

No. 45178-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEVIN V. JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik D. Price, Judge
Cause No. 12-1-01454-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the testimony of a detective constituted inadmissible hearsay when he testified to the following:

a. That a telephone number, ultimately tied to the defendant, was obtained by a confidential source from suspects unrelated to the investigation of the defendant.

b. That the relationship between Johnson and Victoria Stotts was boyfriend-girlfriend.

c. That Victoria Stott told him her phone number.

2. Whether testimony of the detective regarding the relationship between Johnson and Victoria Stotts and regarding Stotts telling him her phone number violated Johnson's confrontation rights under the Sixth Amendment and article I, § 22, of the Washington Constitution.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. The challenged statements were not inadmissible hearsay, but even if they were, it was harmless error.

Johnson challenges three pieces of evidence presented at trial by Detective Landwhrle as inadmissible hearsay.

Hearsay, which is generally inadmissible absent a specific exception, is defined as "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 802. A statement can be written, oral, or in the form of conduct, but it must be intended as an assertion by the person making it. ER 810(a). The character of a statement as hearsay depends upon the purpose for which it is offered. State v. Fisher, 104 Wn. App. 772, 782, 17 P.3d 1200 (2001).

The trial court has great discretion in determining the admissibility of evidence, and its ruling will be reversed only upon a showing of manifest abuse of discretion. State v. Crowder, 103 Wn. App. 20, 25, 11 P.3d 828 (2000). Abuse of discretion occurs when the court’s decision is “manifestly unreasonable or based upon untenable grounds.” Id. at 25-26. The trial court’s understanding of the law is reviewed de novo. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001).

a. The telephone number obtained from the targets of an unrelated investigation was not offered to prove the truth of the matter asserted and thus is not hearsay.

Detective Landwhrle testified that his confidential informant, Wayne Blocher, had contacted some “target” individuals unrelated to the investigation of Kevin Johnson. No drug purchase took place at that time, but these individuals gave Blocher a cell phone

number for their supplier. RP 67-68.¹ Johnson's hearsay objection was overruled. RP 67. On the same day, Blocher received a telephone call from that same number, and during that call he made arrangements with the caller to purchase a quarter ounce of methamphetamine. RP 69. Johnson argues that this is hearsay within hearsay—the targets told Blocher the number, Blocher told Landwhrle, and Landwhrle testified to it.

A statement of fact is not hearsay unless it is offered to prove that same fact at trial. KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON EVIDENCE, ch. 5 at 345 (2013-14). In this instance, the phone number was not offered to prove that the statement—“this is the phone number of our supplier”—was true. The number was relevant whether that statement was true or not. The State wanted to prove that Blocher received a telephone call from that same number, and during that call made arrangements to purchase meth. It would have been relevant if the statement had been “this is the phone number of our plumber,” because it was later the number from which Johnson called. It was important that the number was obtained from suspects in a narcotics investigation, and that it was the number

¹ All references to the Verbatim Report of Proceedings are to the two-volume trial transcript.

used by the person Blocher arranged to buy drugs from, but the statement as to whose number it was, which is what Landwherle testified to, was not offered to prove that it did, in fact, belong to the suspects' supplier. Even though there were, indeed, two levels through which the information passed in getting to the jury, it did not become hearsay just because Landwhrle testified that an unidentified person made the statement to Blocher, who in turn made the statement to Landwhrle.

b. The record does not support Johnson's conclusion that Det. Hollinger's knowledge of his relationship with Stotts came by way of a statement by Stotts.

Detective Hollinger testified that he was aware of the relationship between Johnson and Stotts, and that the relationship was boyfriend-girlfriend. RP 158. Johnson objected on the grounds of hearsay, confrontation violation, and foundation. RP 172-73. His objections were overruled. RP 173.

Johnson assumes, without evidence, that Hollinger knew of the relationship because Stotts made a statement to him to that effect and he was merely repeating that information in court. Stotts did not testify. But Hollinger had been working for Tumwater Police Department since 2003 and with the drug task force several months at that time, RP 148, and it is just as reasonable to assume he was

aware of the relationship from other sources as to believe he was told by Stotts that she had a romantic relationship with Johnson. Where there is no statement there can be no hearsay, and there is simply no evidence to support Johnson's claim that Stotts made such a statement.

c. Stotts' statement to Hollinger telling him her phone number was not offered to prove the truth of the matter asserted and thus is not hearsay.

Hollinger testified at trial that Stotts told him what her phone number was. RP 159, 162, 211. Johnson objected, and the State argued that the number was not hearsay because it was not offered to prove that it was, indeed, Stotts' phone number, but that the number had significance regardless of whether or not it belonged to Stotts. RP 171. Without specifying a reason, the court permitted the testimony. RP 173, 211. The relevance is that it was the same phone number Blocher received from the unrelated suspects and that Johnson called him from. RP 68-69. It is also the same number Stotts told Hollinger belonged to her phone. RP 211. The number had significance because it was connected to these people, regardless of whose phone number it was. As with the previous statement that the phone number was identified as that of

a drug supplier, the statement was not offered to prove that it was, in fact, Stotts' phone number.

d. Even if this court finds the admission of any of these statements to be error, it was harmless.

Evidentiary error is not of constitutional magnitude. State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984). An error is harmless "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). "Strong policy reasons support the use of harmless error analysis. 'A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.' State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). A reversal should occur only when the reliability of the verdict is called into question." State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995).

Johnson argues that the errors he claims cannot be harmless because without the telephone number and the evidence of the nature of Johnson's and Stotts' relationship, there is

insufficient evidence to prove Johnson's identity as the person who sold the meth to Blocher. The State disagrees.

Detective Landwhrle testified that he observed Blocher's contact with the suspect, even though he could see them only from the shoulders up while the transaction was taking place. RP 83. Blocher had been searched before the contact. RP 81. Afterward he handed over meth to the detectives and was searched again. RP 83. Landwhrle testified that he had a good view of the suspect. RP 121. The following day Landwhrle went to the address where the suspect had driven following the transaction, and saw the same person at that location. RP 98-99. Landwhrle identified Johnson in court as matching the description as the suspect, although his hair was different. RP 99. Detective Hollinger showed Blocher a photograph of Johnson that Hollinger obtained from the Department of Licensing and Blocher confirmed that it was the person from whom he had purchased the meth. RP 295-98.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the

State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Even without the challenged statements, there was sufficient evidence that a rational trier of fact could have found Johnson guilty as charged, and therefore if there was error it was harmless.

2. The challenged statements were not hearsay, and only hearsay statements implicate the confrontation clause. Further, they were not testimonial, and non-testimonial statements do not violate Crawford.

Johnson argues that the statements Stotts made to Hollinger, giving her phone number and, he claims, her relationship to him, violated his rights under both the Sixth Amendment and article I, § 22 of the Washington State constitution. As argued above, there is no evidence that Hollinger obtained the information about their relationship in the form of a statement from Stotts, and her statement that her telephone number was 253-301-8603 was not offered to prove that that number was hers. Neither statement implicates Johnson's right to confront witnesses against him.

The Sixth Amendment guarantees a defendant the right to confront witnesses against him. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), holds that “testimonial” statements made by a witness outside of court are inadmissible if (1) the witness is unavailable to testify at trial, and (2) the defendant had no prior opportunity to cross examine the witness under oath. Id. at 54. Crawford does not apply, however, to statements not offered for the truth of the matter as they are not hearsay. In re Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005).

Statements that are hearsay require the Court to determine whether the statements are “testimonial” in nature as only then would their admission violate the defendant’s right to confront witnesses pursuant to Crawford. Id. at 68. The Crawford court did not formulate a complete definition of what “testimonial” means, but it did say that at a minimum it includes, among other things, police interrogations. Id. at 68.

In the absence of guidance from the Supreme Court, the Washington Supreme Court has developed the “primary purpose” test for statements made to law enforcement. Statements are testimonial when “the primary purpose of the interrogation is to establish or prove events potentially relevant to later criminal

prosecution.” State v. Beadle, 173 Wn.2d 97, 108, 265 P.3d 863 (2011) (quoting Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 I. Ed. 2d 224 (2006)).

As to Stotts giving the officer her telephone number, it is hard to envision that as an interrogation. One would expect that a police officer would ask basic questions such as name, address, and phone number, and the person answering would not expect that the information was being gathered to use at trial. There was nothing in Hollinger’s testimony to indicate he even questioned Stotts beyond getting her name and phone number. Even if Stotts’ identification of her phone number could be considered hearsay, it was not testimonial.

a. Even if this court finds that the statements were testimonial hearsay, any error was harmless.

Constitutional errors, including violations of a defendant’s confrontation clause rights, may be harmless. Harrington v. California, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Such an error is harmless if “the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the

error.” Prejudice is presumed where there is constitutional error and the State has the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

For all the reasons discussed above, even if there was a violation of Johnson’s right to confront witnesses against him, it was harmless beyond a reasonable doubt. If the evidence that Stotts and Johnson were boyfriend-girlfriend and that Stotts’ phone number was the number used by Johnson had not been before the jury, it would still have found him guilty.

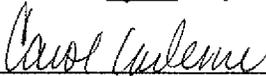
The “overwhelming untainted evidence” test allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

Guloy, 104 Wn.2d at 426.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm Johnson’s conviction.

Respectfully submitted this 8th day of April, 2014.



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