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NO. 68807-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARK CURTIS HUDSON,

Appellant.

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

The Honorable LeRoy McCullough, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	<u>STATEMENT OF CASE IN REPLY</u>	1
B.	<u>ARGUMENT IN REPLY</u>	2
	1. THE STATE'S CONCESSION OF ERROR IS WELL TAKEN.	2
	2. THE COURT ERRONEOUSLY ADMITTED THE OFFICER'S LAY OPINION OF THE IDENTITY OF THE WOMAN IN THE RECORDED PHONE CALLS.	2
	a. <u>The Standard of Review is De Novo.</u>	3
	b. <u>Admitting the Officer's Opinion of Identification was Reversible Error Whatever the Standard of Review.</u>	3
C.	<u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Farr-Lenzini,
93 Wn. App. 453, 970 P.2d 313 (1999) 2, 5

State v. George,
150 Wn. App. 117, 206 P.3d 697 (2009) 2, 5

State v. Jamison,
93 Wn.2d 794, 613 P.2d 776 (1980) 3-5

State v. Johnson,
125 Wn. App. 443, 105 P.3d 85 (2005) 3

State v. Kirkman,
159 Wn.2d 918, 155 P.3d 125 (2007) 2

State v. Montgomery,
163 Wn.2d 577, 183 P.3d 267 (2008) 2, 5

STATUTES AND OTHER AUTHORITIES

Constitution, art. I, § 3 3

Constitution, art. I, § 21 3

Constitution, art. I, § 22 3

United States Constitution, amend. 14 3

United States Constitution, amend. 6 3

A. STATEMENT OF CASE IN REPLY

The State chooses to treat the trial witness as "Rebecca Hudson," Resp. Br. at 4 n.2., although under oath she denied that name, denied ever being married to Mr. Hudson, and denied having his children. App. Br. at 4-5. The jury had to decide whether this witness was the person protected by the court order, and was the person Mr. Hudson contacted from the jail. In order to designate these convictions as "domestic violence," the State also had to prove she was a member of Mr. Hudson's family or household. CP 20, 36-37, 63-65.

Appellant does not concede these issues, and cautions the Court against merely accepting the State's assumption.

The State also claims "Rebecca" "grudgingly admitted that it was her voice on Exhibit 14." Resp. Br. at 12. While the witness admitted having spoken with the Detective by phone, after listening to some portion of the recording, she agreed it sounded like her, but testified that her twin sister sounds like her as well. After further consideration, she explicitly denied it was her own

voice on that recording, or that she spoke with Detective Johnson on that date. RP(4/9) 104-05.

B. ARGUMENT IN REPLY

1. THE STATE'S CONCESSION OF ERROR IS WELL TAKEN.

The State concedes there was insufficient evidence to support the conviction of witness tampering. Resp. Br. at 7-9.

Appellant accepts this gracious concession, and urges the Court to do the same. It should reverse and dismiss this charge with prejudice.

2. THE COURT ERRONEOUSLY ADMITTED THE OFFICER'S LAY OPINION OF THE IDENTITY OF THE WOMAN IN THE RECORDED PHONE CALLS.

The State cites with approval and without distinction the authority cited by appellant, State v. George, 150 Wn. App. 117, 206 P.3d 697 (2009). Resp. Br. at 9-10, 13; App. Br. at 16-19. Nor does the State distinguish appellant's other authorities of relatively recent effect: State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); and State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). See App. Br. at 13-20.

a. The Standard of Review is De Novo.

The State argues an evidentiary ruling is reviewed for abuse of discretion. Resp. Br. at 9.

Appellant challenges the admission of this evidence not merely as violating the Rules of Evidence, but also as invading the province of the jury, and so violating appellant's right to a jury trial. Const., art. I, §§ 3, 21, 22; U.S. Const., amends. 6, 14. The standard of review for a challenge to the right to a "fair and impartial jury" is de novo. State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005).

b. Admitting the Officer's Opinion of Identification was Reversible Error Whatever the Standard of Review.

Without distinguishing any of the authorities appellant cited, the State relies on a single case: State v. Jamison, 93 Wn.2d 794, 800, 613 P.2d 776 (1980). The State argues Detective Johnson had "special knowledge" that the jury did not, and so his testimony based on that special knowledge did not impinge on the jury's function. App. Br. at 11.

Jamison does not support the State's argument. First of all, the Supreme Court held in

Jamison it was error to admit the testimony of two Green Hill School counselors identifying the defendant, a resident of that facility with whom they were familiar for the previous six months, as the person captured in surveillance photos committing a robbery. Despite the counselors' extensive daily contact and personal familiarity with the defendant,

The controlling principle is whether the opinion evidence will assist the jury in correctly understanding matters that are not within their common experience. ...

... Although the surveillance photographs were properly admitted, the defendant himself was in the jury's presence. Thus, the jury was able to compare his appearance with the photographs and decide whether the robber pictured therein was the defendant. The counselors' knowledge of defendant's appearance placed them in no better position to make that critical determination. Accordingly, the counselors' opinion testimony was an impermissible invasion of the jury's province.

Jamison, 93 Wn.2d at 798-99. In the same manner, the witness Rebecca was before the jury. They could hear her voice when she testified. Unlike in Jamison, the detective here had very little contact with the woman he believed was Rebecca Hudson: it was limited to one recorded telephone call. The

jury heard portions of this call, as did the witness.

In Jamison, the defendant himself admitted he was the person in the photographs. Thus the error was harmless. Id. at 800.

The error could not be harmless here. The State's witness Rebecca said her name was Rebecca Brooks, not Rebecca Hudson. Unlike the defendant in Jamison, she denied it was her voice on the recorded statement Detective Johnson took on September 17, 2010. RP(4/9) 102-06. She also testified she did not possess the cell phone with the number called from the jail after late September. App. Br. at 6; RP(4/9) 117-19. There was no other evidence that the woman on the phone was Rebecca Hudson.

In Jamison, the State's opinion witnesses were counselors, not law enforcement officers as here. This factor was found particularly prejudicial in Montgomery, Farr-Lenzini, and George, supra. A police officer's opinion carries extra weight with a jury although in fact it carries no greater probative value.

For the same reasons as were present in those cases, even if the standard of review is abuse of discretion, this Court should reverse Mr. Hudson's conviction for violating a court order.

C. CONCLUSION

This Court should reverse and dismiss the charge of witness tampering. It should reverse and remand for a new trial the charge of violating a court order.

DATED this 18th day of June, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this date I caused a true and correct copy of the attached document to be served on the following individuals, postage prepaid, addressed as indicated:

Ms. Erin Becker
King County Prosecutor's Office
Appellate Unit
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

I declare under penalty of perjury under the laws of the state of Washington that the above statements is true and correct to the best of my knowledge.

6/18/2013-SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST