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NO. 67677-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
CARL SAUNDERS,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE KIMBERLY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Did the trial court properly exercise its discretion in admitting voice identification evidence where the witness's opinion was based on hearing Saunders' voice under circumstances connecting it to Saunders, as required by ER 901(b)(5)?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Carl Saunders with Felony Violation of a No Contact Order, Domestic Violence, alleged to have occurred on March 31, 2011. CP 1; RCW 26.50.110(1)(5). The State alleged that Saunders violated an order prohibiting him from having contact with Angelica Harmon by going to her home on March 31, 2011, and attempting to contact her. CP 4.

Saunders was convicted by a jury at trial as charged. CP 24; 4RP 11-14.¹ The court sentenced him to a standard range sentence. CP 33-41; 5RP 24. Saunders now appeals his conviction. CP 84.

¹ In comport with the appellant's brief, the five volumes of verbatim report proceedings are referred to as: 1RP -7/18/11; 2RP-7/19/11; 3RP-7/20/11; 4RP-7/21/11; and 5RP-8/26/11.

2. SUBSTANTIVE FACTS.

A Domestic Violence No Contact Order was entered on May 8, 2009, prohibiting Carl Saunders from having any contact whatsoever with Angelica Harmon, including coming within 500 feet of her residence, school, or workplace, until May 8, 2014. 3RP 24-26.²

Omoro Jones met Angelica Harmon in November of 2010. 2RP 97. The two began dating in January of 2011. 2RP 98. Jones visited Harmon nearly daily while they were dating. 2RP 102. Prior to dating Harmon, Jones saw Saunders two or three times in person. 2RP 100. On March 31, 2011, at approximately 1 a.m., Jones was at Harmon's home watching television with Harmon. 2RP 101-107. When Harmon went to use the bathroom, Jones heard Saunders' voice outside the home, calling for Harmon. 2RP 107-110. Jones recognized Saunders' voice from having heard 25-30 answering machine messages that Saunders had left for Harmon. 2RP 100, 110, 127. Jones called 911, and Officer Lauren Hill responded and took a report. 2RP 111, 128-9; 3RP 16-21. Saunders was arrested on April 26, 2011. 2RP 37.

² No Contact Order in question admitted as State's Exhibit 8. 3RP 24.

Prior to trial, the State had Jones listen to a recording of a jail phone call made by Saunders, in which Saunders identified himself and spelled out his name. 2RP 113-15. Jones recognized the voice from the jail call as the same voice that was calling for Harmon outside of her home on March 31, 2011, and as the same voice that he heard on the 25-30 telephone answering machine messages that he listened to prior to the March 31, 2011, incident. 2RP 113-15, 129-30.

During pre-trial motions, the State explained that it would offer Saunders' jail calls, including the call in which Saunders identified himself and spelled his name. 1RP 2-5; 2RP 15, 33-42, 49-58. The State explained that it had played the recording to Jones, and that Jones had identified the voice as the same voice he heard outside of Harmon's home on March 31, 2011. 2RP 15, 34, 43-44.

Defense did not challenge the identification of the speaker in the recorded jail calls offered, but argued that the call was relevant only insofar as Saunders identified himself during the call and Jones could identify the voice as the one Jones heard outside of Ms. Harmon's window. 2RP 34, 56.

The court admitted the portion of the recorded jail call in which Saunders identifies himself and spells out his name. 2RP 115; State's Exhibit 4. King County Jail Sergeant Dean Owens testified that all inmate phone calls are recorded and catalogued by time, date, and Personal Identification Number (PIN), assigned to each inmate, and by the housing unit from which the call is made. 2RP 132-3, 135. Inmate PIN numbers are the same as their booking numbers ("BA number"). 2RP 135. The jail tracks the location of each inmate by housing unit. 2RP 135. The inmate call admitted by the court as State's Exhibit 4 was made using Saunders' PIN number, and originated from the housing unit where Saunders was housed on May 10, 2011, at 5:59 p.m. 2RP 140-42. During trial, defense counsel conceded that Saunders had identified himself during the portion of the jail call that the court admitted. 2RP 77.

During pre-trial motions, defense moved to preclude Jones' identification of Saunders' voice, arguing that it was based upon hearsay statements by Harmon identifying the telephone answering machine messages. 2RP 43. The court ruled that the identification was admissible and stated that the defense argument was a matter of weight and not admissibility. 2RP 45-46.

During trial, defense objected to Jones' identification of Saunders' voice utilizing the 25-30 answering machine messages. 2RP 77-78. Further, defense noted concerns that the identification of Saunders' voice on the answering machine messages was based upon hearsay and also potential 404(b) evidence. 2RP 77-78, 85-86.³

The court rejected the hearsay argument, but sought argument from the State as to whether the voice messages were prior acts. 2RP 79. In due course, the court found the evidence relevant to the issue of voice identification and relevant to provide context to Jones' decision call the police, and found that the evidence was more probative than unfairly prejudicial. 2RP 85, 4RP 8. The court suggested that the evidence be sanitized to avoid any inference that the messages were evidence of prior bad acts. 2RP 85-86. Ultimately, the State and defense agreed to a manner of questioning regarding the messages and informed the court that they'd agreed to a stipulated, leading question. 2RP 87.

³ ER 404(b): **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

During Jones' trial testimony regarding his recognition of Saunders' voice outside of Harmon's home, the prosecuting attorney asked Jones how he was able to recognize Mr. Saunders' voice. Jones stated, "From the times I used to spend with Angelica, he would leave messages on the answering machine." 2RP 100. Defense did not object to Jones' testimony. 2RP 100, 124.

Subsequently, defense took issue with the testimony and requested that the State carefully review the pretrial rulings with Jones. 2RP 123. The court noted defense's failure to object to Jones' testimony in a timely manner. 2RP 124.

During cross examination, defense counsel questioned Jones about the content of the answering machine recordings that he had heard. 2RP 129. Jones described the content of the answering machine messages:

[Defense Attorney]: You mentioned some recordings that you heard prior to this incident. The voice on those recordings that you heard, the brief recordings, that voice did not identify itself?

[Jones]: No.

[Defense Attorney]: And, there wasn't any real content to those recordings?

[Jones]: Usually messages like hey, pick up the phone. This is me, pick up the phone. That's what the messages were like. So, there wasn't in terms of

long detailed information, no, they just referred to pick up the phone, I'm calling. [Declarant identity added].

2RP 129.

During closing argument, the prosecuting attorney argued consistently with the stipulation, stating that Jones heard Saunders' voice previously on 25-30 recordings. 3 RP 33, 40, 41. During deliberations, the jury sought, "clarification of the no contact order, Exhibit 8, specifically phone calls and answering machine voices, Lines 10 to 12." 3RP 57-58. See also CP 28-30; 4RP 2. The court and parties speculated regarding the reasoning behind the jury's question. 3RP 58-4RP 5. In the end, the court gave a limiting instruction: "You may consider evidence of any prior phone calls or voice mails only for the purpose of identification of Mr. Saunders' voice. You must not consider this evidence for any other purpose." 4RP 9. Both the defense and State agreed with that instruction. 4RP 9-10.

C. ARGUMENT

1. STANDARD OF REVIEW.

Questions of relevancy and the admissibility of testimonial evidence are generally within the discretion of the trial court, and

are reviewed only for manifest abuse of discretion. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195, 199 (2010). While the trial court's interpretation of the rules of evidence is a question of law that is reviewed de novo, the court's application of the rules to particular facts is reviewed for abuse of discretion. State v. Sanchez–Guillen, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). “Abuse of discretion exists ‘[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.’ ” Id. An appellate court will find that a trial court abused its discretion when it concludes that no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED JONES' TESTIMONY THAT HE RECOGNIZED SAUNDERS' VOICE.

Saunders challenges Jones' identification of his voice during the trial, primarily contending that the identification was improperly based on hearsay. This claim is without merit. The trial court reasonably concluded that the requirements of ER 901(b) (5) were

met: Jones' identification was based on hearing Saunders' voice "under circumstances connecting it to" Saunders.

Evidence must be relevant to be admissible. ER 402. Any evidence tending to identify the accused as the guilty person is relevant. State v. Whalon, 1 Wn. App. 785, 791; 464 P.2d 730 (1970). Preliminary questions concerning the admissibility of evidence are to be determined by the court, and the court is not bound by the Rules of Evidence in making that determination except with respect to privileges. State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111, 118 (2007); ER 104(a); ER 1101(1) and (3). Further, "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). There merely must be some evidence sufficient to support a finding that the evidence in question is what its proponent claims it is. State v. Payne, 117 Wn. App. 99, 69 P.3d 889 (2003). A trial court may rely upon information including lay opinions, hearsay, or the proffered evidence itself in making its determination. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 104.5, at 98 (4th ed.1999). Information relied upon by the court must be

reliable, but does not have to be admissible. City of Bellevue v. Mociulski, 51 Wn. App. 855, 860, 756 P.2d 1320 (1988).

ER 901(b) (5) governs testimony identifying voices. Voices are properly identified by "opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." ER 901(b) (5). Voice identification is sufficient identification to sustain a conviction where the witness has some reasonable basis for comparison of the accused's voice with the voice that the witness identifies as the accused's. Whalon, supra, 1 Wn. App at 789. The probative value of an identification is a question for the jury. Id.

Saunders seeks to rely on State v. Smith, 87 Wn. App. 345, 941 P.2d 725 (1997), to support the proposition that the voice identification based on answering machine messages was inadmissible because the basis for identification was hearsay. Appellant's Brief at 11. This reliance is misplaced. In Smith, the issue was whether a pilot's assertion regarding distance markers on a highway was admissible to prove a speeding infraction when the pilot's assertion was not based on personal knowledge.

Unlike voice identification, as a pre-requisite to the admission of results of a distance measuring device, the moving

party must show that the device is functioning properly and producing accurate results. Bashaw, 169 Wn. 2d at 140. Results of a mechanical device are not relevant until the party offering the results makes a prima facie showing that the device was functioning properly and producing accurate results. Id at 141-2.

In Smith, the court addressed a specific "speed trap authenticity" statute that required that certain criteria be met before such testimony was admissible. Id. In contrast, ER 901(b) (5) does not require specific criteria to be met for voice identification to be admissible. It requires only that the opinion be "based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." ER 901(b) (5).

In the present case, the court properly considered the evidence, both pre-trial and during Jones' trial testimony, that Jones knew Saunders was previously in a relationship with Harmon. 2RP 23-24, 111-12. While Jones and Harmon were dating, Harmon played 25-30 answering machine messages for Jones and told him that they were left by Saunders. 2 RP 43, 100, 110, 127, 129. The voices on the messages sounded just like the voice coming from outside of Harmon's window on March 31, 2011. 2RP 1007-110. Significantly, the voice on the answering machine messages and

the voice Jones heard on March 31, 2011, also sounded like the voice on the jail call recording admitted during the trial in which Saunders identified himself. Ex. 4; 2RP 15, 34, 43-44, 113-15, 129-30. These circumstances, taken together, were sufficient to establish that Jones' identification of Saunders' voice was "based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." ER 901(b) (5). The trial court did not abuse its discretion in so concluding.

D. CONCLUSION

For the foregoing reasons, the Court should therefore affirm the conviction.

DATED this 29th day of May, 2012.

Respectfully submitted,

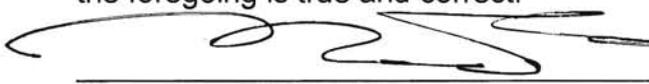
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SAUNDERS, Cause No. 67677-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/30/12

Date