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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove identity, contrary to the Fourteenth Amendment and article I, section 3 guarantee of due process of law.

2. In violation of Taylor's Sixth Amendment right to confrontation, the trial court erred in admitting hearsay testimony to explain the actions of the officers who contacted Taylor.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Identity of an accused person and his presence at the scene of the crime must be proven beyond a reasonable doubt. The State prosecuted Taylor for delivery of cocaine, but to prove identity it presented only the testimony of an undercover officer who purchased drugs and of an officer who contacted Taylor at a bus shelter some blocks away. However, the trial court permitted the State to elicit the description of the drug dealer provided by observation officers, even though this testimony was hearsay. Where the hearsay was improperly admitted for its truth and any error in admitting the evidence was not harmless, must Taylor's conviction be reversed?

C. STATEMENT OF THE CASE

In March 2010, undercover police officer Erin Rodriguez was participating in a “buy and slide”¹ operation in downtown Seattle as part of “Roll the Rock,” a Seattle Police Department anti-drug dealing initiative. 2RP 35-36.² The operation was conducted over a two-week period. 2RP 60. The goal of the initiative was to arrest as many suspected drug dealers as possible. Id.

On March 26, 2010, appellant Robert Taylor, Jr., was contacted and photographed by officers at a bus stop about four blocks from the scene of a drug buy conducted by Rodriguez. 2RP 64, 77-78, 84, 96. The officers handcuffed Taylor but did not search him or arrest him at that time. 2RP 92-93, 100. No prerecorded “buy” money was recovered from Taylor. 2RP 55.

Based on these events, the King County Prosecuting Attorney charged Taylor with one count of Violation of the Uniform Controlled Substances Act (“VUCSA”) – Delivery of Cocaine. CP 1. Taylor proceeded to a jury trial.

¹ In a “buy and slide” operation, an undercover buyer purchases narcotics, but the seller is not immediately arrested so to avoid alerting other drug dealers in the area. 2RP 33.

² Three volumes of transcripts from July 19, 20, and 21, 2010, are cited as 1RP, 2RP, and 3RP, respectively, followed by page number.

At the trial, the State called only two witnesses to testify: Rodriguez and Donald Johnson, one of the police officers who contacted Taylor at the bus shelter with his partner. Rodriguez identified Taylor as the person who had sold her drugs. 2RP 40-41. The State did not present the testimony of any observation officers or other witnesses to corroborate Rodriguez's testimony. Over defense objection, however, the court permitted Johnson to testify to the description he received from other officers of the person he was instructed to stop.³ A jury convicted Taylor as charged. CP 31. Taylor appeals.

D. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE IDENTITY, AN ESSENTIAL ELEMENT OF THE CRIME CHARGED.

a. The State Must Prove the Elements of a Criminal Charge Beyond a Reasonable Doubt. Fundamental principles of due process require the State to prove each of the elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v.

³ Although the prosecutor asked Johnson what he and his partner were looking for, and Johnson answered the question with the description he was provided by the arrest officers, the trial court ruled, "It's not being offered for the truth of the matter asserted, simply what individual they were looking for to stop. I'm going to overrule the objection." 2RP 77-78.

Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006); U.S. Const. amend. XIV; Const. art. I, § 3. The identity of a criminal defendant and his presence at the scene of a crime are implied elements of a crime that must be proven beyond a reasonable doubt. State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), rev. denied, 123 Wn.2d 877 (1994). Because the State did not present sufficient evidence to prove that Taylor was the person who sold drugs to Rodriguez, Taylor's conviction for VUCSA – delivery of cocaine should be dismissed.

b. There Was Insufficient Direct Evidence Linking Taylor to the Crime to Support Conviction Beyond a Reasonable Doubt. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Rodriguez testified that “Roll the Rock” represented a concerted effort by Seattle police to arrest as many suspected drug dealers in the Pioneer Square neighborhood as possible. 2RP 35, 59-60. Rodriguez participated in the program as an undercover buyer for two weeks. 2RP 60. In this capacity she presumably

made many narcotics transactions with a number of different individuals.

At trial, the State elected to call as witnesses only Rodriguez and Johnson. Although the observation officers were within the State's control, the State did not present the testimony of any of these individuals or any other witnesses who tracked the drug dealer to the location where Taylor was ultimately stopped by Johnson and his partner. The State did not offer evidence such as "buy money" to corroborate the allegation that Taylor was the man who sold drugs to Rodriguez. Rodriguez's identification was based only on the photograph taken by Johnson that night. 2RP 39-40.

Although a sufficiency challenge permits the appellate court to construe inferences from the evidence in the State's favor, the inferences must still be reasonable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As an undercover buyer for the "Roll the Rock" initiative, Rodriguez came into contact with as many drug dealers as possible over a two week-period. Her contact with Taylor was brief and occurred at 10 p.m. 2RP 36. It is not reasonable to conclude under these circumstances that Rodriguez had an independent recollection of Taylor at the time of trial four

months later. This Court should conclude that the evidence was insufficient to support Taylor's conviction.

2. THE TRIAL COURT VIOLATED TAYLOR'S SIXTH AMENDMENT RIGHT TO CONFRONTATION IN PERMITTING THE STATE TO ELICIT HEARSAY TO EXPLAIN OFFICER JOHNSON'S ACTIONS.

Given the scant evidence tying Taylor to the crime, there is a reasonable likelihood that instead of convicting based on the evidence presented, the jury improperly considered the description of the suspected drug dealer testified to by Johnson. This testimony, and Johnson's explanation that he contacted Taylor at the bus shelter because the observation officers told him the dealer was at Third Avenue and Columbia Street, were hearsay.⁴

a. Hearsay is Presumptively Inadmissible. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). ER 801 permits the admission of statements otherwise excludable as hearsay if they are not offered for their truth. Id. "However, [an] officer's state of mind in reacting to the information he learned from [a] dispatcher is not in issue and does not make 'determination of the action more

⁴ The trial court sustained Taylor's objection to this latter testimony, but by this point the "bell was rung."

probable or less probable than it would be without the evidence.”

State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990)

(rejecting State’s contention that such evidence was relevant to establish why the officer acted as he did); see also State v. Johnson, 61 Wn. App. 539, 547, 811 P.2d 687 (1991) (reaffirming that “if it is necessary at trial for the officer to relate historical facts about the case, it would be sufficient for him to report he acted upon ‘information received’”). The trial court in this case did not restrict Johnson’s testimony to the statement that he acted on “information received.”

b. The Hearsay Evidence of the Drug Dealer’s Description Does Not Fall Within Any Hearsay Exception. The holdings in Aaron and Johnson iterate the principle that to be admissible under the “state of mind” exception to the hearsay rule, statements must pertain to the declarant’s state of mind. State v. Marintorres, 93 Wn. App. 442, 449, 969 P.2d 501 (1999). Statements may only be admitted to show the effect they have on the hearer if this is relevant to an issue at trial. Id.

Here, the effect on the hearer – Johnson – was not relevant. Whether or not Johnson believed that he had contacted the right person had no bearing on the jury’s consideration of the facts. In

addition to being irrelevant, the hearsay testimony prejudicially allowed the State to bolster Johnson's testimony through the back door, by showing that Johnson stopped Taylor because he matched the description he was given of the person who sold drugs to Rodriguez.

The trial court acknowledged that Taylor had objected to the hearsay, but at the same time stated that it admitted Johnson's testimony to show that the person he contacted wore certain clothing and matched a description he had been provided – i.e., for its truth. 3RP 6-7. The trial court erroneously believed that it had given the jury a curative instruction restricting the purpose for which the evidence could be considered, 3RP 7, but the court's explanation of the purpose for which the evidence was being admitted suggested it could be considered as substantive proof of the matter asserted. 2RP 78. Because the evidence was not relevant for any non-hearsay purpose, its admission was an error.

c. The Out-of-Court Statements Also Violated

Taylor's Sixth Amendment Right to Confrontation. Under the Sixth Amendment, an accused person has the right to confront the witnesses against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); U.S. Const. amend. VI.

“[T]he ‘principal evil’ at which the clause was directed was the civil-law system’s use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases.” State v. Jasper, ___ Wn. App. ___, 245 P.3d 228, 232 (2010) (citation omitted).

Identified in the “core class” of testimonial statements covered by the Confrontation Clause are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

Statements made by a police officer or dispatcher in the course of an investigation for the purpose of apprehending a suspect are statements that an objective witness would reasonably believe would be available for use at a later trial. See Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2534-35, ___ L.Ed.2d ___ (2010) (rejecting efforts to restrict Confrontation Clause to conventional “statements”); Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (holding statements by assault victim to police dispatcher were testimonial); see also Johnson, 61 Wn. App. at 549 (admission of statements of non-testifying police dispatcher violated defendant’s Sixth Amendment right).

The statements of the observation officers were subject to the right to confrontation, and should have been excluded. The admission of the testimony violated Taylor's right to confrontation.

d. The Confrontation Clause Violation was Prejudicial. Admission of evidence in violation of the "bedrock" right of confrontation requires reversal unless the State proves beyond a reasonable doubt the uncontroverted evidence did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict).

The theme of Taylor's defense was that the State's case was based on "trust and faith . . . not facts and evidence." 3RP 23. Taylor argued that the jury could not accept on faith that the person stopped by Johnson at a bus shelter four to five blocks from the scene of Rodriguez's drug buy was the drug dealer. 3RP 23-34. Taylor contended that absent additional corroboration, there was a reasonable doubt that the State had apprehended the right man. Id. The hearsay testimony provided the missing link between the

transaction and Johnson's decision to contact Taylor. It supplanted the need for the State to call the observation officers as witnesses, as their testimony was elicited through Johnson. In short, the State cannot prove beyond a reasonable doubt that the jury did not consider the hearsay testimony in reaching their verdict. Taylor's conviction should be reversed.

e. The Erroneously-Admitted Hearsay Testimony Was Reasonably Likely to Have Influenced the Jury to Convict.

The same result is compelled under the less stringent standard for reviewing an evidentiary error that is not of constitutional magnitude. Such an error requires reversal if there is a reasonable probability that the outcome of the trial was materially affected.

State v. Zwicker, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986). As shown, there is a reasonable probability that the jury relied on the hearsay testimony to fill in the gaps in the State's case. This Court should conclude that even if the judge's ruling on the hearsay is considered a mere evidentiary error, reversal is nonetheless required.

E. CONCLUSION

This Court should conclude that Taylor's Sixth Amendment right to confrontation was violated by the admission of hearsay testimony. Because the evidence was otherwise insufficient to support Taylor's conviction, the conviction should be reversed and dismissed.

DATED this 18th day of February, 2011.

Respectfully submitted:


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66038-1-I
v.)	
)	
ROBERT TAYLOR,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF FEBRUARY, 2011.

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