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Supreme Court No. 98733-5
(COA No. 80157-1-I)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

T. S.-T.,

Petitioner.

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

PETITION FOR REVIEW

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Rules

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A. IDENTITY OF PETITIONER

Tom,¹ petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Tom seeks review of the Court of Appeals decision dated June 8, 2020, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

Whether review should be granted to determine whether Tom's right to have all elements of the charged crime proved beyond a reasonable doubt was violated where the government failed to prove Tom was more than merely present when the assault occurred.

D. STATEMENT OF THE CASE

Dustin Conklin was trick or treating with his girlfriend and children when he confronted a group of about twenty high school-aged boys. RP 10, 23. Most of the boys were wearing Halloween masks. RP 12.

¹ T. S.-T. is a juvenile offender. To preserve his anonymity, but to improve readability, the pseudonym "Tom" is used in place of T. S.-T.

According to Mr. Conklin's girlfriend, Mr. Conklin had a confrontation with the boys where he yelled and swore at them. RP 22-23. Mr. Conklin agreed he yelled racial slurs at the boys, two of whom were black. RP 18. Perhaps because he was intoxicated, Mr. Conklin continued to antagonize the boys after his girlfriend walked away. *Id.*

Mr. Conklin's girlfriend was a block ahead of Mr. Conklin when he began to fight with the boys. RP 23. She stated:

And then I was walking way ahead, so I don't really know what happened.

Id.

Mr. Conklin's girlfriend believed only five of the twenty boys fought with Mr. Conklin. RP 23.

Mr. Conklin could not identify the boys, except for one of them who took off his mask. RP 14. Mr. Conklin was sure this boy was not Tom. *Id.*

Mr. Conklin suffered injuries sufficient to establish assault in the second degree, including a fracture to his skull.

RP 14, 24. Mr. Conklin's girlfriend did not believe he fought back once the fight started. RP 24.

Neither Mr. Conklin nor his girlfriend identified Tom as one of the perpetrators in the courtroom. RP 21, 24. Mr. Conklin was sure it was a different boy who assaulted him. RP 14.

When asked about the photo montage, Mr. Conklin's girlfriend stated she recognized a few of the boys in the pictures, but they "could have been any kind of kids, I guess. Like I said, I just know they were a group of teenage kids, boys." RP 24.

The only evidence of identification came from two police officers who showed Mr. Conklin and his girlfriend photo montages.

The officer who testified about Mr. Conklin's identification provided no testimony that distinguished Tom as one of the boys engaged in the assault, as opposed to one of the boys who were merely present when the assault occurred. RP 39.

The other officer stated Mr. Conklin's girlfriend identified Tom as involved but did not distinguish Tom from one of the other boys who were present, rather than involved in the fight. RP 45.

The court issued written findings of fact-finding Tom guilty of assault in the second degree. CP 3. The Court of Appeals affirmed the adjudication.

E. ARGUMENT

Tom is entitled to have all of the facts alleged against him proven beyond a reasonable doubt. Because the government failed to prove more than that he was merely present when Mr. Conklin was assaulted, the government failed to meet this burden. This Court should grant review of this issue, to protect Tom's right to proof beyond a reasonable doubt of all of the elements of the charged crime.

This Court should grant review of whether Tom was entitled to proof beyond a reasonable doubt of all of the elements of assault in the second degree.

For sufficient evidence, the prosecution must prove a crime occurred and that Tom committed it. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Because the prosecution presented insufficient evidence Tom

was more than present when Mr. Conklin was assaulted, this Court should find the prosecution did not meet its burden. *State v. Everybodytalksabout*, 145 Wn.2d 456, 472–73, 39 P.3d 294 (2002).

Relying on the testimony of the police officers, the Court of Appeals found that there was sufficient evidence that Tom committed assault in the second degree. This interpretation of the officer’s testimony was not consistent with what they said at Tom’s trial. While both officers agreed that the witnesses picked Tom out of a photo montage, neither of the officers were able to say Tom was more than merely present when the assault occurred. In the light most favorable to the prosecution, this is insufficient evidence Tom committed the charged crimes. This Court should accept review to uphold Tom’s right to proof beyond a reasonable doubt of all the elements of the charged crime.

- 1. No witness distinguished Tom from the other twenty boys who were present during the assault.*

Mr. Conklin had been drinking when he began to antagonize a group of boys who were out trick or treating. RP

18, 22-23. The boys were yelling stuff. RP 22. Instead of walking away, Mr. Conklin yelled “stop” and antagonized the boys. *Id.* There were about twenty boys present. RP 23. Mr. Conklin admitted swearing at the boys and yelling racial slurs. RP 18. At least two of the boys were Black. *Id.*

A fight broke out between Mr. Conklin and one of the boys. RP 12. About five boys were involved. RP 23. Mr. Conklin remembered very little of it. RP 12. He stated he blacked out and could not remember anything until he had a towel on his face. *Id.*

Mr. Conklin did not make an in-court identification of Tom. RP 14. He agreed he identified one or two persons from a photo montage with certainty, but could not say Tom was one of the boys who assaulted him. RP 15. Mr. Conklin stated:

There was another kid that I most definitely certainly know that was coming at me. When he took off his mask, I seen his face. This is not that kid, I believe.

RP 21.

Mr. Conklin was with his girlfriend. RP 22. When Mr. Conklin began antagonizing the boys, his girlfriend moved

away, taking their children. RP 23. She did not really know what happened after that, except that Mr. Conklin kept telling the boys to stop. *Id.* She stated she recognized boys from the montage “but they were just, like – could have been any kind of kids, I guess. Like I said I just know they were a group of teenage kids, boys.” RP 24. She did not say the persons she identified in the photo montage assaulted Mr. Conklin. *Id.*

The prosecution introduced evidence about a photo montage Mr. Conklin viewed but did not introduce evidence the person identified in the montage was involved in the assault. RP 39. The officer who showed the montage to Mr. Conklin explained how he created the montage from yearbook photos. RP 35. The officer stated Mr. Conklin identified Tom in the photo montage but did not state that Mr. Conklin told him Tom was one of the perpetrators. RP 39. There was no other evidence from Mr. Conklin tying Tom to the assault.

The prosecution also introduced a photo montage viewed by Mr. Conklin’s girlfriend. RP 45. The officer stated

Mr. Conklin's girlfriend said: "that the individual in photograph number one and number four were involved in the assault." *Id.*² The officer did not distinguish between being present when the assault occurred or engaging in the fight. This assertion was not corroborated by Mr. Conklin's girlfriend. RP 24.

2. The government failed to establish Tom committed the assault or was in some way an accomplice to the act.

The Court of Appeals relied on the officer's testimony to find that the government presented sufficient evidence. While certainly the testimony of an officer can be sufficient, it was not sufficient here. Neither officer was able to say that the eyewitnesses to the assault said that Tom was a perpetrator, but only that he was present when the fight started. This is insufficient evidence to convict Tom.

Likewise, the trial court's written findings do not provide a sufficient basis to find the government presented proof beyond a reasonable doubt. The findings only establish

² Tom was the boy in picture number one. RP 45.

Tom was one of the persons who intentionally assaulted Mr. Conklin and thereby inflicted substantial bodily harm. *Id.* The trial court also found this act occurred in Washington. *Id.*

These facts are insufficient to support a finding of guilt. Evidence of guilt is only sufficient if the government is able to prove every element of a crime beyond a reasonable doubt. *Winship*, 397 U.S. at 364; *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); U.S. Const. amend XIV. Reasonable inferences are construed in the government's favor, but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Both the Court of Appeals and the trial court had to rely on speculation to find the government proved its case beyond a reasonable doubt. This Court should take review to protect Tom's constitutional rights.

To prove assault in the second degree, the government must establish more than a person's physical presence at a scene and their assent. *Everybodytalksabout*, 145 Wn.2d at 472-73. Presence and knowledge alone are also insufficient,

absent evidence from which a readiness to assist or an intent to encourage could be inferred, to support a finding of accomplice liability. *State v. Jameison*, 4 Wn.App.2d 184, 205, 421 P.3d 463 (2018) (citing *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979)).

At best, the facts establish Tom was present when an assault occurred. Neither of the witnesses identified Tom as the perpetrator. RP 21, 24. Mr. Conklin was sure it was not him. RP 21.

Nor do the officers testimony present proof beyond a reasonable doubt. Certainly the police testimony established Tom was present when the assault occurred. But the officers did not provide evidence that Tom committed the charged offense. The officers identified Tom as present when the assault occurred but did not provide testimony Tom was one of the boys involved in the assault. RP 39, 45. These statements should not be read more broadly than they when they were made, as the Court of Appeals appears to have done.

3. This Court should grant review to address the government's failure to prove Tom committed assault in the second degree.

In analyzing the sufficiency of the evidence, this Court looks to the trial court's conclusions of law. *Armenta*, 134 Wn.2d at 9. Based on the evidence found by the juvenile court, there was insufficient evidence Tom was involved in the assault he was convicted of, other than being present. CP 3. This Court should accept review to uphold Tom's right to proof beyond a reasonable doubt of the charged crimes.

F. CONCLUSION

Tom requests that review be granted pursuant to RAP 13.4 (b) of whether he was entitled to proof beyond a reasonable doubt that he committed the charged crime, rather than being merely present when the crime occurred.

DATED this 6th day of July 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)
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APPENDIX

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

STATE OF WASHINGTON,)	No. 80157-1-I
)	
Respondent,)	UNPUBLISHED OPINION
)	
v.)	
)	
T. S.-T.,)	
)	
Appellant.)	
)	

ANDRUS, A.C.J. – T.S.-T. appeals his juvenile adjudication for second degree assault, contending that the State’s evidence was insufficient to demonstrate he was the perpetrator who committed the assault. We disagree and affirm his conviction.

FACTS

On October 31, 2017, Dustin Conklin and his girlfriend, Tara Casady, took Conklin’s young children trick-or-treating in Everett. Around 8:30 pm, a group of approximately 20 teenagers began heckling Conklin, Casady, and the children, from across the street. When Conklin told them to stop and yelled racial epithets at the teens, about five of them approached him, pinned him against a fence, and repeatedly punched him, ultimately knocking him out. When Conklin regained consciousness, the group had dispersed, and Conklin was surrounded by Casady, his children, and police officers. Conklin was taken to the hospital, where he

Citations and pin cites are based on the Westlaw online version of the cited material.

received stitches in his eye and lip and was later diagnosed with a fractured eye socket, nose, and skull.

On November 1, 2017, police officers learned the names of the teens involved in the attack from a witness who saw the group leaving the scene. Everett Police Detective Corey Barrows obtained photos of several of the identified suspects, including T.S.-T., from a high school yearbook and prepared a photo montage to show to Conklin on November 30, 2017. Conklin identified three teens as those who had assaulted him. Conklin was “100 percent sure” of the identity of two of the three, and less sure about the third. According to Detective Barrows, one of the photos Conklin identified with certainty was photo number four, whom Detective Barrows identified as T.S.-T.

Everett Police Officer Maiya Atkins also asked Casady to review the photo montage to identify anyone involved in the attack. Casady identified T.S.-T.’s photo as one of the individuals “involved in the assault.”

The State charged T.S.-T. with second degree assault. At the fact-finding hearing on April 16, 2019, Conklin testified that as of that date, some 18 months after the attack, Conklin could not recall who had attacked him. When asked whether he recognized any of his attackers in the courtroom, Conklin said, “To be honest, I do not. I only recognized one kid when he took off his mask. This is not that individual.” Conklin could not recall whether T.S.-T. was the individual who assaulted him, stating that “I don’t remember this specific kid in the five group coming . . . at me.” Casady similarly testified that she could not identify anyone in the courtroom as the individual who attacked Conklin. Detective Barrows and

Officer Atkins testified that Conklin and Casady had identified the photo of T.S.-T. as one of Conklin's assailants during the pretrial montage procedure within weeks of the assault.

The court found that "[T.S.-T.] was one of the persons who intentionally assaulted Dustin L. Conklin and thereby recklessly inflicted substantial bodily harm." The court entered a disposition order committing T.S.-T. to 15-36 weeks in a Department of Social and Health Services, Division of Rehabilitation Administration facility. T.S.-T. appeals.

ANALYSIS

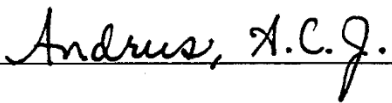
T.S.-T. argues that the State presented insufficient evidence to prove, beyond a reasonable doubt, that he assaulted Conklin. He contends that the evidence shows nothing more than his presence at the scene. We disagree.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). When a petitioner challenges the sufficiency of the State's evidence, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id.

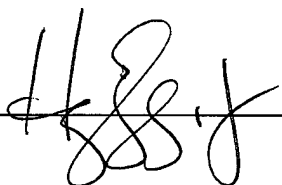
The State presented sufficient evidence to prove T.S.-T. was one of the individuals who assaulted Conklin. Although Conklin and Casady testified that

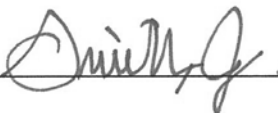
they could not identify T.S.-T. as one of Conklin's assailants during the April 2019 fact-finding hearing, Detective Barrows and Officer Atkins confirmed that both Conklin and Casady had identified T.S.-T as participating in the assault in November 2017.

Conklin's and Casady's inability to make an in-court identification consistent with their pretrial identification does not render the State's evidence insufficient. In State v. Hendrix, 50 Wn. App. 510, 749 P.2d 210 (1988), this court held that a positive pretrial identification by a witness during a photo montage was sufficient to support a conviction even when, at trial, the witness was unable to remember if the defendant was the individual she had previously identified. This case is analogous. Conklin and Casady made positive pretrial identifications of the assailants, and T.S.-T. was one of the individuals they identified. There is no evidence that Conklin or Casady retracted their pretrial identification. As in Hendrix, they simply could not recall at trial, due to the passage of time, who they had identified as the assailants. Accepting the pretrial identification evidence in the light most favorable to the State, the only reasonable inference a rational trier of fact could draw is that T.S.-T. was, as the trial court found, one of the persons who intentionally assaulted Conklin. We therefore affirm the trial court's decision.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80157-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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