

66038-1

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No. 66038-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT TAYLOR, JR.,

Appellant.

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

The Honorable Michael Heavey

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APPELLANT'S REPLY BRIEF

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY ..... 1

IMPROPERLY-ADMITTED HEARSAY DESCRIPTIONS OF  
THE SUSPECT WERE NOT RELEVANT TO EXPLAIN THE  
TESTIFYING OFFICER'S CONDUCT AND IMPROPERLY  
ALLOWED THE STATE TO BOLSTER AN OTHERWISE  
WEAK CASE..... 1

1. The State fails to convincingly distinguish *Aaron* and *Johnson*  
..... 1

2. Decisions from other jurisdictions are in accord with the  
conclusion that the hearsay should have been excluded ..... 4

B. CONCLUSION..... 7

**TABLE OF AUTHORITIES**

**Washington Court of Appeals Decisions**

State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990) ..... 2-4  
State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991) ..... 2-4

**United States Court of Appeals Decisions**

United States v. Cromer, 389 F.3d 662 (6th Cir. 2004) ..... 5  
United States v. Maher, 454 F.3d 13 (1st Cir. 2006) ..... 5  
United States v. Silva, 380 F.3d 1018 (7th Cir. 2004) ..... 5

**Other State Cases**

Postell v. State, 398 So.2d 851 (Fla. Dist. Ct. App.), rev. denied,  
411 So.2d 384 (Fla. 1981) ..... 2  
Sanabria v. State, 974 A.2d 107 (Del. 2009) ..... 5, 6  
State v. Legendre, 942 So.2d 45 (La. App. 2006) ..... 6

A. ARGUMENT IN REPLY

IMPROPERLY-ADMITTED HEARSAY  
DESCRIPTIONS OF THE SUSPECT WERE NOT  
RELEVANT TO EXPLAIN THE TESTIFYING  
OFFICER'S CONDUCT AND IMPROPERLY  
ALLOWED THE STATE TO BOLSTER AN  
OTHERWISE WEAK CASE.

In Robert Taylor's prosecution for delivery of cocaine, the State called as witnesses only the officer who participated in a "buy and slide" operation in Pioneer Square and an officer who photographed Taylor some blocks away, at a bus shelter. Nevertheless the trial court authorized the admission of out-of-court statements describing the alleged drug dealer, ostensibly to explain why the officer targeted Taylor at the bus shelter. The evidence was hearsay, the descriptions were only relevant for their truth, and the State used the evidence for this purpose. Taylor's conviction should be reversed.

1. The State fails to convincingly distinguish *Aaron* and *Johnson*. In both *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990) and *State v. Johnson*, 61 Wn. App. 539, 811 P.2d 687 (1991), this Court reversed the defendants' convictions where the trial court permitted the State to elicit hearsay through testifying officers. In both cases, the State unsuccessfully sought to justify

the admission of the hearsay evidence as serving the non-hearsay purpose of explaining the officers' actions. See Aaron, 57 Wn. App. at 289-90 (officer's testimony that he heard defendant was using a blue jean jacket was hearsay and not relevant for proffered purpose of explaining officer's 'state of mind'); Johnson, 61 Wn. App. at 546-47 (reversible error to permit officer to testify regarding his belief that defendant was engaged in drug trafficking to show officer's 'state of mind' in executing search warrant, where state of mind was not a relevant issue in the case). In Johnson, this Court quoted with approval from a Florida Court of Appeals case:

We hold that where, as in the present case, the inescapable inference from the testimony is that a non-testifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, and the defendant's right of confrontation is defeated, notwithstanding that the actual statements made by the non-testifying witness are not repeated.

Id. at 547 (quoting Postell v. State, 398 So.2d 851, 854 (Fla. Dist. Ct. App.), rev. denied, 411 So.2d 384 (Fla. 1981)). In both cases, this Court emphasized that where it is necessary for a police witness to relate historical facts, it is sufficient for him to state that he acted upon "information received." Aaron, 57 Wn. App. at 281; Johnson, 61 Wn. App. at 547.

The State claims that Aaron is distinguishable “because the testimony offered actually implicated the defendant committing the crime,” whereas “here the testimony was only offered to show why Officer Johnson contacted a particular person based on a description of clothing and a direction of travel.” Br. Resp. at 13. The State asserts that Johnson is distinguishable because the out-of-court statements were used to support the officer’s “belief” that the defendant was involved in drug dealing. Id.

The State neglects to mention, however, that the description of clothing and direction of travel were provided to Johnson by the observation officers, who allegedly saw the drug deal take place and relayed this information to Johnson to ensure that he apprehended the correct person. While overlooking Taylor’s hearsay objection, the trial court ruled that the evidence was being offered to show “what individual they were looking for to stop.” 2RP 77-78. Thus, the testimony “actually implicated the defendant committing the crime” by providing the missing link between the drug buy in Pioneer Square and the apprehension of an apparently uninvolved individual at a bus shelter several blocks away.

If indeed the purpose in introducing the testimony was to show “*why* officers pursued a particular person as he jogged from

the scene”<sup>1</sup> the State does not explain why it would not have been both adequate and appropriate for the officer to testify simply that he acted “upon information received.” In sum, Johnson and Aaron are squarely on point, and establish that the hearsay evidence was used for its truth to shore up the State’s case.

2. Decisions from other jurisdictions are in accord with the conclusion that the hearsay should have been excluded. Other jurisdictions similarly exclude hearsay introduced through the backdoor as an “explanation” for police action, but used for substantive purposes to establish guilt at trial. For example, the Court of Appeals for the Seventh Circuit rejected the contention that officers’ testimony regarding information received from an informant, who did not testify, was admissible to explain the officers’ actions:

Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant’s rights under the sixth amendment and the hearsay rule. This court has warned against the potential for abuse when police testify to the out-of-court statements of a confidential informant. [Citation omitted.] There are no doubt times when the testimony regarding a tip from an informant is relevant. If a jury would not otherwise understand why an investigation targeted a

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<sup>1</sup> Br. Resp. at 14 (emphasis in original).

particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out Silva for nefarious purposes. No such argument was made in this case, however, and no other explanation was given why the testimony would be relevant. Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers.

United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004); accord

United States v. Cromer, 389 F.3d 662, 674-75 (6th Cir. 2004);

United States v. Maher, 454 F.3d 13, 22 (1st Cir. 2006).

The Delaware Supreme Court followed Silva to hold that the trial court should not have admitted a police dispatcher's statement in a burglary prosecution that a motion detector had been triggered, even though the testimony explained an officer's actions at the crime scene. Sanabria v. State, 974 A.2d 107, 116 (Del. 2009).

The Court stressed, "When the prosecution seeks to offer background information, the first question the trial court must consider is whether the jury could be provided the background information without referring to a third party's out-of-court statement." Id. at 113. The Court concluded that the better practice – which would avoid the risk of a conviction based on

inadmissible hearsay – would be for the officer to simply testify that he acted “upon information received.” Id.

The Louisiana Court of Appeals has similarly observed: “The mere fact that an arresting officer had acted on information might be relevant admissible non-hearsay (as, for example, to explain the police officer’s conduct), but this vehicle for the admissibility of the fact that the officer acted upon information should not become a passkey to get to the jury the substance of the out-of-court information, directly or indirectly, that otherwise might be barred by the hearsay rule.” State v. Legendre, 942 So.2d 45, 53 (La. App. 2006) (finding admission of hearsay description of defendant error, but harmless in light of other substantial evidence linking defendant to crime).

The rule endorsed in Sanabria is useful: in nearly every instance where the State seeks to “explain an officer’s actions” it is not necessary to use out-of-court statements to do so. Rather, an officer can simply testify that he acted “upon information received”, thus preventing the jury from considering hearsay in reaching their verdict. In this case, the hearsay linked the drug purchase and Johnson’s subsequent contact with Taylor at the bus shelter. The evidence was necessary for the State to obtain a conviction, and its

admission was not harmless. Taylor's conviction should be reversed.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, this Court should reverse Taylor's conviction.

DATED this 5<sup>th</sup> day of August, 2011.

Respectfully submitted:

  
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ROBERT TAYLOR,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF AUGUST, 2011.

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