

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal)	No. 64359-2-I
Restraint of:)	(Consolidated with) No. 64551-0-
I)	
)	
RANAE NAITOKO,)	
)	
Petitioner.)	
)	
_____)	
STATE OF WASHINGTON,)	UNPUBLISHED OPINION
)	
Respondent,)	
v.)	
)	
RANAE NAITOKO,)	
)	
Appellant.)	
_____)	FILED: <u>April 25, 2011</u>

spearman, j. — Ranae Naitoko was convicted of two counts of first-degree assault and one count of first-degree unlawful possession of a firearm. This court upheld his conviction on direct appeal. Naitoko thereafter filed a personal restraint petition (PRP), which this court transferred to the superior court for appointment of counsel, an evidentiary hearing and determination on the merits under RAP 16.12. Naitoko now appeals the transfer court's¹ dismissal of his

¹ For clarity's sake, this opinion refers to the court that resolved Naitoko's transferred petition on the merits as the transfer court, and the court that presided over Naitoko's original trial as the trial court.

petition, contending that the court erred in deciding that he was not prejudiced by his trial counsel's failure to call certain witnesses to testify in support of his self-defense claim. We find no error on the part of the transfer court and accordingly affirm.

FACTS

Naitoko's convictions arose from an incident on February 20, 2004, at the former First Avenue Pub in South Seattle. Late that night, Naitoko was involved in a fight with Michael Schirmer. The fight was broken up, and Naitoko left the bar. A few minutes later, under circumstances disputed at trial, Naitoko fired shots with a handgun outside the bar, striking Schirmer and another bar patron, Schirmer's friend Maua Vaivao.

According to witnesses for the State,² Naitoko confronted Schirmer outside the front of the bar with a handgun, said a few words, and opened fire. Schirmer was severely wounded and dived back into the bar. Vaivao was hit twice by ricochets and two cars parked near him were damaged by bullets. A civilian witness observed the shooter climbing into a white sports utility vehicle (SUV), which sped away. Crime scene investigators determined that at least five shots were fired. No gun was recovered. Naitoko was positively identified as the shooter by both victims from a photographic montage.

² A more detailed description of the State's case is contained in this court's unpublished opinion affirming Naitoko's conviction on direct appeal. The facts are recounted here only as necessary to address the specific issues raised in this appeal.

According to Naitoko's trial testimony, after the fight inside the bar the bouncer forcibly kicked him out of the bar's back door. He sat down to collect his wind for three to five minutes on the back door steps, where he was left alone. Friends of Schirmer's then came out the back door and Naitoko decided to leave. Schirmer and others in his group, however, spotted Naitoko as he came around the corner of the building. Naitoko stopped running and asked them to fight him fairly, one at a time, but they all attacked him together. As he was swinging blindly, he grabbed one of the attackers who had a big stomach, felt a gun on the man and took it. He testified he fired in self-defense without aiming at anything. After firing the gun two or three times, he dropped it and ran down a hill. He heard more shots, so he believed someone must have picked up the gun and been firing at him. He denied that anyone picked him up in a car.

The jury rejected Naitoko's claim of self-defense, and found him guilty as charged. Naitoko appealed, raising several issues. Rejecting most of Naitoko's claims and concluding that a police detective's improper comment on Naitoko's silence was harmless beyond a reasonable doubt, this court affirmed Naitoko's convictions in an unpublished opinion. The Supreme Court denied his petition for review.

Naitoko then filed a timely pro se personal restraint petition, claiming, among other things, that his trial counsel failed to provide effective assistance because he did not adequately investigate Naitoko's claim of self-defense and

did not object to the improper police testimony. Because Naitoko supported his petition with the sworn declaration of two witnesses he had identified but were not contacted by his trial counsel, this court transferred the petition to the superior court for appointment of new counsel, an evidentiary hearing, and determination on the merits pursuant to RAP 16.12. This court also directed the transfer court to consider whether prejudice from any alleged errors by counsel regarding witnesses accumulated with prejudice resulting from counsel's failure to object to the improper testimony of the detective.

Naitoko presented four witnesses at the evidentiary hearing in addition to himself and his former counsel: Malu Tuifua, Patrick Moimoi, Nesiteko Fainga, and Soeli Latu. After a two-day hearing, the transfer court entered eight pages of detailed findings and conclusions. The court determined that Naitoko's trial counsel should have attempted more formal methods than he used in trying to contact witnesses Naitoko had identified, and thus provided deficient performance.³ Based on the new witnesses' testimony at the hearing and the trial record, however, the court concluded that Naitoko failed to make a showing of prejudice because there was no reasonable probability that the trial result would have been different if any or all of the witnesses had testified. The court therefore concluded that there was no prejudice to accumulate with the improper comment on silence. The transfer court accordingly dismissed the petition.

³ The State has not cross-appealed the transfer court's findings and conclusions in this regard. This opinion accordingly will not further address this aspect of the transfer court's decision.

Naitoko appeals.

ANALYSIS

Naitoko challenges the dismissal of his PRP in this direct appeal of the transfer court's decision. He argues that the court misunderstood the trial evidence about the location of the shooting, made an incorrect implicit finding that several of Naitoko's proposed witnesses were not in a position to see the shooting, and entered several express findings of fact regarding his witnesses that are not supported by the record. Based on our review of the records from the trial and the transfer hearing, we reject these claims, and accordingly affirm the transfer court.

"A decision of a superior court in a personal restraint proceeding transferred to that court for a determination on the merits is subject to review in the same manner and under the same procedure as any other trial court decision." RAP 16.14(b). Thus, the proponent of factual contentions carries the burden of establishing those facts by a preponderance of the evidence. In re Personal Restraint of Gentry, 137 Wn.2d 378, 410, 972 P.2d 1250 (1999).

Consistent with that burden, we apply the substantial evidence standard to the transfer court's findings of fact. Gentry, 137 Wn.2d at 410. We review the transfer court's legal conclusions de novo. See, State v. Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998). We cannot review the transfer court's credibility determinations, since the transfer court had the opportunity to evaluate the

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witnesses' demeanor and judge their credibility. Gentry, 137 Wn.2d at 410-11.

1. The Transfer Court Did Not Misunderstand the Location of the Shooting

Many of Naitoko's challenges to the transfer court's findings of fact are dependent on his overarching claim that the court misunderstood the trial record as to the location where the shootings took place. According to Naitoko, the transfer court erroneously placed the location of the shooting in the area near the front door of the First Avenue Pub, when the actual record showed that it took place near what the witnesses described as the back door. We disagree.

The parties agree that at the time of the shooting, the First Avenue Pub was located on west side of 16th Avenue Southwest, just north of an intersection with Southwest 112th. What the witnesses described as the front door of the bar faced east and what they described as the back door was located on the south side of the building near the southwest corner, at the back of the bar. A parking lot runs parallel to the south side of the building and borders on Southwest 112th.

Contrary to Naitoko's claim, a fair reading of the record before this court⁴

⁴ It is clear from the original trial transcripts that most witnesses, including Naitoko, testified with reference to State's exhibit 1, described in the record as a large-scale diagram of the location admitted for illustrative purposes. There did not appear to be any dispute as to its accuracy. The State has attached a document it claims is that diagram to its brief, but has not formally designated any exhibits to this court. In his reply brief, Naitoko objects that because exhibit 1 was admitted only for illustrative purposes, it was not preserved in the record and therefore is not properly an appendix to the State's brief. While it seems clear from the transcripts that what the State has attached is very likely a version of the chart on which exhibit 1 was based, neither party has placed a motion before this court to resolve this dispute about what was or is in the trial record. Rather than remand this case a second time, we have simply relied on the written trial transcript. We further note that in its findings, the transfer court specifically mentioned it considered trial exhibits, referring particularly to several photographs of the exterior and interior of the bar, which were admitted for substantive purposes at trial. On appeal, however, neither party has designated any of those photographic exhibits or any other exhibits for our review, with the result that this court does not have the benefit of considering them, while the transfer

more than adequately supports the transfer court's understanding of the location of the shooting. Deputy Sheriff James Schrimpsheer was on patrol within a few blocks of the bar and went directly to the scene, where he found victim Vaivao, injured and unattended, near two cars that Schrimpsheer testified were parked north of the front of the bar. Vaivao testified he had been standing between those cars talking to Schirmer when Naitoko came around the corner of the bar with the gun and started firing. Consistent with this, Schirmer testified to being within a few feet of the front door when he was shot. Other witnesses also described the shooting occurring in front of the bar.

Naitoko draws a strained inference from two isolated pieces of testimony to contend the transfer court erred. He refers to an officer's statement about photographs of a car in the parking lot, and a civilian witness's recollection that there was no parking lot in front of the bar. He argues this proves that the events must have taken place in the parking lot south of the bar. At the most, however, these references raise only a disputed fact question, which the transfer court, as finder of fact, was entitled to resolve as it did.

2. The Transfer Court Did Not Err by Implicitly Finding Naitoko's Proposed Witnesses Were Not in a Position to See the Shooting

Naitoko also argues the transfer court's findings were erroneously based on its "implicit finding" that proposed witnesses Latu and Fainga were not in a position to witness events connected to the shooting. We disagree with this

court did.

contention as well.

Naitoko's argument in this regard partially relies on the argument we reject above regarding the location of the shooting. Equally important, it is simply inaccurate to say the transfer court made such an implicit finding. Rather, the transfer court's findings that Fainga, Latu, and Tuifua did not see the shooting were directly supported by the evidence because each one clearly testified that he or she did not, in fact, see the shooting. The transfer court's findings did not imply anything more than that.

As part of this argument, Naitoko also contends that because the transfer court did not expressly use the word "credibility" with respect to these three witnesses, the court made no credibility determinations as part of its assessment of whether they would have assisted his self-defense claim at trial. We disagree with this claim as well.

The very experienced judge that presided over the transfer hearing entered detailed, nuanced findings. For example, in discussing witness Sielli Latu, the court noted that Latu's testimony was at times evasive and his description of events was somewhat inconsistent with Naitoko's trial testimony. While this court can compare Latu's testimony at the transfer hearing with Naitoko's trial testimony, we cannot review the court's assessment of Latu's evasiveness because the transfer court was able to observe his demeanor. Accordingly, we give deference to the transfer court's findings where that court

was in a superior position to consider the evidence regardless of whether the court expressly used the word “credibility.”

Having reached these conclusions regarding Naitoko’s broad-brush criticisms of the transfer court, we turn to the findings regarding the individual witnesses.

3. Petitioner’s Witnesses

a. Malu Tuifua

Tuifua testified at the evidentiary hearing that he drove Naitoko to the First Avenue Pub at approximately 7:00 to 8:00 p.m. They split up once they reached the bar, and Tuifua understood that Naitoko would be leaving the bar on his own. Later in the evening, Tuifua became aware of a scuffle in the area of the pool tables. He testified he could see Mike Schirmer holding a person down by the hair, and other persons punching. The person on the pool table was able to get himself up and Tuifua saw it was Naitoko. Naitoko broke free and ran to the back door. Tuifua ran out through the front door to his car and got inside. He then heard gunshots and looked through his car window, but only saw a bunch of guys ducking. Tuifua did not see any altercation before hearing the gunshots nor did he see any shots being fired. Tuifua drove around the area looking for Naitoko, but never saw him.

The transfer court concluded that Tuifua’s testimony would not have benefited Naitoko. The court found that Tuifua had not seen the shooting, and

that if anything, his testimony actually would have been consistent with the State's evidence. The court also noted that Tuifua acknowledged being a very close friend of Naitoko's.

Naitoko challenges the court's finding that Tuifua's testimony would have been consistent with the State's evidence. He contends that it would have supported Naitoko's claim because it described the initial fight at the pool table as a one-sided affair, unlike the quickly subdued shoving match the State's witnesses described.

We conclude that the challenged findings are supported. The trial evidence described the initial scuffle as involving several people, and that in addition to shoving, there was wrestling back and forth and punches were thrown. Moreover, Tuifua's testimony was not as strong as Naitoko suggests. When asked if he could say how many people were on Naitoko during the scuffle, Tuifua hedged his testimony, explaining that at the time he was nervous and a little intoxicated.⁵ Later, he also testified that he could hardly see anything because of the number of people hanging around the area. The transfer court did not err in rejecting the argument that Tuifua's testimony would have assisted Naitoko based on his description of the events around the pool table, which even Naitoko described as an incident distinct in time and location from the later fight that he maintained caused his need to use self-defense.

⁵ On cross-examination, Tuifua testified that his level of intoxication was not to the point of stumbling, but was "just a good drunk."

The finding that Tuifua did not see the shooting is plainly supported because Tuifua testified that he did not see it. It further appears that the transfer court characterized Tuifua's testimony as consistent with the State's theory of the case because Tuifua left through the front entrance to the bar, but saw no fight in that area. Naitoko argues in a footnote in his reply that this reasoning fails because Tuifua was focused on getting to his car rather than observing events at the front of the bar. Tuifua's actual testimony, however, was that he was seated in his car by the time the shots were fired, at a location from which he could see people ducking in response to the shots. This at least suggests he was in a position to have seen the type of physical confrontation Naitoko had described occurring outside the bar. That he failed to do so supports the transfer court's conclusion that his testimony would not have assisted Naitoko. Bearing in mind that our review is for substantial evidence, we cannot conclude the transfer court erred in entering the findings it did regarding Tuifua's proposed testimony.

b. Patrick Moimoi

Moimoi testified that he was present at the bar near closing time and saw both the scuffle inside and, unlike the other proffered defense witnesses, saw the actual shooting outside. He said that he left the pub after the scuffle between Schirmer and Naitoko. While waiting in his car at a red light, he saw 50 to 60 people beating Naitoko up outside the pub with beer bottles and he heard

the gunshots. He also testified that he could hear the heavy breathing of the combatants from 25 feet away, inside his car with the window rolled up. Moimoi claimed he had personally spent a lot of money on lawyers for Naitoko. When asked why he had never called the police, he replied with a rambling explanation that elders in the Tongan community, whose relatives were police officers, lawyers and governors, had held him personally responsible for stopping the violence between Tongans and Samoans.⁶ The transfer court found that Moimoi's affect during his testimony was very unusual and further found he was simply not a credible witness.

Naitoko does not dispute the transfer court's findings regarding Moimoi's affect while testifying, or that its findings regarding his overall credibility are entitled to deference. He argues, instead, that the court's findings in this regard are irrelevant because only a jury can determine credibility. Under this reasoning, however, a defendant would always meet his burden of showing ineffective assistance when counsel failed to call any wholly incredible witness as long as it conceivably supported his defense. Naitoko cites no authority for this novel view of the prejudice component of an ineffective assistance claim, and we reject it as contrary to the law.

⁶ Naitoko assigns error to the transfer court's finding summarizing this portion of Moimoi's testimony. Given its rambling nature, we find no error. Moreover, even if the transfer court's finding was inaccurate in the way Naitoko claims, any error would be immaterial and therefore harmless. State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). The obvious point of the court's reference to this part of Moimoi's testimony was that it was bizarre, grandiose, and made no sense, and thus would negatively affect his credibility. Based on our review of his testimony, that is undoubtedly the case.

c. Nesiteko Fainga

Fainga was related to Naitoko, was raised in the same house, and described herself as like a big sister to him. She testified that she and her cousin Lili had gone to the First Avenue Pub the night of the shooting. They arrived between 8:00 and 10:00 p.m. and she parked her car across the street to the south. Before getting into the bar, she saw a fight going on at the back door. She saw several people were beating up a man and trying to pull him back inside the back door. She could not see who was being attacked, but believed it was Naitoko because of the pants he wore and because she heard an unnamed person shout that “Ranae” was getting jumped. She never went into the bar, and drove away after hearing gunshots a few minutes later.

While finding that Fainga appeared to be trying to testify honestly to the best of her recollection, the transfer court also found her testimony would not have helped Naitoko for several reasons that made it unclear as to what she had actually witnessed. Fainga placed the events at between 8:00 and 10:00 p.m., when the other evidence was undisputed that the events took place after midnight. She described only a fight at the back door, not at the front, she did not describe taking her eyes off the fight or it moving,⁷ and said she did not see the shooting. The court also noted that her testimony was inconsistent with Naitoko’s, and was inconsistent with her own written declaration.

⁷ Naitoko challenges this aspect of the transfer court’s finding, related to Fainga not taking her eyes off the fight. To do so he relies, however, on an inference that the court was not required to draw.

Naitoko's complaints about these findings related to the location of the shooting have been addressed above. He also contends the finding regarding the timing is unsupported because some State's trial witnesses were also inaccurate about the time of the shooting. We reject this assignment of error because the State's witnesses he refers to testified to an estimated time range consistent with the shooting taking place after midnight, while Fainga's estimate was inconsistent with that time and off by at least two hours. Naitoko provides no challenge to the court's findings about Fainga's inconsistency with her own declaration and with Naitoko's trial testimony.⁸ We find no error with the findings or the court's conclusion that there was no reasonable probability that Fainga's testimony would have changed the outcome of the trial.

d. Sioeli Latu

Latu was a longtime friend of Naitoko's who arrived at the bar to find Naitoko already there. Coming out of the bathroom, he saw people jumping on Naitoko and helped pull them off him. He and Naitoko both left through the back door. Once outside, he saw some sort of fighting going on, but could not see who was involved. He heard a gunshot right after he got outside and ran for safety. He acknowledged that he had consumed enough alcohol to be a little

⁸ Naitoko does argue, however, that it was unreasonable for the transfer court to fault Fainga or any of the proposed defense witnesses for being inconsistent with Naitoko's trial testimony, because some of the State's trial witnesses were also inconsistent with each other. This contention is not well taken because the supposed inconsistencies among State's witnesses Naitoko identifies were immaterial. In contrast, the inconsistency between Fainga's version of the fight near the back door in which people were supposedly trying to pull Naitoko back into the bar, and Naitoko's version, in which he was forcibly ejected out of the back door, then left alone for several minutes, appears to defy logical reconciliation.

drunk. On redirect examination, he also acknowledged that he had told defense counsel during a phone interview that he had seen Naitoko in the fight outside, but testified that was not actually true.

As discussed above, we accept the transfer court's finding that Latu's testimony appeared somewhat evasive, particularly in regard to his earlier, inconsistent statements to counsel. Moreover, the transfer court's finding that Latu's testimony would have been inconsistent with Naitoko's trial testimony is clearly supported by the record, as was the court's finding that Latu was somewhat intoxicated.⁹ And as with Tuifua, Latu's testimony would not have provided a reasonable probability of a different result based solely on his description of the initial fight inside the bar. We find no error in the transfer court's findings or conclusions regarding Latu.

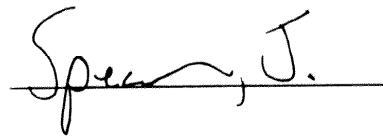
4. Pro Se Claims

Finally, Naitoko has filed a pro se statement of additional grounds for review. In it, he contends that this court should find prejudice from his original trial counsel's failure to call other witnesses, namely, Faone Hefa, Lili Makeafi and Kanga Tuiuai. But there are no statements by any of these supposed witnesses in the record. Naitoko's argument that they should be investigated to

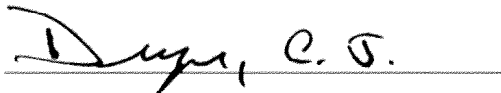
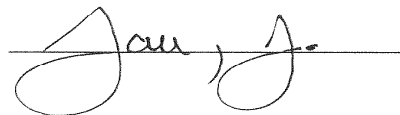
⁹ While he does not challenge the sufficiency of the evidence to support the court's finding regarding Latu's intoxication, Naitoko argues that the transfer court should not have relied on this consideration because there was evidence at the trial that Schirmer had also been drinking. Again, however, the two situations were not comparable because there was no evidence that Schirmer's perception or recollection was affected by what he had to drink, while Latu acknowledged such problems during his testimony.

see if they have anything relevant to say falls far short of meeting his burden of proof to show prejudice.

Because the transfer court properly determined that Naitoko failed to show he was prejudiced by his trial counsel's failure to call the witnesses who testified, we find no error by the court in also concluding that there was no prejudice to accumulate with the police detective's improper testimony we identified in Naitoko's direct appeal. We accordingly, affirm the transfer court's dismissal of the PRP.

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WE CONCUR:

Handwritten signature of Dwyer, C. S. in cursive script, written over a horizontal line.Handwritten signature of Jan, J. in cursive script, written over a horizontal line.