn. App. 220, 87 P.3d 1214 (2004) 14

State v. Smith,
148 Wn.2d 122, 59 P.3d 74 (2002) 11

Statutes

Washington State:

RCW 26.50.110..... 14

RCW 9A.20.021 14

Rules and Regulations

Washington State:

ER 801(a)(2) 5

A. ISSUES PRESENTED

1. Whether an unidentified witness made a testimonial statement admitted at trial in violation of the Confrontation Clause by flagging down a police officer and pointing at the defendant.

2. Whether the defendant must be resentenced because his total sentence potentially exceeds the statutory maximum for the crime of conviction.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Roosevelt Young, Jr., was charged with one count of felony violation of a court order for assaulting his girlfriend, Simone Liberty, in violation of a no-contact order on March 22, 2008. CP 1-5. A jury trial was held before the Honorable Monica Benton in July 2008, and the jury found Young guilty as charged. CP 17. Young received a standard-range sentence of 48 months in prison and 9 to 18 months of community custody. CP 46-54. Young now appeals. CP 59-68.

2. SUBSTANTIVE FACTS

Shortly before 11:00 a.m. on March 22, 2008, witness Jordana Lesesne was leaving her home near the Rainier Playfield in south Seattle to go to the grocery store when she heard a

woman screaming. RP (7/29/08) 8. When Lesesne got closer, she heard the woman say "don't hit me, stop." RP (7/29/08) 8-9. As Lesesne approached the park, she saw some individuals on a park bench. She then heard the woman say, "Stop it, don't hit me, stop hitting me," and then she saw a black male shove the woman down on the bench. RP (7/29/08) 10-11. Lesesne identified the black male assailant in court as the defendant, Roosevelt Young, Jr. RP (7/29/08) 16-17.

Lesesne tried to call 911, but her cell phone wasn't working. RP (7/29/08) 14. Lesesne then walked to a nearby bus stop to make sure that someone was calling the police. RP (7/29/08) 15. Indeed, at least two people called 911 to report the assault, and recordings of these calls were played for the jury at trial. CP 7-16. The callers described the assault as it was occurring. They reported that the black male assailant in a black "beanie" or knit cap and a dark jacket with a red hooded sweatshirt underneath was assaulting a female who was also wearing a red sweatshirt. CP 8-9, 11, 14-15. The callers reported that the male was punching the female and dragging her along the ground by her hair. CP 8-10, 13. The first caller also reported that a second black male in a tan coat was present on the scene, but that he was not participating in

the assault. CP 8-9. In addition, the first caller called a second time to report that the individuals were walking northbound on 37th Avenue to assist the police in finding them. CP 16.

Seattle Police Officer Clark Dixon was one of the first officers to arrive in the area, and he positioned his patrol car near the scene to wait for backup. RP (7/30/08) 5. He then saw two men and a woman fitting the descriptions given by the 911 callers walking north on 37th as described. RP (7/30/08) 6. The male in the knit cap and dark coat and the woman in the red sweatshirt "were flailing their arms around, like they were in a heated exchange." RP (7/30/08) 6. Officer Dixon identified Young in court as the male in the knit cap and dark coat. RP (7/30/08) 6-7.

Officer Nicholas Carter also responded to this incident. Officer Carter contacted the female in the red sweatshirt and identified her as Simone Liberty. RP (7/29/08) 46-47. Officer Carter noted that Liberty had a swelling injury on her face near her left eye that appeared to be fresh. In addition, she had muddy stains on the knees of her pants that appeared to be "drag marks." RP (7/29/08) 44-46. Liberty was uncooperative, and would not allow Officer Carter to take photographs of her. RP (7/29/08) 49. Nonetheless, the police were able to confirm the existence of a

valid no-contact order protecting Liberty from any contact by the defendant. RP (7/29/08) 51-52.

Officer Bradley Krise also responded to this call. As Officer Krise was turning the corner in order to drive northbound on 37th, an unidentified witness flagged him down and pointed at the defendant to identify him as the perpetrator of the reported assault. RP (7/29/08) 29-30. Officer Krise noted that Young fit the description of the suspect that had received from the dispatcher. RP (7/29/08) 31. Officer Krise and Officer Dixon then contacted Young and eventually arrested him. Young was hostile and uncooperative. RP (7/29/08) 31-32; RP (7/30/08) 54.

Simone Liberty reluctantly testified at trial. She identified Young in court as her boyfriend of four years. RP (7/30/08) 17. Although Liberty denied that Young assaulted her on March 22, 2008, she acknowledged that she and Young had had an argument that day that resulted in their contact with the police. RP (7/30/08) 18, 21-25.

Additional facts will be discussed further below as necessary for argument.

C. **ARGUMENT**

1. **THERE WAS NO CONFRONTATION CLAUSE VIOLATION BECAUSE THE STATEMENT AT ISSUE IS NOT TESTIMONIAL, BUT THE ALLEGED ERROR IS ALSO HARMLESS BEYOND A REASONABLE DOUBT.**

Young first argues that his rights under the Confrontation Clause of the Sixth Amendment were violated by the admission of testimonial hearsay. More specifically, Young claims that the trial court should not have allowed Officer Krise to testify that as he arrived on the scene, an unidentified witness flagged him down and pointed at Young to identify him as the suspect. Brief of Appellant, at 7-13. This claim should be rejected for two reasons. First, the statement¹ at issue is not testimonial; rather, the witness's pointing provided information that enabled Officer Krise to respond to an ongoing emergency. Second, even if this Court were to find that the testimony about pointing was admitted in violation of the Confrontation Clause, the error is harmless beyond a reasonable doubt because overwhelming, unchallenged evidence established

¹ Pointing, as assertive nonverbal conduct, constitutes a "statement" for purposes of the hearsay rules. ER 801(a)(2).

that Young was the perpetrator of this crime. Accordingly, this Court should affirm.

The United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), fundamentally changed the course of Confrontation Clause jurisprudence. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, Crawford shifted the focus to the question of whether out-of-court statements are "testimonial" in nature. Accordingly, under Crawford, a witness's "testimonial" out-of-court statements are not admissible at trial unless the defendant has been given an opportunity to cross-examine that witness. However, although the Court concluded specifically that recorded statements made during a formal, structured police interrogation were clearly testimonial, the Court "[le]ft for another day any effort to spell out a comprehensive definition of 'testimonial.'" Crawford, 541 U.S. at 68.

Some further guidance was provided by the Court's later decision in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the Court ruled that a 911 caller's statements were not testimonial because they were made for the primary purpose of assisting the police in responding to an

ongoing emergency, not to assist in a later court proceeding. As the Court explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Accordingly, the Court concluded that nontestimonial statements made during an ongoing emergency fall outside the scope of the Confrontation Clause, and thus, no constitutional violation occurs when such statements are admitted at trial. Id.

The Washington Supreme Court applied these principles from Davis in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). In further defining a test for determining whether the primary purpose of an interrogation is to meet an ongoing emergency, the court in Ohlson identified four factors that courts should consider: 1) the timing of the statements; 2) the level of harm threatened; 3) the level of need for the information; and 4) the formality of the questioning. Ohlson, 162 Wn.2d at 15. Based on these four

factors, the court concluded that statements that the victim had made to the first officer on the scene following an assault with racial overtones were not testimonial. Thus, these statements were admissible as excited utterances despite the victim's failure to testify at trial. Id. at 16-19. In so holding, the court found it significant that the assailant had not yet been apprehended; therefore, the need for the information and the level of the threat posed were greater than would have been the case otherwise. Id.

In this case, application of the four factors from Ohlson demonstrates that the statement from the unidentified witness, i.e., pointing at Young, is not testimonial. First, as to the timing of the statement in question, Officer Krise testified that the unidentified witness flagged him down as he was turning north on 37th in his patrol car, and that the witness then pointed to Young, identifying him as the suspect. RP (7/29/08) 29-30. In other words, the nonverbal statement was made immediately upon Officer Krise's arrival at the scene. Second, as to the level of harm threatened, this case involved a report of an ongoing assault in which Young punched and pushed Simone Liberty, and dragged her by her hair. CP 8-10, 13-14, 16; RP (7/29/08) 11. For purposes of the Ohlson test, Young's conduct posed an obvious threat. Third, as to the

level of need for the information, as noted above, Officer Krise had just arrived at the scene and had not yet contacted a suspect. Therefore, Krise had an obvious need for the information provided by the unidentified witness. And fourth, as to the formality of the questioning, there was no formality whatsoever. Rather, as Krise described, the witness flagged him down in the street and pointed at Young to identify him as the perpetrator of the reported assault. RP (7/29/08) 29-30.

In this case, under the four factors set forth in Ohlson, the primary purpose of the interrogation – if the term "interrogation" even applies in these circumstances, since it appears that no questions were asked – was to enable Officer Krise to respond to an ongoing emergency, not to assist with a later court proceeding. As such, the nonverbal statement of the unidentified witness is not testimonial, and there was no Confrontation Clause violation when that nonverbal statement was admitted at trial.

This conclusion is further bolstered by another, very recent decision from the Washington Supreme Court. In State v. Koslowski, ___ Wn.2d ___, 2009 WL 1709639, the court considered whether detailed statements made to police officers by a robbery victim were testimonial statements. In concluding that

the statements in question were testimonial, the court again identified four relevant factors from Davis that were used to guide the court's inquiry:

1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. 2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. 3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial. 4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial.

Koslowski, at *4.

Again, in this case, each of these factors show that the nonverbal statement of the unidentified witness is not testimonial. First, the unidentified witness flagged down Officer Krise and pointed at Young in response to ongoing events, not in response to something that had happened in the past. Second, a reasonable

listener – or more accurately in this case, a reasonable *observer* – would conclude that the unidentified witness was assisting Officer Krise in responding to an ongoing emergency. Third, as to the nature of what was asked and answered, the record in this case does not indicate that any questions were asked at all. And fourth, as to the level of formality, again, there was none. Accordingly, the unidentified witness did not make a testimonial statement when he or she flagged down Officer Krise and pointed at Young. This Court should reject Young's claims to the contrary, and affirm.

Nonetheless, even if this Court were to conclude that the unidentified witness made a testimonial statement by pointing at Young, reversal is still not required. Rather, the record plainly demonstrates that any error is harmless beyond a reasonable doubt.

When statements have been admitted at trial in violation of the Confrontation Clause, any resulting conviction should be affirmed if the error is harmless beyond a reasonable doubt.

Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Smith, 148 Wn.2d 122, 138-39, 59 P.3d 74 (2002). An error is harmless beyond a reasonable doubt if the untainted evidence overwhelmingly proves the defendant's guilt.

Smith, 148 Wn.2d at 139. Put another way, such error is harmless if there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995).

In this case, the evidence other than the pointing by the unidentified witness that Young was the perpetrator of the assault upon Simone Liberty was overwhelming. First, both 911 callers specifically identified the black male in the black "beanie" or knit hat and a dark jacket with a red hoodie underneath as the suspect who was assaulting the female victim. CP 9, 14-15. Officer Krise and Officer Carter confirmed on the scene that Young fit this description exactly. RP (7/29/08) 30-31, 42-43. Both officers also identified Young in court. RP (7/29/08) 30-31, 57. In addition, independent witness Jordana Lesesne identified Young in court as the person she saw assaulting the victim on the day in question. RP (7/29/08) 16-17. Officer Dixon, who was one of the first officers to arrive in the area, saw Young and Liberty "flailing their arms around, like they were in a heated exchange." RP (7/30/08) 6. Officer Dixon also identified Young in court as the male in the knit cap and dark jacket who had been flailing his arms. RP (7/30/08) 6-7. Moreover, although Simone Liberty denied that Young had assaulted her on

March 22, 2008, she identified Young in court as her boyfriend, and she admitted that they had had an argument that day that resulted in contact with the police. RP (7/30/08) 17-18, 20-23.

In sum, the evidence was overwhelming that Young was the person responsible for the assault upon Simone Liberty. Therefore, there is no reasonable probability that the outcome of the trial would have been different if Officer Krise had not testified that the unidentified witness pointed at Young to indicate that he was the suspect. Accordingly, any error is harmless beyond a reasonable doubt, and this Court should affirm.

2. THE STATE CONCEDES THAT YOUNG'S SENTENCE MAY POTENTIALLY EXCEED THE STATUTORY MAXIMUM.

Young next argues that his sentence is illegal because the combination of incarceration and community custody potentially exceeds the statutory maximum of 60 months. Young also argues that his sentence violates the separation of powers doctrine. Brief of Appellant, at 13-19. Young is correct that his sentence potentially exceeds the statutory maximum, and therefore, the State concedes that resentencing is necessary. Accordingly, Young's separation of powers argument need not be addressed.

The maximum sentence for felony violation of a court order is 60 months. RCW 26.50.110(1) and (4); RCW 9A.20.021(1)(c). In this case, the trial court imposed 48 months of confinement in the Department of Corrections and 9 to 18 months of community custody. CP 49-50. Therefore, Young's total sentence potentially exceeds the statutory maximum by six months.

In State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008), as amended on denial of reconsideration (March 23, 2009), this Court rejected the approach it had previously approved in State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004), under which the trial court could impose a total sentence that exceeded the statutory maximum so long as the court included a notation clarifying that the actual time served in confinement plus community custody could not exceed the statutory maximum. Linerud, 147 Wn. App. at 948. The Court held instead that, where a term of community custody is imposed, the sentencing court must explicitly limit the total sentence to the statutory maximum. Id. at 950-51.

Because Young's sentence potentially exceeds the statutory maximum for the crime of conviction, this case must be remanded for resentencing under Linerud.

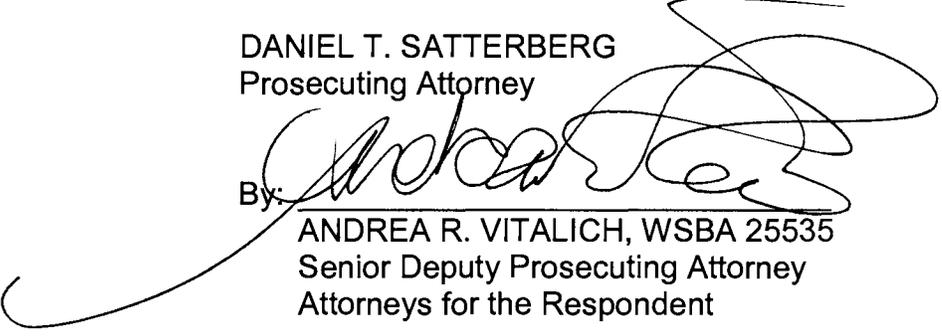
D. CONCLUSION

There was no violation of the Confrontation Clause, but even if this Court disagrees, any error is harmless beyond a reasonable doubt. However, Young's sentence may potentially exceed the statutory maximum. Therefore, the State asks this Court to affirm Young's conviction, and to remand for resentencing.

DATED this 10th day of July, 2009.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 

ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ROOSEVELT YOUNG, JR., Cause No. 62251-0-1, 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.



Name
Done in Seattle, Washington

07-10-2009

Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 10 PM 4:44