

66038-1

66038-1



NO. 66038-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT TAYLOR, JR.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the State present sufficient evidence at trial for a rational jury to find the Appellant guilty of Delivery of Cocaine?

2. Did the trial court err in allowing Officer Johnson to testify as to a clothing description and direction of travel when the evidence was admitted for a legitimate purpose other than to prove the truth of the matter asserted? If deemed hearsay, is the error harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

On March 26, 2010, the Seattle Police Department was targeting drug trafficking in the Pioneer Square neighborhood. Report of Proceedings, July 20, 2010 at Page 36.<sup>1</sup> Seattle Police initiated "Operation Roll the Rock" to address complaints of narcotics dealing in and around the area of Second Avenue. 1RP 34-35. The strategy employed by police includes an undercover police officer purchasing drugs from suspects, but not making an

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<sup>1</sup> Report of Proceedings for the substantive portion of the trial on July 20, 2010 were provided by the Appellant, and hereinafter referenced as "1RP." The Report of Proceedings for the remainder of the trial on July 21, 2010 were also provided, and are referenced as "2RP."

arrest so as to not alert others of the operation. 1RP 33. Such an operation is termed a “buy and slide.” 1RP 33.

Officer Erin Rodriguez attended the Washington State Criminal Justice Training Center in 2005, and as part of her training there completed 16 hours of study in narcotics investigations. 1RP 31. Officer Rodriguez completed an 80-hour course in undercover investigations in 2008, and has assisted narcotics investigations approximately 30 times during her career. 1RP 31-32. Among these investigations Officer Rodriguez has participated as the undercover buyer approximately eight to ten times. 1RP 34.

Officer Rodriguez was participating as the undercover buyer for the operation on March 26, 2010. 1RP 36. Officer Rodriguez was dressed in clothing that disguised her role, and was carrying pre-recorded money that would be used to purchase narcotics. 1RP 36-37. During her testimony at trial Officer Rodriguez illustrated for the jury the area in which her encounter with the Appellant took place: the southwest corner of Second Avenue and Yesler Street. 1RP 38.

During trial testimony Officer Rodriguez identified the Appellant, Mr. Taylor, as the person she encountered on March 26,

2010, and described the clothing he was wearing that night.

1RP 39. Officer Rodriguez also identified the Appellant through a photograph taken by Officer Donald Johnson after the Appellant was detained by officers. 1RP 39, 80. The photograph, Exhibit One, was admitted into evidence after Officer Rodriguez testified that it was a fair and accurate depiction of how the Appellant appeared on the night of the incident. 1RP 39-40. According to Officer Rodriguez, the photograph accurately depicted the clothing worn by the Appellant at the time of the transaction. 1RP 49.

Officer Rodriguez testified that her encounter with the Appellant began with eye contact and the Appellant nodding his head. 1RP 40. Officer Rodriguez testified that she asked the Appellant, "do you know where I could get a 20?" Id. The Appellant acknowledged that he could get the officer "a 20" and encouraged her to follow him as he led her westbound on the street. 1RP 40-41. Officer Rodriguez then made a "hand to hand" exchange with the Appellant, with her handing him a \$20 bill in exchange for "one rock." 1RP 41.<sup>2</sup> During the exchange, the

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<sup>2</sup> The rock handed to the officer by the Appellant was determined to contain cocaine after forensic evaluation by the Washington State Patrol. 2RP 12-13; Clerk's Papers (CP) at 10-13. The parties entered into a stipulation that the substance in-question contained cocaine.

officer was standing at “a ruler’s width” from the Appellant and had a good view of his face. 1RP 45.

Officer Rodriguez testified that the Appellant expressed no confusion as to the term “20” and asked no questions about what “20” referred to. 1RP 44. The term “20” is consistent with narcotics trafficking as an amount. 1RP 41. After the exchange, Officer Rodriguez made a pre-determined “good buy” signal to other officers observing nearby and left the area. 1RP 41-42.

The Appellant was ultimately contacted and detained by officers near Third Avenue and Columbia Street. 1RP 61-63, 76. Officer Johnson was riding a bicycle and was working as an “arrest team officer,” and testified that he and other arrest team officers “were directed to the area of Three and Columbia to contact Mr. Taylor and identify him.” 1RP 76, 83. After this testimony, the Deputy Prosecutor continued asking Officer Johnson about the nature of his contact with the Appellant:

Deputy Prosecutor: Okay. What sort of information were you -- were you working with at that point?

Defense Counsel: Objection, your Honor. Calls for hearsay.

Court: I'm going to overrule the objection. The question was what type of information, so not the specifics of the information. So the objection's overruled. Go ahead and answer, sir.

Ofc. Johnson: We were given clothing description, basic -- well, physicals, clothing description, and location.

Deputy Prosecutor: Okay. And so what were you looking for?

Ofc. Johnson: We were looking for a male black who had on a black knit cap, wearing glasses, I believe.

Defense Counsel: Your Honor, I'm going to object. I think this is -- this is hearsay.

Court: 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. Go ahead.

Ofc. Johnson: Black leather jacket and a hoodie, gray hoodie, underneath the black jacket.

1RP 77.

Officer Johnson identified the Appellant in court as the same person whom he had contacted on March 26, 2010. 1RP 76. The Deputy Prosecutor then asked the officer whether he had information about which direction the suspect had been heading before the contact was made, drawing another objection from Defense Counsel. 1RP 80. The Court ruled that it was not being offered for the "truth of the matter asserted, [but] simply to give the

jury an understanding why the officer took the action he did.” Id.  
Defense Counsel asked for a limiting instruction, and the court  
agreed to further instruct the jury as to which purpose it was  
allowed to consider the testimony:

Court: [L]adies and Gentlemen, the following  
testimony is not being offered for the truth of the  
matter asserted, but to simply give you some  
understanding as to why the officer took the action  
that he did. Go ahead.

Ofc. Johnson: That Mr. Taylor was running in a  
northerly direction from the south of Third and  
Columbia. Where exactly he was running from,  
I don't recall. And that we were to move up and  
contact him as quick as we could. And he finally  
stopped at Third and Columbia, and that's where  
I was able to get my tired legs pedaling the bicycle up  
the hill to get him.

1RP 81.

Officer Johnson also testified that as he was tracking down  
the suspect he saw the Appellant jogging as he traveled north and  
then east through downtown Seattle. 1RP 82-83. Officer Johnson  
explained that “there was not very much foot traffic” on the streets  
at that time, and that he encountered no one else matching the

description of the Appellant, nor was there anyone else wearing the same combination of clothing. 1RP 84-85.<sup>3</sup>

Officer Johnson described that the Appellant was only out of sight for approximately 20 seconds as he was jogging toward Third and Columbia. 1RP 94. When contacted the Appellant was cooperative, but as officers were approaching him “he was very nervous,” trying to step around the officers as they were dismounting their bikes. 1RP 97. Officer Johnson testified that the Appellant’s demeanor became more calm when the officers told him that they only needed to identify him, as he matched the description of a car-prowl suspect. 1RP 99.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS THE APPELLANT’S CONVICTION FOR DELIVERY OF COCAINE.

When a defendant challenges the sufficiency of the evidence, all reasonable inferences from the evidence must be drawn in favor of the State, and the defendant admits the truth of

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<sup>3</sup> The court did sustain an objection as to part of this particular statement, striking the officer’s testimony about having “verification,” and reiterating that limiting instruction after a side-bar discussion with the parties. 1RP 85.

the State's evidence and all inferences that can reasonably be drawn from that evidence. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Furthermore, the State is entitled to rely upon circumstantial evidence to prove its case. State v. Bernson, 40 Wn. App. 729, 733, 700 P.2d 758 (1985). Circumstantial and direct evidence are to be considered equally reliable by the reviewing court in determining the sufficiency of the evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court need not be convinced beyond a reasonable doubt of the defendant's guilt. Gentry, 125 Wn.2d at 597. The fact-finder is the sole judge of the credibility of the witnesses and of what weight to give their testimony. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Appellate courts must defer to the trier of fact to resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the evidence. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (1981).

Here, the Appellant challenges the sufficiency of the evidence, arguing that the State did not prove that the Appellant was the offender in question. Brief of Appellant at 3-4. The Appellant's argument is predicated on the assumption that it is "not reasonable" that Officer Rodriguez could "independently" recollect

that the Appellant was indeed the person whom she purchased cocaine from four months before trial. Id. at 5-6. This argument, however, is not supported by the evidence.

Officer Rodriguez identified the Appellant in court as the person who sold her cocaine on March 26, 2010. The officer's testimony is reasonable, as her encounter with the Appellant was not merely a momentary exchange. She testified that she met face-to-face with the Appellant and had a brief discussion about obtaining "a 20," to which the Appellant encouraged the officer to follow him. During the exchange the officer was standing only a "ruler's width" from him and had a good view of his face. Further, she testified that she recalled how the Appellant was dressed, and that the photograph in Exhibit One was the Appellant.

At no point did the officer express doubt that the Appellant was the one who sold her drugs. Thus the evidence before the trier of fact was that he was the offender, based on a description of his clothing, appearance, and testimony that the person in the photograph was the person who delivered cocaine. When these facts are taken as true, and viewed in the light most favorable to the State, with the trier of fact as the determining body to weigh the

evidence, the jury rationally concluded that the Appellant was indeed the offender.

2. THE TRIAL COURT PROPERLY ALLOWED OFFICER JOHNSON'S TESTIMONY EXPLAINING WHY HE TOOK THE INVESTIGATIVE STEPS IN DETAINING THE APPELLANT.

The Appellant argues that the trial court erred allowing Officer Johnson to testify about information received from non-testifying "observation" officers, claiming it is hearsay that violated the Appellant's right to confront adverse witnesses. Brief of Appellant at 6. The trial court properly found the testimony admissible, as it was not offered to prove the truth of the statements, but rather to allow the witness to explain why he conducted his investigation in the manner he did.

a. The Testimony Offered By Officer Johnson Was Not Hearsay, Nor Did The Trial Court Abuse Its Discretion In Allowing His Testimony.

The trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). To show abuse of discretion, it must be clear that an action was manifestly unreasonable, exercised on untenable grounds, or

for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An abuse of discretion occurs only when no reasonable judge would take the view adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

However, whether or not a statement is hearsay is a question of law, which the appellate court reviews de novo. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Out-of-court statements offered for a purpose other than the truth asserted do not qualify as hearsay and are not barred by the confrontation clause. State v. Lillard, 122 Wn. App. 422, 437, 93 P.3d 969 (2004).

Here, Officer Johnson was not testifying to prove the truth of the information he received from other officers, but to explain why the officers took the steps they took in locating the suspect. The trial court acknowledged this in each of its rulings. 1RP 77, 80, 81. The trial court also took the additional step of instructing the jury to consider the testimony not for the truth of the statement, but “to simply give you some understanding as to why the officer took the action that he did.” 1RP 81.

The Appellant points to two decisions that call for exclusion of such testimony. Brief of Appellant at 6-7. The Appellant offers no analysis of why those cases should command a different result here. In State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990), this court found that an officer's testimony about information relayed from a dispatcher about a suspect using a blue jeans jacket to push his way through some bushes to reach a stolen VCR was irrelevant, inadmissible hearsay, and prejudicial error calling for reversal. The facts of this case are distinguishable because the jacket, once located on the defendant, contained property stolen from the burglary in question. Id. at 279. This court found that the State's proffered purpose, "to explain why the officer acted as he did," in taking the jacket was irrelevant. Id. at 280. This court further found that the trial court's refusal to provide a limiting instruction compounded the error, thus it was not harmless. Id. at 281-83.

The other case cited by the Appellant, State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991), is distinguishable as well. In Johnson, this court found that a police officer's testimony about information provided by a non-testifying confidential informant about prior instances of drug dealing was hearsay, and did not fall

within the “state of mind” exception. Id. at 545. This court found that the officer’s “state of mind” was not at issue because the validity of the search warrant, from which the information was predicated, was not challenged. Id. In so holding, this court found troubling the fact that the trial court did not articulate why the testimony did not fall within the definition of hearsay, nor did it declare the “limited purpose” for which it would be introduced. Id. at 548.

Aaron is distinguishable because the testimony offered actually implicated the defendant committing the crime, returning to the scene of a crime to obtain stolen property, whereas here the testimony was only offered to show why Officer Johnson contacted a particular person based on a description of clothing and direction of travel. Aaron also involved the trial court refusing to offer a limiting instruction. Johnson is similarly distinguishable, because it involved out-of-court statements as a basis for the officer’s “belief” that the defendant was involved with drug dealing in a possession with intent to deliver prosecution. Johnson, 61 Wn. App. at 546.

The trial court properly recognized that the testimony was not being offered to prove that the Appellant was *in fact* wearing a particular combination of clothing, but to explain *why* officers

pursued a particular person as he jogged from the scene (emphasis added). Officer Johnson's testimony, unlike that of Aaron and Johnson, did not implicate the Appellant actually committing the crime, but rather was general information about a description and a direction of travel. The trial court made clear that the jurors were only to consider the testimony for its limited purpose. A reviewing court presumes that the jury followed the court's instructions. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). The trial court did not abuse its discretion in allowing this testimony for the limited purpose for which it was introduced.

- b. Even If Determined To Be Hearsay, The Testimony Is Inconsequential In The Context Of The Issues Before The Trier Of Fact, And Is Harmless Under Both The Constitutional And Non-constitutional Error Standards.

When an evidentiary error is not of constitutional magnitude, the appellate court must determine, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the

overall, overwhelming evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). With respect to a violation of a criminal defendant's constitutional right of confrontation, an error may be harmless if "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Johnson, 61 Wn. App. at 549-50.

The Appellant's trial concerned a delivery of cocaine to a single person: Officer Erin Rodriguez. The State's case was proven beyond a reasonable doubt before Officer Johnson took the witness stand, as she identified the Appellant as the person who delivered a rock of crack cocaine to her in exchange for \$20. Officer Johnson's testimony was of no consequence to the underlying issues, other than the fact that he took a photograph of the Appellant upon being contacted.<sup>4</sup> The Appellant was charged and convicted for delivery of a controlled substance. At no point did Officer Johnson testify that *someone else told him* that the Appellant delivered a controlled substance. All that was relayed and testified to was that the Appellant matched a particular

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<sup>4</sup> The photograph, however, was admitted through Officer Rodriguez's testimony. 1RP 40.

description and was walking in a general direction, to give context as to why he was contacted.

D. CONCLUSION

Sufficient evidence supported the Appellant's conviction for delivery of a controlled substance, as Officer Rodriguez gave clear and unequivocal testimony that the Appellant was the person from whom she purchased crack cocaine. She identified him in court, and from a photograph admitted as evidence. The Appellant's argument that Officer Rodriguez could not possibly have an independent recollection of the Appellant's identity is not supported by the evidence, and is simply an argument as to the weight of the evidence. The trial court did not err in admitting testimony of Officer Johnson's investigative steps, and the reasons he took them. This evidence was not hearsay, as it was not offered to prove the truth of the statements. The trial court gave an adequate limiting instruction and declared the limited purpose for which the testimony was admitted. Even if deemed hearsay, the evidence of the Appellant's guilt was admitted prior to Officer Johnson taking

the witness stand, thus any error is harmless beyond a reasonable doubt.

DATED this 18<sup>th</sup> day of May, 2011.

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 SUSAN F. WILK, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROBERT TAYLOR, JR., Cause No. 66038-1-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.



\_\_\_\_\_  
PETER D. LEWICKI, WSBA #39273  
Done in Bellevue, Washington

5/18/11  
\_\_\_\_\_  
Date 5/18/2011