

No. 43046-I-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT JESSE HILL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Appellant Robert Hill was deprived of his state and federal constitutional rights to due process and the trial court abused its discretion in admitting evidence and convicting Hill based upon evidence admitted without sufficient authentication.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under both the state and federal due process clauses, the evidence used against a defendant in a criminal case must be sufficiently reliable. For audiorecordings, it must be established that the recording is authentic, which requires evidence regarding the device which made the recording, the person who made the recording, whether additions or deletions had been made, and other questions designed to guarantee reliability of the evidence.

Hill's conviction was based in large part on audiorecordings which were contained on a compact disc handed to a police officer by a witness who did not testify at trial. Were Hill's rights to due process violated and did the trial court abuse its discretion in admitting and relying these audiorecordings where there was no foundation to establish any of the requirements to prove their authenticity?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Robert J. Hill was charged by corrected amended information with intimidating a judge. CP 57; RCW 9A.72.160(1).

Pretrial and bench trial proceedings were held before the Honorable Judge Ronald E. Culpepper on January 4, 9, 11-12, 2012, after which Judge Culpepper found Hill guilty as charged. 1RP 174; CP 65-82.¹ On February 3, Judge Culpepper imposed a standard-range sentence of 16 months in prison. 2RP 17.

¹The verbatim report of proceedings consists of three volumes, which will be referred to as follows:

the two chronologically-paginated volumes containing the proceedings of January 4, 9, 11 and 12, 2012, as "1RP;"
February 3, 2012, as "2RP."

Hill appealed and this pleading follows. See CP 89-100.²

2. Testimony at trial

On September 8, 2011, Tacoma Municipal Court prosecutor Eric Furer appeared in the municipal court in front of Commissioner Randy Hansen, in a case involving Robert Hill. RP 71-72. Furer asked the Commissioner to increase bail on Mr. Hill even though Hill had already posted a “booking bail” in the same matter and was out of custody. RP 71-72. As a result of this, Furer admitted, Hill was taken into custody and had to post additional bail. RP 72. Furer thought, however, that the Commissioner had actually set bail “somewhat less” than what Furer had requested. RP 72.

The next day, which was Friday, September 9th, Furer checked and saw that Hill had posted the increased bail. RP 73. Later that morning, Hill came into the courtroom where Furer was working and Hansen was presiding. RP 72-73. Hill had copies of “affidavits of prejudice” filled out for the Commissioner and was speaking to people waiting for their cases to be called. RP 72-74. On the documents, Furer said, it was written “Randy, in quotation marks, I think I’m too handsome,” or “I think I’m so handsome Hansen.” RP 74. Furer that it appeared that Hill was encouraging people to file the affidavit in court. RP 74.

According to Furer, Hill appeared “agitated.” RP 74. Furer also thought that Hill’s leaving and entering the courtroom was “somewhat of a disturbance” to court proceedings, although he admitted that it did not stop

²Because of the length of the sentence, a Motion for Accelerated Review is also being filed herewith.

proceedings at all. RP 74.

Furer testified that Hill approached him at the end of the calendar after most of the day's cases were done. RP 74-75. Furer told Hill that there was nothing on the docket for Hill but Hill still wanted to speak with the Commissioner, asking Furer to go with him. RP 75. According to Furer, Hill said Hansen had given Hill the "mf'ing" bail increase "in some type of retaliatory sense" against Hill because Hill "had knowledge of the Commissioner's incestuous relationship with his [the Commissioner's] daughter, Jodi." RP 75.

At the time of this conversation, Commissioner Hansen was not on the bench or even in the room. RP 75. A few moments later, everyone left the courtroom, including Hill, without incident. RP 76.

Furer decided to go tell the Commissioner about the conversation with Hill. RP 76. He first asked the Commissioner if he had a daughter named Jodi, and when the Commissioner said "yes," Furer then told the Commissioner that Hill had been "saying something to the effect that you have had an incestuous relationship with Jodi; he knows Jodi, and that's why you gave him the bail." RP 76.

The following Monday, Furer said, he received a phone message in the morning from someone claiming to be Hill. RP 77. Furer said the message referred to the comments Hill had made and asked for another bail hearing to be set. RP 77-78. Furer recalled the message saying the caller did not want to cause embarrassment to the city but "he would do this the, again, mf'ing, expletive, hard way if he needed to." RP 78, 87-89. Furer said the voice on the message seemed agitated and raised, and that

the caller said something about calling a number by 10 that morning
“otherwise its on your shoulders.” RP 78.

At that point, Furer contacted Pierce County Sheriff’s Department
sergeant Jesus Villahermosa. RP 50, 78-79. A decision was made to get
the message recorded, something Furer said a person in his office who did
“tech” stuff had done by someone at the phone company. RP 78-79.
When he received the disc, Furer listened to it and handed it over to
deputies. RP 79.

Furer said he had handled cases with Hill and witnessed others and
thus had heard Hill’s voice before. RP 79. He opined that the caller’s
“tone and the cadence and the speech patterns matched” with that of Hill.
RP 80. Villahermosa also opined the voice sounded like Hill. RP 59.

The message to Furer said something about Hill as “candidate of
Tacoma City Council Position Three” and left a phone number, then said:

[C]onsidering that I’ve had carnal relations with Jody, the daughter
of Judge Hansen, who also have had [sic] carnal relations with her
that she’s told me about the incest with him and that’s why he
gave. . . fifteen thousand dollars mother fucking bail. You might
not have known all that but now you do. Hey, and I just want to
reset everything on this thing in front of him today if possible. I
tried to do it yesterday in a friendly way and the county sheriff’s
department that knows that I know this and wants to fuck with my
schedule kept me away from doing this yesterday so give me a call
at your earliest convenience because I’d like to do this in an easy
way in a nice friendly way not embarrass the City of Tacoma
government way. But I’ll do it the mother fucking hard way if I
have to. If you don’t call me by ten o’clock today. . . it’s on your
shoulders Eric Furer.

See Exhibit 5; CP 61.

That same day, Villahermosa was contacted by a man named
Derek Young regarding some phone messages purporting to be from Hill.

RP 42-46. Young is the owner/webmaster of a popular “blog,” Exit 133, which discusses issues of interest regarding the city of Tacoma. RP 131. The officer went to Young’s office, where Young handed over a CD, saying there were two phone messages which been left on his business voice mail account. RP 46-47. Villahermosa, who said he had previously had “dozens” of contacts with Hill, testified that he played the recordings and recognized Hill’s voice in both calls. RP 57. In the first call, the caller identified himself as Hill, while in the second, the caller tried to lower their voice. RP 57. Because of his previous contacts with Hill, including at the courthouse or in relation to city counsel meetings, Villahermosa said Hill’s voice was “very familiar,” and Villahermosa said that he thought the second caller sounded like Hill, too. RP 46, 61.

Villahermosa admitted, however, that he reached his conclusion that the caller was Hill in large part based upon the content of the calls. RP 57. He conceded that a number of his contacts with Hill were for “goofy things.” RP 62.

The first part of the compact disc that Young provided the officer was transcribed as follows:

Yeah, this is Robert Hill. It’s Sunday morning the eleventh of September. Tomorrow morning there’s a big event I’m going to be a part of in the county courthouse on the second floor on the north side of the west half because it’s normally Judge Ladenburg’s court but there’s this punk-ass bitch Judge Hansen who put me at fifteen thousand and he did it for bad reason cuz I mean he did it for bad reason and he did it to the wrong person and you can watch with your camera of whatever you want to use to make notes of uhh. . . and, you know, publish it in your thing exit 133.

See Exhibit 4; CP 61. The second part was transcribed:

Do you want to do the story on the commissioner that had

incest with his daughter that he gave me fifty thousand dollars bail and he's going to get fucked in the ass, rhetorically, figuratively speaking, tomorrow probably probably? Uhh. . .there's a guy name of Robert Hill. He's making all the sink about this. He's kind of well known. And if you want to reach him, my name's Bubba. I'm his. . . I'm a. . . just a friend just kind of making some extra phone calls to the media.

CP 61.

Commissioner Randall Hansen of the municipal court remembered increasing Hill's bail and Hill being in and out of the courtroom a few times the next day. RP 88-91. The only exchange the Commissioner heard was when Hill did not want to take a seat as suggested by court staff, but the Commissioner did not think there was any reason Hill should not be standing where he was so the Commissioner said nothing. RP 92.

When asked, Hansen testified that these kinds of accusations could affect his employment in the future and it was difficult or awkward to discuss with his daughter. RP 97-99. Hansen said his daughter told him that she did not know Hill at all and that they discussed an article about Hill in the paper when Hansen was babysitting his granddaughter. RP 99-100.

The Commissioner also recalled and reported to Villahermosa that Furer claimed Hill had said he knew Jodi. RP 102.

Robert Hill admitted that he did not, in fact, know Jodi Hansen personally and never had any sexual relationship with her himself. RP 106-108. Instead, he learned of her on September 8th, after Hill had been taken into custody on the increased bail when he was sitting in the hallway, waiting for release. RP 106-107. Another man was there and saw Hill's paperwork. RP 107. The man said, "[y]ou had Hansen today?"

RP 107. The man then told Hill that the man knew Hansen, that Hansen's daughter's name was Jodi and that they had a kid together. RP 106-107. The man showed Hill a tattoo on his right shoulder with the name, "Jodi." RP 107.

Hill was at the courthouse the next day for another reason and had gone to the courtroom where Hansen was presiding to pass out affidavit of prejudice forms he had copied at the law library and tell people about those forms. RP 111. He also wanted to talk to Furer and ask to "re-discuss" the bail increase and set up "less than five-day notice hearing." RP 112. Hill had been told that Hansen would not be in the courtroom after Monday so Hill wanted to get the matter reset before him quickly. RP 111-12.

Hill conceded that he had written "Randy, quote, I'm so handsome, unquote, Hansen" on the affidavit of prejudice. RP 127. Hill also remembered speaking to the prosecutor but denied saying anything to Furer about Hansen having an incestuous relationship with Hansen's daughter. RP 113-14. Hill also did not say anything to Furer about having had a relationship with Hansen's daughter himself. RP 114.

The next night, Saturday, very late, Hill said, he formed the opinion that there was not a lawful basis to increase the bail. RP 113. He admitted making some phone calls at some time between 2 and 4 in the morning after that. RP 115. In the first call to Young, the owner/host of "Exit 133," Hill said, "[t]omorrow morning there's a big event I'm going to be part of at the county courthouse," which Hill explained at trial was referring to getting the hearing held so quickly and his expectation of

eliminating the increase of \$11,400 in bail. RP 115, 133. Hill conceded he had also called Hansen “punk-ass bitch Judge Hansen” in that message, because he was angry. RP 116.

Hill said that, although he had never previously met Young, he had contacted Young a few times trying to get some publicity for his campaign or other issues. RP 133. Young had never called back and Hill was hoping that this time, Young would call back to ask what Hill was talking about. RP 133.

The second call Hill thought he had made to the Tacoma News-Tribune newspaper. RP 117, 135. He had disguised his voice as a private joke with the reporter he thought he was calling, and left the phone number of an answering service he had used. RP 137.

In the call where Hill said Hansen was “going to get fucked in the ass rhetorically, figuratively speaking, tomorrow morning,” Hill said that it was an insulting reference to homosexuality playing on the fears of the average man about it. RP 118. But Hill said that what he meant when he said it was that Hansen was going to “endure embarrassment from having wrongfully raised the bail.” RP 118. Hill staunchly denied that he was going to ever say anything in open court about incest allegations. RP 118. Indeed, Hill described himself as a sex educator and “sex worker” and said he knew incest was a sensitive subject. RP 119. He said he was mad, venting and got a “silly idea” to try to get the website to cover it. RP 119.

The phone call to Furer about not embarrassing the city, Hill said, was because he often made comments at city council meetings and he said it would embarrass the city if he talked about a judge wrongly setting bail.

RP 121. He said he did not intend to imply anything about going before the council to accuse Hansen of incest. RP 121. Indeed, he said, he would not have said any such thing because he believed a victim should not be forced to be involved in “criminal justice action” and should initiate it themselves. RP 121.

Hill said what he had intended was to ask Hansen if he had set the bail increase because he thought Hill was responsible for getting Jodi pregnant, knowing the answer was going to be “no.” RP 130. Hill was just planning on seeing what Hansen “would have done from that.” RP 130.

Ultimately, Hill did not know why he said the things about incest. RP 139. He said he had not known at the time he made the statements that incest was a crime, and had no explanation for why he said what he said but testified that he was not trying to harm Hansen’s reputation to make him change the bail amount. RP 149.

Hill did not remember making the third call, the one Furer received. RP 117.

In its written findings of fact and conclusions of law, the judge found Hill guilty of intimidating a judge based upon all three calls, by communicating “the intent to accuse any person of a crime, to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule; or to do any other act that is intended to harm substantially the person threatened or another with respect to that person’s health, safety, business, financial condition or person [sp] relationships[.]” CP 68-69.

D. ARGUMENT

1. THE TRIAL COURT ERRED AND HILL'S DUE PROCESS RIGHTS TO BE FREE FROM CONVICTION UPON UNRELIABLE EVIDENCE WERE VIOLATED WHEN THE COURT ADMITTED AND RELIED ON THE RECORDINGS WITHOUT SUFFICIENT EVIDENCE FOR AUTHENTICATION

Both the state and federal due process clauses provide the accused with the rights to a fundamentally fair trial, which includes the right to have the evidence used against him meet certain standards of reliability. See, State v. Johnson, 132 Wn. App. 454, 462-63, 132 P.3d 767 (2006), review denied, 159 Wn.2d 1002 (2007); see also, California v. Green, 399 U.S. 149, 187 n. 20, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (Harlan, J., concurring). Here, in deciding that Hill was guilty as charged, the trial court relied in large part on the recordings of the phone calls purporting to be to Young, admitted into evidence over defense objection. See CP 65-69. This Court should reverse the conviction, because the trial court abused its discretion in admitting the recordings, which were not properly authenticated as required and the resulting conviction was thus gained in violation of Hill's due process rights.

a. Relevant facts

Before trial, Hill moved to exclude the recordings of the phone calls. Regarding the two voice mail messages that Young provided to the officer, Hill argued they were inadmissible because Young was out of town and possibly out of the country and thus could not provide the required authentication and foundation for those calls. RP 16-17. The prosecutor conceded that Young was out of the country but argued that

Villahermosa could provide the required foundation for admission of the tapes by simply identifying the voice on them as belonging to Hill. RP 17. He argued that the problems with Young being gone and unable to establish the circumstances of the actual recording “goes to weight and not admissibility.” RP 17. The court reserved ruling, saying it needed an offer of proof from the officer. RP 18.

Later, the officer testified that he went to Derek Young’s office in Tacoma and was handed a “CD recording” from Young. RP 47. Although the officer testified that he booked the compact disc into evidence and had a copy made, verifying that the copy was a true copy of the original, he was not involved in making the recording. RP 48-49.

Counsel argued that there was not sufficient foundation to support admission of the recordings, noting that the only evidence regarding the Young calls was that Young gave a CD to Villahermosa but there was no evidence regarding “the system they came in on, how they were recorded by Mr. Young,” or other “foundation or authentication” of the CDS. RP 41. The court then clarified with the officer that the “sheriff’s office didn’t copy it.” RP 51.

Despite this questioning, the court nevertheless admitted the CD purportedly made by the absent Young, saying it was sufficient foundation and authentication if Villahermosa testified that he had conversations in the past with Hill and then identified his voice. RP 52.

In finding Hill guilty as charged, the court relied on both Young tapes as providing proof to support the conviction. See CP 65-69. The court’s written findings and conclusions said that Hill had “made a threat,

either directly or indirectly to Commissioner Randy Hansen,” and that the “threats consisted of three messages or voice mails,” referring to the two calls to Young and the third call to Furer. CP 66.

b. The convictions were improperly based on the recordings which should not have been admitted into evidence

The trial court abused its discretion in admitting this evidence and relying on it in finding guilt, because the recordings were not properly authenticated. A trial court abuses its discretion in admitting evidence when the court’s decision is manifestly unreasonable or it has exercised its discretion on untenable grounds, or for untenable reasons. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In this case, this Court should find that the trial court abused its discretion in allowing admission of evidence when basic threshold requirements of authentication were not met. Further, the admission of the unreliable, unsupported evidence and its use against Hill violated Hill’s due process rights to be free from conviction upon anything less than reliable evidence.

First, the trial court erred in admitting the evidence without ensuring sufficient authentication to make sure the evidence was reliable. Authentication is “a threshold requirement designed to assure that evidence is what it purports to be.” Karl B. Tegland, *Washington Practice*, § 900.2, at 175 (4th ed. 1999). To satisfy the requirements for authentication, there must be evidence sufficient to support a *prima facie* showing that the evidence is authentic. See, e.g., State v. Jackson, 113 Wn. App. 762, 769, 54 P.3d 739 (2002).

For sound recordings, the requirements are:

(1) It must be shown that the mechanical transcription device was capable [of recording. . .] (2) It must be shown that the operator of the device was competent to operate it. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.

State v. Robinson, 38 Wn. App. 871, 885, 691 P.3d 213 (1984), review denied, 103 Wn.2d 1013 (1985).

Thus, in Robinson, there was sufficient evidence to authenticate an answering machine tape where the witness testified about 1) buying the answering machine, 2) installing it according to the instructions, 3) hearing a taped message left by a caller who said he was Robinson, 4) preserving it for police to pick up, and 5) making no changes to the tape at any point. 38 Wn. App. at 886. The witness also testified that he recognized the voice on the message as that of the defendant in that case, Robinson. Id.

Further, the officer who took the tape said he had also made no changes to it. Id. This evidence was sufficient to authenticate the tape. Id.; see also, State v. Smith, 85 Wn.2d 840, 540 P.2d 424 (1975) (sufficient authentication because there was expert testimony the device was capable of recording and everything in working order on the relevant day, the accuracy of the content of part of it was corroborated, there was lack of opportunity for changes and deletions, and the preservation of it was thoroughly documented).

Here, in stark contrast, none of the factors showing authentication were met for the Jones recordings. There was no testimony about the

device on which they were recorded, or the operator of it being competent, or that no changes, additions or deletions were made, or any of the other foundational requirements. Nor was the “manner of preservation of the record. . . shown.” Instead, the only evidence was hearsay from the officer who was handed a CD someone - possibly Jones - had made, with Jones declaring that it contained recordings he had received on his voice mail account. The officer, however, never heard the original messages himself and thus could not have testified to verify that the recordings were complete or accurate. See RP 48.

Nor was it sufficient that someone identified the voice on the messages as sounding like Hill or even that the caller identified himself as such. While there is a concept of an “earwitness comparison” to authenticate a tape, such a comparison requires a witness “who has personal knowledge of the events recorded on the tape” to testify that they have listened to the tape and believe it accurately portrays the events. See Jackson, 113 Wn. App. at 762 (finding such a comparison sufficient where the witness who called 9-1-1 testified that she had reviewed an audio recording of a call, copied by police at 9-1-1, and that there had been no changes or deletions to what she said was an accurate recording of her call). Here, the officer only heard the recordings Young handed him, not the original messages, so that he could not have provided that “personal knowledge of events.” See RP 48.

The error in admitting this evidence over defense objection compels reversal. The Young recordings comprised the bulk of the evidence against Hill and were two of the three bases upon which the court

found guilty. CP 65-69. Had the court applied the proper standards, those recordings would have been excluded. And because those recordings were the bulk of the evidence used against Hill and of the reason for the court's conclusion of guilt, reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 31st day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Robert Hill, BKG 2011314058, PC Jail, 910 Tacoma Ave. S., Tacoma, WA, 98402.

DATED this 31st day of May, 2012.

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