

FILED  
Mar 31, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74113-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SIMION MARTINEZ,

Appellant.

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

The Honorable Leroy McCullough, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court's admission of testimonial hearsay over defense counsel's objection violated appellant's constitutional right to confront his accusers.

Issue Pertaining to Assignment of Error

The main issue at trial was identity – whether appellant was the one who punched the complaining witness at a party of approximately 20 people – and therefore guilty of assault. The complainant never met appellant before and testified at trial he recognized him from pictures police showed him at the hospital. The complainant also told police he was punched from behind.

Over defense counsel's hearsay objection, the state was allowed to elicit testimony from the officer who responded to the 911 call that he spoke to various members of the crowd upon arrival and obtained appellant's name and information as the suspect. The officer testified he spoke with two people in particular, neither of who testified. Did admission of the officer's testimony relaying what he was told by other people violate appellant's right to confront his accusers?

B. STATEMENT OF THE CASE<sup>1</sup>

Following a jury trial in King county superior court, appellant Simion Martinez was convicted of assaulting Cesar Bustillo-Diaz and recklessly inflicting substantial bodily harm (second degree assault). CP 50-56, 58. The state alleged Martinez punched Bustillo-Diaz several times just after midnight on April 13, 2015, when the two reportedly attended the same wake/memorial at a Burien apartment complex. CP 1-6.

King county sheriff's deputy Andrew Weekley testified he was called to a disturbance at a Burien apartment complex around 12:30 a.m. on April 13, 2015. RP 29-30. Weekley testified that when he arrived, "there was tons of people outside just kind of milling about." RP 31. He noticed one man, Cesar Bustillo-Diaz, was bleeding from his face. RP 31-32.

Weekley left Bustillo-Diaz with his partner and began speaking to the crowd of 15-20 people, "just trying to get any information I could." RP 33. Defense counsel objected – but was overruled – when the prosecutor inquired whether Weekley was able to obtain the suspect's name from the crowd:

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<sup>1</sup> This brief refers to the verbatim report of proceedings as followed: "1RP" – pretrial hearing held September 3, 2015; and "RP" – trial held September 8-10, September 15-16 and sentencing on October 16, 2015.

Q. Okay. Did the information you gathered from them help you identify who the suspect was?

A. Yes.

Q. Did you eventually get a name?

A. Yes.

Q. And what was that name?

MS. POLLOCK [defense counsel]: I'm going to object, it's hearsay.

MR. KIM [prosecutor]: For identification.

MS. POLLOCK: But it's not – he's not the one who's doing the identifying.

A. A possible suspect.

THE COURT: Your further comment regarding the objection, Mr. Kim?

MR. KIM: It's for identification.

THE COURT: The objection will be overruled.

RP 34-35.

When the prosecutor asked the name of the potential suspect, Weekley testified he could not remember exactly, but the name the crowd gave him was close to what he ultimately came up with, after running the name through a database:

I can't give you the exact, because they said – I remember, and then in my report as well, I remember it being a close match to the person, and that happens all the time. We'll get, you know, Andre Weekley for me, and so I put in A. Weekley in our little search, and it would come back Andy Weekley or Andrew Weekley. And I go, hey, that's – that's a possibility. Ages match, you know, sexes match. So I don't know the exact name and date of birth I had originally, but through our databases we were able to come up with the name of Simon Martinez.

RP 36.

Defense counsel again objected but the court ultimately allowed Weekley to testify this was the name he was given by the crowd:

MS. POLLOCK: I'm going to object and move to strike. Now he's not – the question – or – and it's also nonresponsive. The question was what information he got from the people there, and now he's telling about information he got from his databases.

THE COURT: Sustained. Redirect the witness.

MR. KIM: I will, Your Honor.

Q. Did you get information from these witnesses?

A. Yes.

Q. Did that eventually lead to a name of a suspect?

A. Yes.

Q. What was the name of that suspect?

A. Sorry, Simon Martinez.

MS. POLLOCK: I'm going to object again.

MR. KIM: It's already been ruled on, your Honor.

THE COURT: Just a second. What is the objection now?

MS. POLLOCK: Well, he's giving information that maybe came from some other source that's hearsay, and he's saying eventually, and it's still nonresponsive to the question.

THE COURT: Objection overruled. Exception to the hearsay is identification.

You may answer the question. What's the name?

A. Simon Martinez.

RP 36.

Weekley subsequently clarified he meant "Simion" Martinez.

RP 37. Weekley testified the information he gathered came from two people in particular, a man who he did not identify and a woman named Gilma Martinez Crisanto. RP 37-38.

Bustillo-Diaz testified that around midnight on April 13, he went to an apartment in Burien to offer his condolences to the family of a fellow Honduran man who passed away. RP 46-49.

While on his way, he saw Crisanto, whom he knew only as "Gilma" and offered to give her a ride to the memorial. RP 50.

Bustillo-Diaz estimated there were about 20 people there when he arrived. He testified he recognized Martinez from a picture a police officer later showed him at the hospital:

Q. [prosecutor] Do you recognize him?

A. Yeah.

MS. POLLOCK: Objection, your Honor, leading.

THE COURT: I'm going to allow it under the circumstances.

MS. POLLOCK: Your Honor –

Q. How do you recognize him?

A. How?

Q. Yeah.

A. Police officer show me picture.

Q. Okay, and was –

A. In the hospital.

Q. Was he, and I'm referring to the defendant, let the record reflect, was he at the apartment on that day?

A. Um-hmm, in the kitchen.

RP 52.

According to Bustillo-Diaz, the man in the kitchen was “so rude and that night, and he repeat a lot of times someone need to going to die[.]” RP 53. But the man was by himself. RP 89.

After 30 minutes and two beers, Bustillo-Diaz and Crisanto left and went to the parking lot. RP 51, 54-55, 78. Bustillo-Diaz testified that while Crisanto was smoking a cigarette, he heard someone running towards him. RP 56. According to Bustillo-Diaz, “And I just turn around and see – and just – that guy just hit me a lot, a lot of times.” RP 56. Bustillo-Diaz said it was the defendant. RP 56, 74. Bustillo-Diaz previously told police he was punched from behind, however. RP 88.

When it was over, someone called 911. RP 60. After speaking to police, Bustillo-Diaz went to the hospital. RP 60. The state offered no medical testimony, but Bustillo-Diaz claimed he received 5-7 stitches on his face. RP 62.

Weekley’s partner trooper Scott Mandella arrived at the apartment complex shortly after Weekley. RP 112. Mandella testified Weekley appeared successful in speaking to some of the crowd members, including a woman.<sup>2</sup> RP 113-14.

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<sup>2</sup> The state did not obtain a material witness warrant for Gilma Crisanto, but a detective testified to his effort to obtain her voluntary presence for trial. RP 103, 109-110.

Mandella went to the hospital and took a verbal statement from Bustillo-Diaz. RP 115. Bustillo-Diaz described his attacker as “a black/white mixed race male.” RP 126.

Mandella went back to the police station to create a photo line-up. In creating the line-up, Mandella explained Weekley relayed to him the name of a suspect. RP 116. As Mandella testified, “Deputy Weekley relayed that information to me that was given to him from another witness on scene.” RP 116. Although Bustillo-Diaz described his attacker as “a black/white mixed race male,” Mandella chose men with “[d]ark skin” or “black” men. RP 118.

While Bustillo-Diaz was still at the hospital, Mandella showed him the photo line-up. RP 62, 119. Bustillo-Diaz testified he assumed the person who hit him was in the photographs. RP 76. Mandella acknowledged that although montage instructions written in Spanish were available, he provided Bustillo-Diaz with English instructions.<sup>3</sup> RP 123. Bustillo-Diaz picked #3 as his attacker, whom Mandella identified as Martinez. RP 62-63, 126.

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<sup>3</sup> Towards the end of his testimony, Bustillo-Diaz indicated he would feel more comfortable with a Spanish interpreter and was provided one for the end of his direct and cross-examination. RP 68, 73.

Bustillo-Diaz testified never saw Martinez before that night. RP 79. However, Bustillo-Diaz had attended events within the Honduran community that featured reggae music and a DJ. RP 84. He remembered an event hosted by DJ Garifuna. RP 84. Bustillo-Diaz denied that he saw Martinez assisting Garifuna at that event, although he did see other people assisting Garifuna who are dark-skinned like Martinez. RP 85-86.

In closing, the defense disputed the state proved it was Martinez who assaulted Bustillo-Diaz. RP 186. The defense pointed out that Bustillo-Diaz described his attacker as a "black/white mixed race male," whereas Martinez "is not light skinned." RP 187. Defense counsel also pointed out Bustillo-Diaz initially testified he recognized Martinez from the pictures police showed him. RP 187. Moreover, Bustillo-Diaz acknowledged he assumed his attacker was among the photos the police showed him. RP 188. And no one else from the party testified. RP 189.

After three hours of deliberating, the jury informed the court it would be unable to reach a verdict. RP 202-205. Nonetheless, the court directed the jury to resume deliberating. RP 206. The jury ultimately convicted after another day and a half of deliberations. RP 206-211.

C. ARGUMENT

1. THE COURT'S ADMISSION OF NON-TESTIFYING WITNESSES' OUT-OF-COURT STATEMENTS IDENTIFYING MARTINEZ AS BUSTILLO-DIAZ'S ATTACKER VIOLATED MARTINEZ'S RIGHT TO CONFRONT HIS ACCUSERS.

Other than Bustillo-Diaz, no one from the memorial testified or identified Martinez as Bustillo-Diaz's attacker. Over defense counsel's hearsay objection, the prosecutor was allowed to elicit from trooper Weekley that various attendees – at least two in particular – identified Martinez as Bustillo-Diaz's attacker. Contrary to the court's ruling, these out-of-court accusations were not admissible under the identification exception to the hearsay rule. Moreover, their admission violated Bustillo-Diaz's right to confront his accusers. Because identity was the main issue at trial, and because there were reasons to doubt Bustillo-Diaz's identification, the state cannot prove the constitutional error was harmless beyond a reasonable doubt. This Court should reverse Martinez's conviction.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10); State v.

Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The essence of the right to confrontation is the right to meaningfully cross-examine one's accusers. Id. at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68. This Court reviews alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A statement includes nonverbal conduct intended as an assertion. ER 801(a)(2).

The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

In Davis, the Court elaborated on what did and did not constitute testimonial statements. Non-testimonial statements may occur in the course of police interrogation when, objectively viewed, the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Davis, 547 U.S. at 822. In contrast, statements are testimonial when, objectively viewed, there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id., 547 U.S. at 822; accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements of an informant or dispatcher. Johnson, 61 Wn. App. at 549; State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. State v.

O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), reversed on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009).

Trooper Weekley's testimony here included out-of-court statements of witnesses who did not testify – at least two, an unidentified man and Gilma Cristanto. In testifying that through talking to these individuals and possibly other crowd members, he obtained the name of a potential suspect – Simion Martinez – Weekley essentially told the jury these other people identified Martinez as Bustillo-Diaz's attacker.

Contrary to the trial court's ruling, the out-of-court statements of the non-testifying witnesses were not admissible as statements made for identification and therefore not hearsay under ER 801(d)(1)(iii). Under ER 801(d), a statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (iii) one of identification of a person made after perceiving him; ...

This rule excepts from hearsay treatment any statement identifying an accused made by a perceiving witness who testifies at trial and is subject to cross examination. State v. Grover, 55 Wn. App. 252, 777 P.2d 22 (1989). Thus, in Grover, the witness' statement to police identifying Grover as the robber was admissible

through the officer, because even though the witness testified she did not remember her identification, she was in court and subject to cross-examination. Grover, 55 Wn. App. at 257. Because of the declarant's presence and availability for cross-examination, the common hearsay dangers were not present. Id.

In Martinez's case, the court clearly admitted the out-of-court identifications based on ER 801(d)(1)(iii). However, as defense counsel pointed out, Weekley was not the individual/s who made the identification. Rather, he was merely repeating what he heard. As such, the statements were hearsay and inadmissible. The court erred in concluding otherwise.

The next question is whether the hearsay statements were testimonial. To determine whether statements elicited through police questioning trigger the confrontation clause, the question is whether, objectively considered, the interrogation that took place produced testimonial statements. Davis, 547 U.S. at 826. Under the primary purpose test, courts must objectively appraise the interrogation to determine whether its primary purpose is to enable police to meet an ongoing emergency. Id. at 822.

In applying the test to the cases of two defendants, Davis and Hammon, the Davis Court discussed four pertinent factors to

be considered in making such a determination: (1) the timing relative to the events discussed; (2) the threat of harm posed by the situation; (3) the need for information to resolve a present emergency; and (4) the formality of the interrogation. Id. at 827-30; Ohlson, 162 Wn.2d at 12.

In Davis' case, the Court determined a caller's statements to a 911 operator during a domestic disturbance, including the caller's identification of her assailant by name in response to the operator's questions, were not testimonial. First, the caller was speaking about events as they occurred. Second, a reasonable listener would have concluded the caller faced an immediate physical threat. Third, objectively viewed, the elicited statements were necessary to resolve the present emergency, rather than simply to learn (as in Crawford) what happened in the past. Finally, as to the level of formality, unlike the declarant in Crawford, the caller provided answers in a frantic environment. The Davis Court concluded the circumstances of the interrogation objectively indicated its primary purpose was to enable police to meet an ongoing emergency, rendering the resulting statements non-testimonial. Davis, 547 U.S. at 827-28.

With respect to Hammon's case, however, the Davis court held a woman's statements to a police officer who responded to a domestic disturbance call were testimonial. When the officer questioned the woman, and elicited the challenged statements, he was not seeking to determine what was happening, but rather what happened. Id. at 830. There was no emergency in progress. Id. at 829. Finally, while the Crawford interrogation was more formal, the interrogation at issue was formal enough. Id. at 830. The Davis Court concluded, "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct, rendering the resulting statements testimonial." Id. at 829.

The circumstances of Crisanto's and the other unidentified witnesses' statements here are like those in Hammon's case. The police questioning was somewhat formal. Weekley testified Crisanto was "respectful but uncooperative." RP 38. As Weekley explained, "It took a very long time for me to get information from her, because she was avoiding the questions, didn't want to talk to me, didn't – didn't want to help out." RP 38. Whether that qualifies as "formal" under Crawford, it was, in the words of the Davis Court, formal enough. Id. at 830.

More significant to this Court's analysis, however, is the fact that the assault already occurred and Weekley was "trying to figure out if the bad guy was still there, and other victims, who saw it, just trying to get any information I could." RP 33. The witnesses' statements were made in the midst of a crime scene investigation, not while reacting to meet an ongoing emergency. The witnesses' statements therefore are within that core class of statements a reasonable person would expect to be used prosecutorially. Such is also evident from the fact Crisanto did not want to talk to police and the fact the other unidentified witness did not give his name. RP 38-39.

Based on the pertinent Davis factors, the witnesses' out-of-court statements were testimonial and prohibited by the confrontation clause. The court therefore erred in overruling defense counsel's timely objection and allowing such testimony, which the state thereafter elaborated on several times more.

Confrontation clause errors are subject to harmless error analysis. Shafer, 156 Wn.2d at 395. A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425,

705 P.2d 1182 (1985). Constitutional error is presumed prejudicial and the state bears the burden of proving the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

The State cannot meet its burden to demonstrate beyond a reasonable doubt the jury would have reached the same result absent the erroneously admitted evidence. The state presented no eyewitness testimony. Despite the fact there were 15-20 other people in the parking lot, the state presented no testimony from the other memorial attendees.

Moreover, there was reason to doubt Bustillo-Diaz's identification of Martinez. He initially told police he was hit from behind. He initially described his attacker as being of mixed race. At trial, he testified he recognized Martinez from the pictures police showed him. Moreover, he assumed a picture of the suspect would be among those the police showed him. Because there were identified reasons to doubt Bustillo-Diaz's identification, the state cannot show the jury was not influenced by the trooper's testimony indicating other witnesses also identified Martinez. This Court should reverse Martinez's conviction.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Martinez was represented below by appointed counsel. Supp. CP \_\_\_ (sub. no. 45, Motion and Declaration of Indigency, 10/16/15). The trial court found him indigent for purposes of this appeal. Supp. CP \_\_\_ (sub. no. 46, Order Authorizing Appeal In Forma Pauperis, 10/16/15). Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

At sentencing, the court imposed only the \$500 VPA and \$100 DNA fee. CP 52. Martinez may be ordered to pay a substantial sum in restitution. CP 52. At the time he filed this appeal, Martinez declared he was not employed and had only \$3.00 in cash to his name. Supp. CP \_\_\_ (sub. no. 45, Motion and Declaration of Indigency).

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "*will*" award costs to the State if the State is the substantially prevailing party on review,

*“unless the appellate court directs otherwise in its decision terminating review.”* RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ 2016 WL 393719.<sup>4</sup> Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, WL 393719, \*5. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Martinez’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

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<sup>4</sup> Only the Westlaw version is available at the time of this filing.

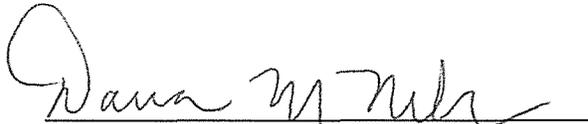
D. CONCLUSION

Because Martinez was denied the right to confront his accusers, this Court should reverse his conviction. Alternatively, this Court should exercise its discretion and deny costs, if the state is the prevailing party.

Dated this 31<sup>st</sup> day of March, 2016

Respectfully submitted

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

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STATE OF WASHINGTON )

Respondent, )

vs. )

SIMION MARTINEZ, )

Appellant. )

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COA NO. 74113-6-I

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF MARCH, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SIMION MARTINEZ  
3526 132<sup>ND</sup> ST SW  
LYNNWOOD, WA 98087

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF MARCH 2015.

X *Patrick Mayovsky*