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NO. 62676-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
T'ZHIONNE WATSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CAROL A. SCHAPIRA

BRIEF OF RESPONDENT

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2009 SEP 10 10:01 AM
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A. ISSUE PRESENTED

Was testimony about the non-testifying complaining witness's out of court identification of the respondent¹ to a police officer harmless error, where two other witnesses who knew the respondent positively identified him and testified that they saw him assault another student, where two other witnesses testified regarding a sequence of events that was consistent with that described by the eyewitnesses to the assault, and where the complaining witness identified the respondent as his assailant to the school nurse who treated him?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

T'Zhionne Watson was charged on January 22, 2008, with assault in the fourth degree, of Marcus Saddler, pursuant to RCW 9A.36.041. CP 2, 86. The Honorable Carol Schapira found the respondent guilty at bench trial on October 27, 2008. 2RP²

¹ This brief refers to T'Zhionne Watson, appellant, as the respondent in its discussion of the facts and trial proceedings.

² This brief refers to the verbatim report of proceedings in the same manner as the appellant's brief as follows: 1RP-August 12, 2008; 2RP-September 22, October 10, and October 27, 2008.

188-92. Judge Schapira sentenced the respondent the same day to four months of supervision and 12 hours of community service. 2RP 192-200.

2. SUBSTANTIVE FACTS

In November of 2007, Marcus Saddler, D'Vonte Ashford, Justin Lee, and T'Zhionne Watson³ all attended Todd Beamer High School in Federal Way, King County, Washington. 2RP 35, 95-98, 154-57. Constance Spangler was employed at the time as the Todd Beamer High School nurse. 2RP 55. Greg Phillips taught marketing, business law, and entrepreneurship. 2RP 109. Rex Tucker was the principal of the Business and Industry Academy, one of four academies housed at Todd Beamer High School. 2RP 120-21. Officer Mike Chi, a commissioned Federal Way police officer, was assigned to Todd Beamer High School as the School Resource Officer. 2RP 137-38. Marcus Saddler was T'Zhionne Watson's stepbrother. 2RP 162-66.

On November 1, 2007, after school, D'Vonte Ashford, Marcus Saddler, and another student named Tyrone, walked out of the locker room following football practice. 2RP 36. Saddler

³ The named respondent/petitioner.

walked away, and T'Zhionne Watson, who's nickname was "TT," approached Ashford and Tyrone and began a conversation.

2RP 36. Watson was with his brother, Dazhinar, and three or four others. 2RP 37-38. Ashford knew Watson and Dazhinar from a basketball league that the three were involved in and had known them for about two years. 2RP 37-38, 52-53, 171-72. Ashford knew Saddler because they were both on the football team.

2RP 37, 51.

Ashford, Tyrone, Watson, and Dazhinar, all walked down the hallway together, into the great hall area of the school. 2RP 37.

One member of the group asked Ashford if he knew where Marcus Saddler was and Ashford did not. 2RP 39. Ashford heard someone yell the name "Marcus," and Watson and his brother, Dazhinar, and the three or four others that were with them, walked away. 2RP 37-38.

Ashford heard the sounds of feet running, and walked around the corner, and saw Marcus Saddler fall to the ground, and Watson, Dazhinar, and the three or four others begin to kick Saddler. 2RP 37-41. Ashford specifically saw Watson kick Saddler's body two to three times. 2RP 41. Ashford also saw Dazhinar kick Saddler in his stomach, back, and head. 2RP 42.

Ashford and Tyrone tried to stop the assault unsuccessfully, because the three or four others who were with Watson tried to fight them. 2RP 41-42. Ashford did not see Saddler do anything except lay on the ground in a ball, and try to kick one of his assailants unsuccessfully. 2RP 43. As Ashford and Tyrone became involved, school administrators, including Mr. Phillips, came out and broke up the scuffle. 2RP 41-43. Ashford saw Mr. Phillips grab a hold of Dazhinar, and then saw Dazhinar break free and saw Watson, Dazhinar, and the others who were involved run away. 2RP 42-43.

Ashford and Tyrone then helped carry Saddler into the Humanitarian Arts Academy office and sat him in a chair. 2RP 44-45, 48. Ashford noticed that Saddler was crying and had red marks on his arms, chest, back, and face. 2RP 44-45. Ashford had a clear view of the assault from beginning to end. 2RP 50.

Justin Lee was also at Todd Beamer High School on November 1, 2007. 2RP 96. Lee knew Watson by his nickname, "TT," because they had a class together. 2RP 96-97, 172. Lee also played football, and knew Saddler because they were on the same football team. 2RP 98.

After school, around 2:20 p.m., Lee was standing near a vending machine when he saw Watson and three others approach Saddler. 2RP 97-98, 103. Lee saw Watson push Saddler against a window and hit him. 2RP 98. Lee then saw Saddler run towards the student store and watched Watson and the others follow him. 2RP 98. Lee saw Saddler fall to the ground, and Saddler and three others surround Saddler. 2RP 99. Lee saw the group begin to kick Saddler as Saddler lay in a ball on his side on the ground. 2RP 100. Lee specifically saw Watson kick Saddler. 2RP 100-01. Lee saw Mr. Phillips come out and then saw the group, including Watson, run away. 2RP 102.

On November 1, 2007, around 2:20 p.m., Mr. Phillips was working inside of the student store at Todd Beamer High School when he heard the sound of tennis shoes squeaking. 2RP 110-11. Mr. Phillips looked out of the door of the student store and saw one student lying on the ground and two other student-aged males kicking the downed student in the head. 2RP 111. Mr. Phillips was about 50 feet away from the downed student. 2RP 111. Mr. Phillips ran over, and the downed student's assailants ran away. 2RP 111-13. Mr. Phillips grabbed one of the assailants and

tried to keep him from getting away, but another member of the group pushed him and they were both able to run away. 2RP 114.

At that time, Rex Tucker arrived in the area. 2RP 114.

Mr. Phillips went to care for the student who was down. 2RP 115-16. Mr. Phillips noticed that the student's eyes were rolled back into his head and was lying on the ground in a fetal position. 2RP 116. Other staff arrived moments later, and so Mr. Phillips gathered the witnesses and had them write statements. 2RP 115-16. Justin Lee was one of the student witnesses that Mr. Phillips contacted, who Mr. Phillips recognized because Lee was one of Phillips' students. 2RP 115-16.

After school ended at 2:05 p.m. on November 1, 2007, Mr. Tucker was in his office completing paperwork when he heard yelling. 2RP 122. He went into the hallway and found one student lying on the ground in a fetal position, covering his head as two other males kicked him. 2RP 122-23, 134. Mr. Tucker saw Mr. Phillips try to detain one of the assailants unsuccessfully. 2RP 122, 124, 126-28. Mr. Tucker called for nurse assistance, and witnessed the downed student's assailants flee to the parking lot. 2RP 128-29. Mr. Tucker had his office manager call for Officer Chi, and followed the assailants to the parking lot, where he watched

them get into a car and drive away. 2RP 129. Mr. Tucker then returned to the office where Saddler had been taken. 2RP at 130. He noticed that Saddler was disoriented and trembling and was being treated by the school nurse. 2RP at 130.

Constance Spangler, the school nurse, was in her office at Todd Beamer High School finishing paperwork after the school day ended on November 1, 2007. 2RP 63. Her radio was on and she heard an urgent call for a nurse to the student store. 2RP 63. She ran to the student store from her office, passing Rex Tucker in the hallway on the way, as he ran to the parking lot. 2RP 63-64, 129.

When she arrived at the student store, Ms. Spangler saw another student carrying Saddler into the door of a nearby academy office. 2RP 68, 71. She noticed that Saddler was upset, crying, and did not have a shirt on. 2RP 68-71. She noticed that Saddler had swelling on his forehead and behind his ear, and had red marks on his chest. 2RP 77. Ms. Spangler evaluated Saddler's injuries, gave him an ice pack, and asked him what happened. 2RP 68-76. Saddler told her "something to the effect that TT hit me from behind or jumped me from behind or something to that effect." 2RP 82. Ms. Spangler did not know anyone named "TT" but was given the name by Saddler and wrote it down. 2RP 83.

Officer Chi was called to the location of the assault. 2RP 139. He attempted to locate Saddler's assailants but was unsuccessful. 2RP 139. Chi then went into the office where Ms. Spangler was treating Saddler's injuries in order to make sure Saddler was okay. 2RP 140. Chi noticed minor fresh looking bruises on Saddler's face and saw that Saddler was distraught, in tears, and very emotional. 2RP 140, 141. Chi knew Marcus Saddler from other school-related incidents. 2RP 140-41. Officer Chi asked Saddler if he was okay and if he could give Chi information regarding what happened. 2RP 142. Saddler told Officer Chi that his stepbrothers had assaulted him, and mentioned the names TT and Dazhinar. 2RP 142. Officer Chi knew TT to be the respondent, T'Zhionne Watson's, nickname. 2RP 143. Officer Chi contacted T'Zhionne Watson and Dazhinar the following day and did not notice any injuries on either of their persons. 2RP 144.

C. ARGUMENT

Allowing Officer Chi to testify about Saddler's out of court identification of the respondent was error, but harmless. Saddler's statement was a testimonial statement to a police officer, and Saddler did not testify at trial. Further, Saddler was not

unavailable, and there had been no opportunities for the respondent to cross examine him, and so the respondent's right to confront Saddler was violated in the court's admission of the statement of identification. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). See also U.S. Const. amend. VI.

Violations of the Confrontation Clause of the Constitution of the United States may be harmless. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The test for determination of whether a constitutional error is harmless is whether, considering the evidence in the light most favorable to the State, affording all reasonable inferences, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Saunders, 132 Wash.App. 592, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017 (2007). Factors bearing upon such inquiry include the importance of the erroneously admitted evidence to the prosecution's case, whether the testimony was cumulative, the presence or absence of other evidence corroborating or contradicting the erroneously admitted testimony as to material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's

case. Saunders, id.; Van Arsdall, 475 U.S. at 684, 106 S. Ct 1431; State v. Walker, 129 Wash.App. 258, 118 P.3d 935 (2005).

Courts find harmless error when the erroneously admitted testimony was cumulative of other evidence properly admitted during the trial or fact finding. In State v. Moses, the defendant sought to reverse his conviction for the second degree murder of his wife, Jennifer, based upon the trial court's erroneous admission of Jennifer's statement given in response to structured police questioning in which she detailed specific assault by the defendant. 129 Wash.App. 718, 119 P.3d 906 (2005). Properly admitted testimony regarding that particular assault included multiple witnesses who identified the defendant as Jennifer's assailant, evidence documenting Jennifer's injuries, and expert testimony indicating that the injury that Jennifer sustained as the result of the assault—a severely broken jaw—was not the result of an accidental slip and fall. 129 Wash.App. at 732-33. The court found that the erroneously admitted statement to the police was harmless error beyond a reasonable doubt because the untainted evidence led to a finding of guilt. Id.

Similarly, in State v. Mason, Mason was convicted at trial of the first degree, aggravated murder of Hartanto Santoso. 127

Wash.App. 554, 126 P.3d 34 (2005). The trial court erroneously allowed testimony from a police officer regarding an out of court statement that he took from Santoso regarding an incident in which Santoso was seriously assaulted by Mason. 126 P.3d at 40. The court of appeals found that the erroneous admission of such testimony was harmless because forensic evidence and the testimony of Mason's girlfriend describing Mason's admission of the murder and evidence corroborating such admission would have been sufficient to convict Mason of murder. Id. Further, Santoso's roommate, employer, emergency doctor, and sister all testified about his description of the assault that he told the officer about. Id.

In Saunders, the defendant was convicted of assault in the third degree, domestic violence, and malicious mischief in the third degree, domestic violence. 132 Wash.App. at 596. The victim, Mikele Hieronymus, did not testify at trial, but several other witnesses including a police officer, paramedic, and emergency room physician did testify. 132 Wash.App. at 597, 598, 132 P.3d at 746. All of the witnesses testified regarding Heironymus's injuries. Id. Both the paramedic and police officer testified regarding her account of the defendant's infliction of her injuries.

Id. The court found that the victim's statements to both the paramedic and doctor were properly admitted because they were made for the purpose of medical diagnosis and treatment. 132 Wash.App. at 603, 132 P.3d at 749. The court found that the statements to the police officer, made during a structured interview, were harmless error beyond a reasonable doubt since such evidence was entirely cumulative and did not offer anything of significance that the jury had not already heard through other properly admitted testimony. 132 Wash.App. at 604.

As in Moses, Mason, and Saunders, the improperly admitted testimony was cumulative of other evidence properly considered by the finder of fact. Even absent any of Officer Chi's testimony, overwhelming evidence proved that the respondent, T'Zhionne Watson, assaulted Marcus Saddler on November 1, 2007, in King County, Washington.

Any reasonable trier of fact would have found the respondent guilty beyond a reasonable doubt. Two eyewitnesses to the entire assault, D'Vonte Ashford and Justin Lee, identified the respondent as Saddler's assailant and described specifically seeing

the respondent, Watson, hit and kick the victim, Marcus Saddler. Although Mr. Greg Phillips and Mr. Rex Tucker did not recognize Marcus Saddler or T'Zhionne Watson, their testimony corroborates that of Ashford and Lee. Both Phillips and Tucker saw two males kicking a person, later identified as Saddler, as he lie in a fetal position on the ground. Testimony properly elicited from Nurse Spangler included Saddler naming "TT" as an assailant. Officer Chi's admissible testimony corroborates all of the other witnesses' testimony as to the sequence of events on November 1, 2007. The statement that Marcus Saddler made to Officer Chi regarding the identity of his assailant was cumulative, as other witnesses actually saw the respondent assault Saddler, and Nurse Spangler's testimony regarding Saddler's statement that the respondent was indeed his assailant was properly admitted by the trial court.

Unlike most scenarios in which juries are the finders of fact, in this case, the respondent/petitioner, T'Zhionne Watson, was a juvenile at the time of fact finding, and so was found guilty at bench trial. As such, the record contains a specific account of the trial judge's findings, including the evidence that weighed into her ultimate finding of guilt. In her oral findings at the conclusion of the

fact finding, the sitting judge, the Honorable Carol Schapira, summarized the evidence upon which she relied in finding the respondent guilty. She did not mention Saddler's identification of the respondent to Officer Chi. 2RP 188-92. Judge Schapira discussed the accounts of Lee and Ashford, who witnessed the assault. 2RP 188-89. She also discussed the fact that other witnesses' testimony as to the sequence of events on November 1, 2007, were consistent with Lee and Ashford's accounts. 2RP 189. She discussed the nurse and Officer Chi's description of Saddler's injuries as being fresh. 2RP 190. In her findings, Judge Schapira also mentioned the fact that Saddler mentioned the respondent's nickname to the nurse. Judge Schapira did not rely on the cumulative evidence presented regarding Saddler's naming of the respondent as his assailant to the police officer. As such, admission of the testimony was harmless error beyond a reasonable doubt.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm Watson's judgment and sentence for assault in the fourth degree.

DATED this 10th day of September, 2009.

Respectfully submitted,

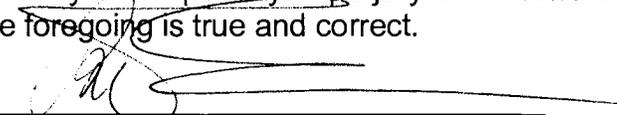
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, 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. T'ZHIONNE WATSON, Cause No.62676-1-I, 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

09-10-2009

Date

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2009 SEP 10 11:11 AM '09
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