67677-6

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NO. 67677-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

CARL SAUNDERS,

Appellant.

REC'D
FEB 09 2012
King County Prosecutor
Appellate Unit

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

The Honorable Kimberly Prochnau, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in allowing the State's key witness to testify to factual matters for which he lacked personal knowledge.

Issue Pertaining to Assignment of Error

The State charged appellant with felony violation of a no-contact order for allegedly yelling outside the home of the protected party. The only contested trial issue was identity. Did the trial court err in allowing a witness to testify it was the appellant outside the home based solely on voice recognition when the witness lacked any personal knowledge on which to base that claimed recognition?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Carl Saunders with felony violation of a court order. CP 1; RCW 26.50.110(1), (5). The State alleged Saunders violated an order prohibiting him from having contact with Angelica Harmon by going to her home on March 31, 2011. CP 4.

A jury convicted Saunders as charged. CP 24; 4RP 11-14.[1] He was sentenced to 46 months in prison. CP 33-41; 5RP 24. He appeals. CP 84.

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[1] There are five volumes of verbatim report proceedings: 1RP - 7/18/11; 2RP - 7/19/11; 3RP - 7/20/11; 4RP - 7/21/11; and 5RP - 8/26/11.

2. Substantive Facts

The defense moved pretrial to preclude a guest of Harmon's at the time of the alleged incident, Omore Jones, from testifying he knew it was Saunders outside Harmon's home on March 31, 2011, based on voice recognition. Counsel noted the only basis for Jones' voice recognition claim was that Harmon had played him voice mail messages she said were from Saunders. 2RP 43. Counsel also noted the State had played Jones several jail call recordings purported to be of Saunders, which Jones then claimed to recognize as Saunders' voice. 2RP 43-44.

In response, the State admitted Jones "has never had a face-to-face conversation with Mr. Saunders[.]" The prosecutor asserted, however, that Jones could recognize Saunders' voice "from 20 to 30 voice mail messages" Harmon had played for him, from the March 31st incident, and from the jail call recordings. 2RP 44-45.

The court denied the defense motion. The court held the State's offer of proof that Jones could identify Saunders' voice on the jail call recordings was sufficient and that any questions as to the accuracy of Jones' identification of Saunders "go to the weight, not to the admissibility." 2RP 46.

In a related context, the State sought pretrial approval to introduce two of the jail call recordings allegedly involving Saunders. 1RP 2-5.

The court ruled the State could introduce a portion of one of the calls in which one of the two people involved states the name "Carl Saunders", and spells out "S-a-u-n-d-e-r-s", but excluded the rest as irrelevant and prejudicial. 2RP 62-64; Ex. 4.

Following opening statements, defense counsel once again expressed concern with the basis for Jones' ability to recognize Saunders' voice. Counsel noted the only reason Jones thought the voice mail messages Harmon played were from Saunders was because Harmon told him they were. 2RP 77. Counsel also noted that because Jones must have heard the messages when the no-contact order was in effect, evidence of those messages constituted other bad acts evidence that was inadmissible under ER 404(b). 2RP 77-78.

The trial court agreed. 2RP 81-82. It held, however, that its relevance to Jones's ability to identify Saunders's voice outweighed the prejudice. 2RP 87. The court invited the parties to propose a way to "sanitize" the evidence in a way that would alleviate the ER 404(b) problem. 2RP 87. The defense later agreed to allow the prosecutor to ask Jones leading questions about the voice mail messages. 2RP 87.

At trial, Jones testified he and Harmon dated from January through April 2011. 2RP 98, 116. He knew about Saunders, had seen him three times "at most[,]" but had neither spoken with him nor ever seen him

speak. 2RP 100, 130. Jones claimed, however, that he could recognize Saunders' voice. 2RP 100. When asked how that was possible, Jones replied, "From the times I used to spend with [Harmon], he would leave messages on the answering machine." 2RP 100. Jones claimed he heard Saunders' recorded voice "[a]t least maybe 25 or 30" times. 2RP 100.

Jones recalled being at Harmon's home on March 31, 2011, when he heard a voice outside calling for her and asking her to open the door. 2RP 101, 106-07. Jones recognized the voice as Saunders' because it was the same as the recorded voice he had heard before. 1RP 107, 110. Concerned about a confrontation with Saunders, Jones called 911. 2RP 111. Jones admitted he never looked outside to confirm whether it was in fact Saunders. 2RP 128-29.

Jones also testified he heard Saunders' voice on a recording he listened to immediately before testifying. 2RP 113. Jones said the voice sounded the same as the one he heard outside Harmon's home and on the 25 to 30 recordings he had heard "on the answering machine." 2RP 114, 129. The recording was played for the jury. 2RP 115; Ex. 4.

In the jury's absence, defense counsel noted that despite the pretrial stipulation,[2] Jones testified he was able to recognize Saunders' voice

[2] The parties agreed the prosecutor would lead Jones in order to avoid mention of "voice mails" by asking him, "prior to this incident you had

because of the voice mail messages left for Harmon, and asked that the ruling be reviewed with Jones so there would be no further violations. 2RP 122-23. The court noted the lack of a contemporaneous objection to the offending testimony. 2RP 124. The prosecutor agreed to review the ruling with Jones. 2RP 124. Defense counsel then elicited from Jones that the caller never identified himself on the recordings. 2RP 127.

King County Jail Sergeant Dean Owens testified that all inmate phone calls are recorded and catalogued by time, date, the Personal Identification Number (PIN) assigned to each inmate, and by the housing unit from which the call is made. 2RP 132-33, 135. Each housing unit holds 4-20 inmates. 2RP 137. The jail also tracks the location of each inmate by housing unit. 2RP 135.

Owens agreed inmates sometimes make calls using another inmate's PIN. 2RP 134, 142. Therefore, the best the jail system can do is to determine when and from which housing unit a call originated. 2RP 142.

Exhibit 4, the recording played for the jury, was a portion of a jail call made using the PIN assigned to Saunders and from Saunders' housing

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heard brief recordings of a voice you now recognize as Mr. Saunders' voice." 2RP 123-24 (emphasis added).

unit. 2RP 139-42. Owens said there were "at least 19 other folks" that could have used Saunders' PIN to make the call. 2RP 143.

Officer Lauren Hill responded to Jones' 911 call. 3RP 17-19. After speaking with Jones and Harmon, Hill confirmed a court order existed prohibiting Saunders from coming within 500 feet of Harmon's home. 3RP 23, 25; Ex. 8. The order also prohibits Saunders from having contact with Harmon "directly or indirectly, in person, in writing or by telephone, personally or through any other person[.]" Ex. 8. Hill never saw Saunders at or in the vicinity of Harmon's home. 3RP 26.

In closing argument, the prosecutor repeatedly emphasized Jones recognized Saunders' voice from the "25 to 30" times he had heard it on "recordings." 3RP 33, 40, 41. The prosecutor also noted Saunders was prohibited by court order from having any contact with Harmon, not just on March 31, 2001, but for the entire time between May 8, 2009, and May 8, 2014. 3RP 36.

During deliberations, the jury sought "clarification of no contact order[,] Exhibit 8[,] specifically phone calls + answering machine voices, Lines 10 to 12" CP 25; 4RP 2. The jury also sought "clarification of 'on or about said date'[.] What exactly does that date range mean?" CP 28; 4RP 3.

The prosecutor opined the questions indicated the jury was contemplating convicting Saunders for leaving Harmon voice mail messages. 4RP 3. Defense counsel noted:

> This was a subject of a pretrial motion to keep [the "voice mail"] terminology out. I didn't object to it because the answer was a - - well, I wouldn't call it a non sequitur, but it certainly was not the expected answer, and I was concerned about calling attention to it. And I - - obviously that was a tactic that didn't work.
>
> At this point though it is what it is, in terms of the jury handling it. And, were they to come back with this issue, I think it's a mistrial.

4RP 5-6.

Defense counsel proposed instructing the jury it could only convict Saunders if it found he had "in-person" contact with Harmon on March 31st. 4RP 6. The court rejected this proposal, noting there was no evidence of "in-person" contact. 4RP 9. Instead, with the agreement of the parties, the court instructed the jury it could "consider evidence of prior phone calls or voice mails only for the purpose of identification of Mr. Saunders' voice." CP 27, 30; 4RP 9.

C. <u>ARGUMENT</u>

ALLOWING JONES TO TESTIFY HE RECOGNIZED SAUNDERS' VOICE DESPITE LACK OF PERSONAL KNOWLEDGE DEPRIVED SAUNDERS OF A FAIR TRIAL.

Jones testified he knew it was Saunders outside Harmon's home on March 31, 2011, because he recognized his voice. The only reason Jones

thought it was Saunders' voice was because Harmon had played him voice mail messages she said were from Saunders. Because Jones had no personal knowledge of Saunders' voice, the trial court erred by denying the defense motion to preclude Jones' identification testimony. Because the testimony was the strongest evidence of Saunders' guilt, this Court should reverse.

"The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined." State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). "Evidentiary foundations must establish that the evidence is relevant, authentic and admissible." State v. Smith, 87 Wn. App. 345, 348, 941 P.2d 725 (1997). The burden of establishing foundation is on the party who introduces evidence. Id.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.[3] Id.

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[3] For example, a trial court abuses its discretion when it fails to follow the controlling law, or to consider compulsory matters before rendering its decision. In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007) (court's failure to apply controlling law is not merely error, but a "fundamental defect"); State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) court abuses its discretion if it based its ruling on an erroneous view of the law.).

Interpretation of the rules of evidence involve questions of law that are reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The range of discretionary choices is a question of law and a judge abuses her discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can constitute an abuse of discretion. Foxhoven, 161 Wn. 2d at 174.

Evidence must be relevant to be admissible. ER 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. In this regard:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

ER 602. "Stated negatively, the rule bars statements which purport to relate facts but which are based only on the reports of others." 5A Karl B.

Tegland, Washington Practice: Evidence Law and Practice, §602.1 at 339 (5th Ed., 2007).[4]

Similarly,

> If a witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perceptions of the witness, (b) helpful to a clear understanding the witness' testimony or to determining of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

ER 701.

As such, testimony relating to the existence of any fact of consequence to the determination of the action cannot rest on "guess, speculation, or conjecture", or on the claims of others. State v. Prestegard, 108 Wn. App. 14, 23, 28 P.3d 817 (2001); 5A, Tegland, §602.1 at 339.

In State v. Smith, at issue was whether a Washington State Patrol pilot's affidavit asserting that "aerial surveillance traffic marks (ASTMs) painted on the highway" were a half mile apart was properly admitted at Smith's trial for a speeding infraction. 87 Wn. App. at 346. Admissibility of the pilot's assertion turned on whether there was a sufficient basis to

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[4] As Tegland notes, ER 602 "should not be confused with the hearsay rule. If the witness states as fact that which he or she has heard from others, the objection is lack of personal knowledge. If the witness repeats what others have told him or her, the objection is hearsay." 5A, Tegland, §602.1 at 342.

show he had personal knowledge of the distances between the ASTMs. 87 Wn. App. at 351. This Court noted that when a witness's belief is based primarily on hearsay, it is inadmissible. 87 Wn. App. at 352. Finding the State failed to establish whether "the pilot assumed, rather than knew, that the ASTMs were" a half mile apart, this Court admitting the assertion violated ER 602, and reversed and dismissed. Id. at 351-52.

Here, the defense correctly noted that the sole basis for Jones' belief he could identify Saunders' voice was Harmon telling him the voice mail messages he heard were from Saunders. 2RP 43, 100. Jones admitted the caller did not identify himself in the messages. 2RP 127. Likewise, Jones admitted he never spoke with Saunders or ever saw him speak. 2RP 100, 130. Jones also acknowledged he never looked outside to confirm whether it was Saunders he heard on March 31st. 2RP 128-29. These admissions show Jones lacked personal knowledge of what Saunders' voice sounded like, or therefore, who was yelling outside Harmon's home, or who was speaking on Exhibit 4.

Jones's claim was based solely on hearsay from Harmon. This does not meet the "personal knowledge" requirement under ER 602, or the "rationally based on the reasonable perceptions of the witness" requirement under ER 701. Thus, the trial court's decision to admit this

evidence over defense objection was an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

Saunders was prejudiced by the court's error. Without Jones' testimony, there was little to connect Saunders to the charged incident. The prosecution might have sought to make the connection by eliciting from Jones that the voice he heard on March 31st was similar to the voice on Exhibit 4, and then argue that, coupled with Sergeant Owens's testimony that Exhibit 4 was part of a call made from the same housing unit and PIN assigned to Saunders, proved it was Saunders outside Harmon's home on March 31st. But a jury could reasonably doubt the soundness of this connection, either by questioning Jones's ability to compare voices, or the fact that 19 other inmates could be the voice on Exhibit 4.[5] 2RP 143.

The trial court abused its discretion by admitting Jones' identification testimony at trial. Because this error prejudiced Saunders, this Court should reverse his judgment and sentence.

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[5] It is also worth noting that although one of the two people heard on Exhibit 4 states the name "Carl Saunders", neither claims to be that person. Ex. 4.

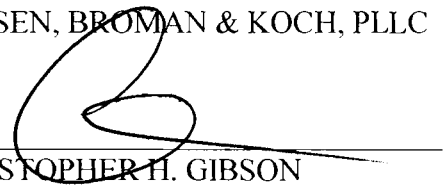
D. CONCLUSION

For the reasons stated this Court should reverse Saunders' conviction.

DATED this 8th day of February 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67677-6-I
	)	
CARL SAUNDERS,	)	
	)	
Appellant.	)	

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 9TH DAY OF FEBRUARY 2012, 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] CARL SAUNDERS
DOC NO. 990490
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF FEBRUARY 2012.

x Patrick Mayovsky

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