

65246-0

NO. 65246-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

REY DAVIS-BELL,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 28 AM 4: 22

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE LAURA INVEEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The police arrested Rey Davis-Bell, placed him in a room and told him that he was being recorded. He then made a number of telephone calls, and his side of the conversation was recorded. Given that he was aware that he was being recorded, has Davis-Bell failed to establish that these conversations were private communications covered under the privacy act?

2. After he was advised of his Miranda¹ rights, Davis-Bell requested an attorney. Were the police required to re-advise Davis-Bell of his Miranda rights again on the recording even though they did not intend to interrogate him?

3. Any error in admitting evidence under the privacy act is harmless unless it is reasonably probable that, had the error not occurred, the outcome of the trial would have been different. In light of the overwhelming evidence of Davis-Bell's guilt, has he failed to show that any error in admitting a recording of his telephone conversations justifies reversal of his convictions?

4. Davis-Bell agreed that testimony about his video expert's work on a prior homicide was not relevant. The prosecutor asked

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the expert about whether his work was peer reviewed, and the expert responded that it was not. Did the trial court act within its discretion in holding that this questioning did not open the door to testimony about the expert's work on a different case?

5. Davis-Bell admitted that his video expert's work on a prior homicide case involved different processes. Was any error in excluding evidence about this prior case harmless?

6. Davis-Bell proposed the firearm special verdict instruction that the trial court gave. Does the doctrine of invited error bar him from challenging it on appeal?

7. At the time of the trial, the Court of Appeals had upheld the firearm special verdict instruction proposed by Davis-Bell. Has he failed to show that his attorney was ineffective by proposing this instruction?

8. The jury necessarily found that Davis-Bell was armed with a firearm when they convicted him of murder, attempted murder, and unlawful possession of a firearm. Is any error in the firearm special verdict instruction harmless?

B. STATEMENT OF THE CASE

After arguing with his ex-girlfriend Claressa Scott, Davis-Bell drove to her West Seattle apartment and fired nine shots into the apartment. Scott, her neighbor, and her neighbor's child narrowly missed being hit. Immediately afterwards, Davis-Bell admitted to his grandmother that he committed the shooting and stated that he was going to take care of everyone who had hurt him. He then drove to the Philadelphia Cheese Steak Restaurant and shot and killed the owner, Degene Deshasa. He also shot and seriously wounded a customer and then fired several shots at a restaurant worker as she fled the store. Later that night, he hid at his girlfriend's house and told her that he had shot a man.

Davis-Bell's grandmother reported his statements to the police, and they arrested him the next day as he ran from his girlfriend's house. Witnesses at the Philadelphia Cheese Steak Restaurant identified him as the shooter, and his cell phone records placed him at the scenes of the crimes. An analysis of the fired shell casings established that the two shootings were linked, and were consistent with being fired by the kind of gun that Davis-Bell owned.

A jury convicted him of one count of first-degree murder, three counts of attempted first-degree murder and one count of first-degree unlawful possession of a firearm.

1. SUBSTANTIVE FACTS

a. The Shooting At Claressa Scott's Apartment.

Claressa Scott dated Davis-Bell for several months. RP 492-95. He had her name tattooed on his chest, but she later suspected him of being unfaithful, and they broke up in April of 2007. RP 491-96, 542-44, 1722.²

In the summer of 2007, Davis-Bell began dating Satrinna “Dee Dee” Thomas. 3RP 33-34. They discussed marriage, and he stayed over at her house several times a week. 3RP 35. Unbeknownst to Thomas, Davis-Bell resumed a sexual relationship with Scott. RP 501-04, 546-47. In order to keep their relationship a secret, Scott understood that she was not supposed to call or text him. RP 504, 563.

Nonetheless, Thomas became suspicious of Davis-Bell. 3RP 37-38. In late January of 2008, she found Scott's phone

² The State adopts the abbreviations for the report of proceedings used in the appellant's opening brief.

number written on a piece of paper and she became very angry.

3RP 37-40, 81-82.

After their break-up, Davis-Bell had allowed Scott to continue to use his car. RP 508-09. On the night of January 29, 2008, the car was impounded, and Scott called Davis-Bell and left a message on his voicemail seeking his help to get the car out of impound. RP 508-14, 543-50. Later that night, a woman called Scott back, and stated, "You think he's going to help you with that fucking Lexus."³ RP 510. Scott hung up the phone. RP 510.

The next morning, January 30, 2008, Scott's friend and neighbor, Rasheena Thomas and her five-year old daughter Shashie, visited Scott in her West Seattle apartment. RP 471-72, 493, 519-20. Scott called Davis-Bell again and told him about the car; he said that he would help her. RP 472-73, 515-16. While Davis-Bell spoke with Scott on the phone, Thomas was nearby, and, after the call ended, she questioned him about what was going on. 3RP 41-43.

³ Thomas was the likely caller. The cell phone records show a call from Thomas's cell phone to Scott's phone at 11:54 p.m. on January 29, 2008. RP 513; 3RP 80; Ex. 131.

A few minutes after this telephone conversation ended, Davis-Bell called Scott back and began arguing with her. RP 516-19, 472-73. He was very angry, accused her of trying to ruin his life, and told her that he hated her. RP 519-20, 579. Scott hung up on him. RP 519.

Davis-Bell then called his paternal grandmother, Janiece Jackson. RP 676-80, 1759; Ex. 130.⁴ He was upset about friction between Scott and Thomas, and that a friend had not paid a bill. RP 677-79, 691. He told Jackson that he was going to West Seattle "to take care of business." RP 680, 696. Davis-Bell sounded so upset that Jackson was concerned about what he intended to do to Scott. RP 681. She unsuccessfully tried to talk him into coming to her house, and after their conversation ended, she called other members of the family and asked them to contact Davis-Bell. RP 681-82, 696, 1725-27.

Approximately fifteen minutes after Scott and Davis-Bell ended their last phone conversation, numerous shots were fired through the window of her apartment. RP 474, 518. Scott hit the

⁴ Telephone records show that, after a series of calls between Davis-Bell and Scott, he called Jackson at approximately 10:18 a.m. and talked to her for approximately 13 minutes. Ex. 130; RP 513, 678; 2RP 159.

floor and narrowly missed being hit. RP 526. Rasheena Thomas grabbed her daughter and ducked into a corner. RP 475, 527-28. Scott did not see the shooter. RP 529-30. No one was hit, though there were nine bullet holes in the wall. RP 612-24, 651-59.

A construction worker, Brian Cordes, was outside and heard the gunshots. RP 581-83. He saw a man walking across the parking lot near where the shots came from. RP 586-87. He could not tell the man's race. RP 587.

After the shots were fired, Scott called her cousin and her case manager. RP 530-31. Both encouraged her to call the police, but she was reluctant because she was on house arrest and had been smoking marijuana in the apartment that morning. RP 531-32. Approximately twenty minutes after the shooting, at 10:47 a.m., she called the police. RP 532, 736.

Meanwhile, Janiece Jackson called back Davis-Bell on his cell phone. RP 682, 696. She asked him not to go to Scott's apartment, and he replied that he had already been there. RP 683, 697. He stated, "I saw her in the window and shot at the window." RP 683, 697, 1333. He added, "I'm going to take care of the rest of them." RP 697. He also told Jackson, "Anybody that has hurt me, I have enough ammunition to take care of them." RP 691.

During this time, Davis-Bell also talked to his current girlfriend, Dee Dee Thomas, several times over the telephone. RP 43-46; 3RP 80; Ex. 130. He was so angry that she could barely understand what he was saying. 3RP 44-45. He complained that Scott had threatened to have her cousins do something to him. 3RP 45. He also stated that "he was going to do something to everybody that had done something to him." 3RP 46. Thomas unsuccessfully tried to calm him down, and he hung up on her. 3RP 46.

Davis-Bell's mother, Debra Davis-Bell, called him at 10:50 a.m. RP 1728. She asked him where he was, and he responded that he was driving in Seattle. RP 1728-29. His mother asked him to pray with her, and he told her, "I am through praying." RP 1728-29.

b. The Shooting At The Philadelphia Cheese Steak Restaurant.

Degene "Safie" Deshasa owned the Philadelphia Cheese Steak Restaurant, located at 23rd and Union, in Seattle. RP 837-47, 1014-15. That morning, Habiba Golicha was also working at the restaurant. RP 837-47, 1019. A short time after the

restaurant opened at approximately 11:00 a.m., two customers, Leonard Smith and Richard Walker, arrived and ordered sandwiches. RP 1014-18, 1058-59. A third customer, Yoseb Lee, then entered and ordered several sandwiches from Golicha while Deshasa was upstairs in his office. RP 844-45, 1421-24.

Davis-Bell drove his black Lincoln into the parking lot of the restaurant, exited the car and walked into the restaurant. RP 537, 981-98, 1876-87. With his right hand in his pocket, he asked Golicha, "Where's Safie?" RP 838-47, 858, 1428-32. Golicha recognized Davis-Bell as having visited the restaurant several times in the past.⁵ RP 848, 939-43. When Golicha did not immediately respond, Davis-Bell asked again, "Is Safie here?" RP 847. Golicha said yes and asked him to give her a second. RP 845-48.

Deshasa then came downstairs, and Davis-Bell yelled, "Safie, come here." RP 848. When Deshasa approached him, Davis-Bell fired several shots. RP 848, 962, 1025. One shot hit Deshasa in the chest, penetrating both lungs and his heart. RP 1299, 1307.

⁵ Golicha recalled that Davis-Bell would come to the restaurant, not order any food and ask for water. RP 954-55. She stated that he would annoy her. RP 954. Davis-Bell's grandmother confirmed that Davis-Bell had eaten at the restaurant and hung around the area. RP 1289.

Davis-Bell then turned toward Lee, who was two feet away. RP 1432-33. Lee pulled out his wallet and placed it on the counter. RP 1433. Davis-Bell ignored the wallet and fired several shots at Lee, hitting him in the chest. RP 851-53, 911-13, 963, 1433-34.

Davis-Bell then pointed his gun at Golicha, and she turned and ran toward the back door. RP 853, 916. As she ran, Davis-Bell fired his gun several times at her. RP 855, 881-82, 918-20, 1387-88. The shots missed her, and Golicha ran into a nearby bank and yelled that there had been a shooting. RP 922.

Davis-Bell walked out the front door of the restaurant, got into his car and drove away. RP 982, 999. Lee then staggered out the front door and collapsed. RP 982, 1117-18, 1438-39.

Meanwhile, the other customers in the restaurant, Smith and Walker, who had hidden themselves when the shooting started, called 911. RP 1025-27, 1060. At 11:17 a.m., the police arrived. RP 1028, 1115-16, 1132. By the time paramedics arrived, Deshasa had no pulse; he was dead when he arrived at Harborview Medical Center. RP 1158-63, 1345-49.

Lee's injuries were life-threatening, and he was transported to Harborview Medical Center. RP 1403-08, 1648. He had a collapsed lung and blood inside his chest. RP 1631-32. He

developed pneumonia and remained in the hospital for approximately two weeks. RP 1638-45.

c. The Arrest Of Davis-Bell.

Davis-Bell's grandmother, Janiece Jackson, had become so upset after her telephone conversation with him that she had an anxiety attack. RP 685. At approximately 11:30 a.m., paramedics responded to her house, and she told them about her telephone conversation with Davis-Bell. RP 685-88, 773-91. Paramedic Michael Mann, realizing that there could be a connection between Davis-Bell and the shooting at Philadelphia Cheese Steak Restaurant, contacted the police. RP 790-95. The police then interviewed Jackson after she was taken to Harborview Medical Center. RP 688, 776-79, 808-14, 829-33.

As a result of the information from Jackson, the police focused their investigation on Davis-Bell. RP 1366-67, 1390-91. That day, a detective showed Golicha a photo montage, which included Davis-Bell's picture. RP 860-61, 1369-79. Golicha selected his picture, stating that she was 75% certain that he was the shooter. RP 861-63, 1369-79.

Meanwhile, Davis-Bell had continued to drive around Seattle. Sometime after 12:00 p.m., Seattle Police Officer Caron saw Davis-Bell's black Lincoln make an illegal u-turn in the intersection of Martin Luther King, Jr. Way and South Walden Street. RP 1657-63, 1873-86. The officer then heard a sound similar to gunshots, and the car passed him again. RP 1659-63. Suspicious, Officer Caron wrote down the license plate number of the car. RP 1663.

Sometime between 12:30 and 1:00 p.m., Davis-Bell went to the house of his maternal grandmother, Gloria Taylor, in Seattle and parked his car in her driveway. RP 1758-62. Taylor, who was just leaving the house, approached him and invited Davis-Bell to walk with her. RP 1764. He declined and simply stared straight ahead. RP 1765. Taylor then left. RP 1765-68.

Later that day, Davis-Bell called Dee Dee Thomas, told her that he had gotten into a fight with his cousin, and asked her to pick him up in West Seattle. 3RP 47-52. After she drove him to her house, he told her that he had "gotten into it" with Claressa Scott, that he had shot a man and that he did not know whether the man

had survived.⁶ 3RP 52-55. When she asked him why he did it, Davis-Bell stated that Scott "had him so mad he didn't know what to do." 3RP 54. He told Thomas that he did not want to give her more information because the police might get hold of her and force her to testify. 3RP 54. Davis-Bell started crying and apologized to Thomas. 3RP 57.

The police had placed Thomas' residence under surveillance, and saw Davis-Bell leave the house the next day. RP 1911-18, 1988-94. As they followed him, he took off running, cutting through residential yards, jumping over fences, and discarding his clothing. RP 1918-21, 1996-98, 2022-26. The police caught up and arrested him. RP 1921-22; 1RP 13-21.

Davis-Bell was transported to police headquarters and placed into a room. 4RP 102-03. He was advised that everything in the room was being recorded, and he was provided with a telephone. 4RP 103-04. Davis-Bell made several phone calls to friends, explaining that he had been arrested. 4RP 104, 124-26; Ex. 148 & 149.

⁶ When the police first interviewed Thomas, she did not reveal that Davis-Bell had admitted to shooting a man. 3RP 62-63. She disclosed this information in an interview with the prosecutor shortly before trial in January of 2010. 3RP 69-70.

d. Further Investigation And Evidence.

The police recovered bullets and shell casings at the different scenes. They recovered nine .40 caliber shell casings and eight bullet fragments near Claressa Scott's apartment. RP 612-24, 651-66, 737; 5RP 28-29. They collected seven .40 caliber shell casings at the Philadelphia Cheese Steak Restaurant scene.⁷ RP 1576-77, 1817-29; 5RP 28-29. Finally, the day after the shootings, Seattle Police Officer Caron returned to the scene where he had seen Davis-Bell's car and had heard apparent gunshots; he found two .40 caliber shell casings in the area. RP 1667-74, 1711-73; 5RP 43-44.

During a search of Davis-Bell's car, the police found a box of 100-count Winchester .40 caliber Smith & Wesson ammunition, with 50 rounds missing.⁸ RP 1837-63.

Washington State Patrol Crime Laboratory forensic scientist Rick Wyant examined the casings recovered at the three scenes

⁷ The police found 6 shell casings, and, a few days later, a cleaning crew found another shell casing in the restaurant. RP 1576, 1978-80.

⁸ Davis-Bell's friend Paris Johnson testified at trial and claimed that he had left ammunition in Davis-Bell's car. 7RP 156-60. However, the box of ammunition that he described was different from that found in Davis-Bell's car. 7RP 179-80. Johnson also testified that he had only used 26 of 100 rounds of ammunition that he purchased. 7RP 177.

and concluded that they had been fired by the same gun. 5RP 23-27, 41-43, 53. Some of the casings were also consistent with the ammunition found in Davis-Bell's car. 5RP 45-46. The characteristics of the fired bullets and casings were consistent with having been fired by an IMI Desert Eagle or a Kahr firearm. 5RP 31, 57-61. Claressa Scott confirmed that Davis-Bell regularly carried a Desert Eagle semi-automatic firearm. RP 538-41; 6RP 91-92.

Records from Davis-Bell's cell phone confirmed his involvement in the shootings.⁹ They showed that on the day of the shooting between 10:18 a.m. and 10:30 a.m., he had traveled to West Seattle, near Claressa Scott's apartment. 6RP 29-32; Ex. 130 & 163. By 11:14 a.m., Davis-Bell's cell phone was in the area of the Philadelphia Cheese Steak Restaurant. 6RP 32-36; Ex. 130 & 163. Davis-Bell then moved south; around noon, he was in the Rainier Beach neighborhood.¹⁰ 6RP 36-39; Ex. 130 & 163.

⁹ Ex. 130 are the call records for Davis-Bell's cell phone (206-853-7496). RP 513; 2RP 158-59. Ex. 131 are the call records for Dee Dee Thomas's cell phone (206-941-0985). 2RP 159-61; 3RP 80. Other relevant phone numbers are Claressa Scott (206-932-2392) and Janiece Jackson (206-322-5727). RP 513-14, 678. Ex. 163 contains the maps showing the relevant cell tower locations. 6RP 29.

¹⁰ This location was consistent with other evidence. After his arrest, the police found a receipt in Davis-Bell's wallet indicating that at 12:04 p.m., he had purchased cognac from a store in Rainier Beach. RP 1602-15.

At approximately 12:20 p.m., Davis-Bell's cell phone was in the area where Officer Caron had seen Davis-Bell's car and heard gunshots. 6RP 39-42; Ex. 130 & 163.

The police showed witnesses photo montages containing Davis-Bell's picture. A few weeks after the shooting, Yoseb Lee initially indicated that he could not recall the shooter's face. However, after looking at the photographs, he pointed to Davis-Bell's picture and stated, "I don't know. Maybe that guy." RP 1443-44, 1896-1902. Leonard Smith, who had been in the restaurant at the time of the shooting, picked Davis-Bell out of a photo montage, stating that he was 70% certain he was the shooter. RP 1041-43, 1311-17. However, Smith had already seen Davis-Bell's photograph on the news. RP 1051-52.

While in jail, Davis-Bell made a number of phone calls to Thomas. 3RP 86-88. In one call, he told her not to tell anyone what he had told her. Ex. 137; 3RP 101. When she visited him in the jail he asked her to call a phone number and tell the person that he had been with her all day on the day of the shooting. 3RP 102-03.

Davis-Bell's defense theory was that he was shorter than the shooter. He emphasized the testimony of several witnesses, who had offered estimates of the shooter's height ranging between 5'8" and 6'0".¹¹ Opening Brief of Appellant at 13, 18-19.

Davis-Bell also called Thomas Sandor, who has background in video production. 7RP 56-62. Sandor examined a surveillance video, taken from a gas station across the street from the Philadelphia Cheese Steak Restaurant, which showed the shooter entering and leaving the restaurant. 7RP 40, 66-67. Using this video and others that he created, Sandor claimed that the shooter's height was approximately 5 feet 8 inches tall. 7RP 62-63, 84-138.

In order to do his calculations, Sandor used the Photoshop program to convert the video into a picture. 8RP 37-39. When cross-examined about how the program worked, Sandor responded, "I really don't care about what the computer does. I don't have to know how my engine works in my Mercedes. I can drive it." 8RP 55.

¹¹ During pretrial motions, defense counsel stated that Davis-Bell was 5' 4". BRP 88. Most of the witnesses, whose height estimates Davis-Bell cites, had seen the shooter briefly and/or from a distance. RP 585-603, 980-91, 1073-83. In contrast, Lee, who is approximately 5'6" and stood a few feet from the shooter, testified that he was taller than the shooter. RP 1432-33, 1491-92. Golicha, who is 5'7", also testified that she was taller than the shooter. RP 959-60.

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In rebuttal, the State called Grant Fredericks, a forensic video analyst. Fredericks explained that there was a proper method for calculating the height of a person in an image, but it was not possible to perform it with the video in this case because of the quality of the image and the fact that the suspect's feet could not be seen. 8RP 150-59, 165. He explained that any attempt to calculate height would have a margin of error of at least five inches. 8RP 165-66. He testified that Sandor's conclusions were flawed because he had used several different processes that changed the values of the pixels in the images. 8RP 129, 148-49, 160-64.

On February 24, 2010, the jury found Davis-Bell guilty as charged on all counts. CP 101-09. The trial court imposed standard range sentences on all counts. CP 130-34.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED DAVIS-BELL'S MOTION TO SUPPRESS.

Davis-Bell argues that the trial court should have excluded the video-recording of his telephone calls while at police headquarters, claiming that the police violated the privacy act by not re-advising him of his Miranda rights at the beginning of the

recording. However, because Davis-Bell had been arrested and knew that he was being recorded, his telephone calls were not private communications protected under the privacy act. In addition, the police were not required to re-advise Davis-Bell of his Miranda rights because he had already requested counsel and they did not intend to interrogate him. Finally, even if the trial court did err in admitting the recording, any error was harmless given that the evidence of Davis-Bell's guilt was overwhelming.

a. Relevant Facts.¹²

On January 31, 2008, after the police arrested Davis-Bell and advised him of his Miranda rights, he requested an attorney. CP 265. The police did not question him, transported him to Seattle Police headquarters, and placed him in an interview room. CP 266. Detective David Duty then advised Davis-Bell that everything in the interview room was being recorded and announced the time and date. Id.; Pretrial Ex. 1.¹³ At that time, the

¹² The facts relevant to Davis-Bell's pretrial motion to suppress under the privacy act were undisputed. CP 268; BRP 5.

¹³ Pretrial Exhibit 1 is the complete video of Davis-Bell in the interview room, reviewed by the trial court when deciding the motion to suppress. BRP 27-30. Trial exhibit 148 is the edited version of the video admitted at trial, and Ex. 149 is a transcript of that edited video.

detective did not re-advise Davis-Bell of his constitutional rights. CP 266. The detective provided Davis-Bell with a telephone and told him that he could use the phone. Id.

Over approximately the next 30 minutes, Davis-Bell made several phone calls. Id. In one call, he explained how he had been arrested and stated that he knew the police had been to his grandmother's and sister's houses. Pretrial Ex. 1. In another call to an apparent girlfriend, he described how he was arrested, warned her that the police might "hit the house," and insisted that he never had a gun. Id. In another call, he insisted that he was innocent to a friend, stating that phone records would show that he was on the phone with his grandmother when the crime happened. Id.

At one point, Davis-Bell made a call to an attorney, and, during the call, told her that he was being recorded. CP 266; Pretrial Ex. 1. Davis-Bell summoned Detective Duffy into the room to speak with his attorney on the telephone. CP 266. Detective Duffy later moved Davis-Bell into a different room so that he could speak with his attorney privately using the detective's cell phone. CP 267. Afterwards, Detective Duffy moved Davis-Bell back into the room and re-advise him of his Miranda rights. Id. Davis-Bell again stated that he would not speak without his attorney present,

and the detective left the room. Id. Davis-Bell continued to make phone calls. Id. After a total of about four hours in the room, Davis-Bell was taken to the jail. CP 268.

At trial, Davis-Bell moved to suppress evidence of the video-recording, claiming it violated the privacy act. CP 143-47. He argued that the detective's failure to re-advise him of his Miranda rights when the recording began required suppression of the tape.¹⁴ CP 143-47; BRP 19-23. After hearing argument on the issue, the trial court denied the motion to suppress. BRP 40-45.

The court later entered findings of fact and conclusions of law. CP 265-71. The court found: "None of the statements made by the defendant while he was on the telephone in the interview room were the result of any questioning or interrogation by the police." CP 268. The court further found that "[t]he defendant knew the entire time he was in the interview room that his side of the conversation was being recorded." Id.

In the conclusions of law, the court held:

Given the continuous recording of the defendant while in the interview room, his obvious knowledge that everything he was saying was being recorded, and

¹⁴ Davis-Bell also argued that his Miranda rights were violated, claiming that placing the telephone in the interview room was the equivalent of interrogation. CP 146-47; BRP 18-19. He does not maintain this argument on appeal.

the lack of any police interrogation, none of the potential concerns addressed by the Privacy Act are at issue in the present case and all of the statements made by the defendant while on the telephone in the interview room recording are admissible.

CP 270.

At trial, the State introduced an edited version of the videotape. Ex. 148 & 149.

b. The Police Did Not Violate The Privacy Act.

Davis-Bell claims that the police violated the privacy act by recording his portion of telephone calls that he made to third persons. A review of the relevant statutes and caselaw establishes that this claim lacks merit.

"Under RCW 9.73.030, the protections of the Privacy Act apply only to private communications or conversations." State v. Clark, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). RCW 9.73.030 restricts the ability to record private communications. In pertinent part, it provides:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

....

(3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted, PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.030.

RCW 9.73.090 provides an exception to RCW 9.73.030's prohibition of recording private communications. It states in pertinent part:

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical services, emergency communication center, and poison center personnel in the following instances:

....

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities....

RCW 9.73.090(1).

Here, the prohibition against recording in RCW 9.73.030 does not apply because Davis-Bell's telephone conversations with third persons were not *private* communications. A communication is private when (1) the parties have a subjective expectation that it is private, and (2) that expectation is objectively reasonable. State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). A

789 (2004). A telephone call made by an arrested person who knows that the call is being recorded is not a private communication. In State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008), Modica claimed that the jail violated the privacy act by recording telephone calls that he had made to his grandmother. Signs were posted near the telephones warning that calls would be recorded, and a message informed both Modica and his grandmother that the call would be recorded. Id. at 86-87. The Supreme Court concluded that any subjective expectation of privacy was not objectively reasonable because Modica had a reduced expectation of privacy and knew that he was being recorded. Id. at 88.

In this case, Davis-Bell did not have a reasonable expectation that his phone calls to third persons were private. Like the defendant in Modica, he had a reduced expectation of privacy after he was arrested, and he knew that he was being recorded. CP 268 ("The defendant knew the entire time he was in the interview room that his side of the conversation was being

recorded.").¹⁵ When he wished to speak with his lawyer, the police moved him out of the room so he could talk to her privately. The police did not violate the privacy act by recording Davis-Bell's telephone calls.

Davis-Bell appears to argue that, regardless of whether his communications were private under RCW 9.73.030, the police were required to comply with RCW 9.73.090(1)(b) and re-advise him of his Miranda rights when the recording began. The State acknowledges that existing law on whether RCW 9.73.090(1)(b) applies to non-private communications is muddled. On the one hand, the Supreme Court has held that the protections of the privacy act are limited to private communications. Clark, 129 Wn.2d at 224. By its plain language, RCW 9.73.090 is an exception to the general prohibition on recording *private communications* in RCW 9.73.030.

¹⁵ For the first time on appeal, Davis-Bell claims that after he made his unrecorded call to his attorney and was returned to the interview room, it would have been reasonable for him to believe that the recording had stopped. Opening Brief of Appellant at 34. Davis-Bell never made this argument before, and therefore, it is waived. RAP 2.5(a); see State v. Sengxa, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (holding that the failure to raise a privacy act claim at trial waives the issue on appeal). Moreover, he has not assigned error to the trial court's finding that he knew that he was being recorded, and that finding is a verity on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). This claim has no merit.

Yet in the cases addressing claims of RCW 9.73.090(1)(b) violations, there is no discussion of whether the conversation at issue qualified as a private communication, and the parties and the court appear to have simply assumed that the statute applied. See, e.g., State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980); State v. Courtney, 137 Wn. App. 376, 153 P.3d 238 (2007); State v. Mazzante, 86 Wn. App. 425, 936 P.2d 1206 (1997). In Lewis v. Dept. of Licensing, 157 Wn.2d 446, 464-67, 139 P.3d 1078 (2006), the Supreme Court held that a different subsection of the statute, RCW 9.73.090(1)(c), applies to non-private communications, and, in dicta, suggested that subsection (1)(b) also applies to non-private communications. As dicta, this section of the Lewis opinion is not binding upon this Court,¹⁶ and, given the plain language of the statute, the Court should decline to follow it and hold that Davis-Bell's privacy act claims fails because the recorded telephone calls were not private communications.

However, even assuming RCW 9.73.090(1)(b) applies to non-private communications, this provision would have been triggered only if the police had interrogated Davis-Bell. The

¹⁶ State v. Preston, 66 Wn. App. 494, 498 n.1, 832 P.2d 513 (1992).

Supreme Court has explained that the purpose of RCW 9.73.090(1)(b) is to avoid swearing matches as to whether a defendant actually waived his Miranda rights and agreed to speak to the police:

Insofar as we are here concerned, RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public.... The recordings are required to "conform strictly" to rules which ensure that waiver by consent authorized by RCW 9.73.030 is capable of proof by the recording itself thereby avoiding a "swearing contest".

Cunningham, 93 Wn.2d at 829. The court further stated that the giving of Miranda warnings on the recording would establish "that the statement was not obtained by means of oppressively long interrogation or interrogation that occurred at unreasonable times or in unreasonable sequence." Id.; see also Courtney, 137 Wn. App. at 382 ("The legislature has enacted provisions in the privacy act that govern the conditions under which police may make recordings of suspects during custodial interrogations"). It makes no sense to require the re-advisement of Miranda rights when the defendant has invoked his right to counsel and the police cannot interrogate him.

Even if RCW 9.73.090(1)(b) applied to the recording of Davis-Bell in the interview room, the trial court properly admitted the recording because the police substantially complied with the requirements of the statute. A recording is admissible when there is substantial compliance with the requirements of RCW 9.73.090(1)(b). See State v. Rupe, 101 Wn.2d 664, 685, 683 P.2d 571 (1984) (recording properly admitted although police did not state the start time on the record); State v. Jones, 95 Wn.2d 616, 627, 628 P.2d 472 (1981) (recording admitted although no announcement at the beginning that a recording was being made); State v. Gelvin, 43 Wn. App. 691, 695-96, 719 P.2d 580 (1986) (recording admitted although police did not state ending time).

Here, the police substantially complied with the requirements of RCW 9.73.090(1)(b). On the recording, the detective announced that a recording was being made and stated the time. It was undisputed that the police advised Davis-Bell of his Miranda rights before the tape began, that he requested counsel, and that a detective re-advised him again of his rights on the recording, albeit after several hours had passed. Given the purposes of the requirements of RCW 9.73.090(1)(b), this was substantial compliance with the statute.

Davis-Bell cites Mazzante, supra, for the proposition that there must be strict compliance with the requirement that the police begin the recording with the Miranda warnings. However, at issue in Mazzante was the admissibility of a recorded *interrogation* of the defendant. In holding that the recording was inadmissible, the Court of Appeals cited to Cunningham's discussion of the reasons for requiring the Miranda warnings on the recording. Here, there was no interrogation and no reason to provide Davis-Bell with yet another reading of his Miranda rights. See State v. Post, 118 Wn.2d 596, 605, 826 P.2d 172 (1992) (recognizing that Miranda warnings are required only when there is an interrogation by a state agent). Under these circumstances, this Court should hold that the police substantially complied with RCW 9.73.090(1)(b).

c. Any Error Was Harmless.

Even if the trial court erred in admitting the video recording, any error was harmless. Given the overwhelming evidence of Davis-Bell's guilt and the fact that the video recording of Davis-Bell's telephone calls was not particularly incriminating, it is

not reasonably probable that the result of the trial would have been different had the video not been admitted.

Admission of evidence in violation of the privacy act is a statutory, not a constitutional, violation. Courtney, 137 Wn. App. at 383. Accordingly, the error is deemed harmless unless it is reasonably probable that, had the error not occurred, the outcome of the trial would have been different. Cunningham, 93 Wn.2d at 831.

The video-recording of Davis-Bell's conversation in the interview room was not very incriminating. In the recording, Davis-Bell did not admit to committing the crimes; rather, he denied guilt. Ex. 148 & 149. He insisted, "I never had no gun." Id. In closing argument, the prosecutor did not discuss the telephone calls at any length.¹⁷ Davis-Bell claims that the recording included incriminating statements, referring to the fact that he stated, "They got me." Opening Brief of Appellant at 35. However, in this

¹⁷ The prosecutor only mentioned the recording during closing argument by noting that Davis-Bell had stated in a call that the battery in his cell phone had died. 9RP 61.

statement he was referring to the fact that the police had arrested him, not that he had committed any of the crimes.¹⁸

Moreover, the evidence of Davis-Bell's guilt was overwhelming. He had argued with Scott shortly before shots were fired into her apartment. Immediately after this shooting, he admitted to his grandmother that he had done so. He then told his grandmother that he was on his way "to take care of the rest of them" and that he had "enough ammunition" to take care of "anybody that has hurt me." He made similar comments to his girlfriend Dee Dee Thomas. Several witnesses from the Philadelphia Cheese Steak Restaurant positively identified him as the shooter. His cell phone records placed him at the location of both shootings at the time that the crimes occurred. The shell casings from the scenes were positively linked together, were consistent with ammunition found in his car, and had been likely fired by the same type of gun that he owned. Finally, on the night

¹⁸ Davis-Bell claims that the jury requested to watch the video recording during their deliberations. Opening Brief of Appellant at 11. In fact, the record indicates that during deliberations, the jury requested a laptop and monitor to "review video" without indicating which video they wished to watch. CP 110. There were multiple videos admitted into evidence, and there was far more discussion, testimony and attention devoted to the surveillance video of the Philadelphia Cheese Steak Restaurant. CP 111.

after the crimes occurred, he admitted to his girlfriend that he had shot a man and did not know whether the man had survived. Given this evidence, Davis has not shown that the outcome of the trial would have been different had the trial court excluded the recording of his telephone calls.

2. THE TRIAL COURT PROPERLY LIMITED THE TESTIMONY OF DAVIS-BELL'S VIDEO WITNESS.

Davis-Bell claims that his right to present a defense was violated because he was not allowed to elicit testimony about his video expert's work on a prior homicide case. However, Davis-Bell initially acknowledged that testimony about this prior case was not relevant and that his expert had used a different process in that case. Davis-Bell's claim that the prosecutor somehow opened the door to this testimony by asking him about peer review is without merit. His expert candidly admitted that his work was not peer reviewed in this case or in other cases.

a. Relevant Facts.

Davis-Bell called Thomas Sandor, who has background in video production, as a witness. 7RP 56-62. Sandor examined a

video showing the shooter at the scene of the Philadelphia Cheese Steak Restaurant. 7RP 62-63. He enhanced this video, took several other videos, and attempted to determine the shooter's height. 7RP 62-63, 84-138. Accordingly to Sandor's calculations, the shooter was approximately 5 feet 8 inches tall. 7RP 127-38.

Prior to Sandor's testimony, the prosecutor reported that Sandor had repeatedly stated that he believed that a prior homicide case had been dismissed due to his work. 7RP 4. The prosecutor represented to the court that "there was much more that went into it, including testimony of additional witnesses." Id. The prosecutor requested that the court prohibit Sandor from discussing "the results or his understanding of the impact of his results." Id. Defense counsel agreed. "The process... and the expertise that Mr. Sandor used in those other cases are different from what's used in this case. And so I wasn't going to seek to be making any sort of comparison between those cases that ended in dismissals and his expertise on this particular case." 7RP 5-6. The court agreed that the subject matter was not relevant and ruled that Sandor should not be asked to make comparisons with the results of other cases. 7RP 6.

During cross-examination, the prosecutor asked Sandor whether he considered himself a "forensic expert." 8RP 74. Sandor replied that the "legal community thinks I am." Id. When asked what forensic organizations he belonged to, he replied, "My record of successful cases is only what I have to stand on." Id. When the prosecutor asked Sandor whether his work was peer-reviewed, defense counsel then requested a side bar. 8RP 77.

After the jury was excused, defense counsel asked that Sandor be permitted to testify about the prior cases that he had worked on. 8RP 78-79. While counsel acknowledged that he did not know the particulars of the prior cases, he argued:

Now, I'm not privy to the State's reason, I wasn't the attorney on any of those cases, so I can't speak to the merits of them. And I'm not going to even attempt to. But I think when you start getting into peer review aspects of the work that he's conducted, it's opened up a factor now that we're -- I think that he should be able to explain that he's done some work and that obviously there has been experts that have viewed his work on those other cases. And whether or not they reached the same conclusion, I don't know. Maybe they can be called as rebuttal witnesses or something.

8RP 79. The prosecutor argued that cross-examination did not open the door to discussing the specifics of prior cases and further

reminded the trial court that, according to Sandor, the process that he used in the prior case was not used in this case. 8RP 79-80.

The trial court denied the defense request.

I don't find that simply by inquiring as to whether or not the work has been peer reviewed that that somehow opens the door to analogizing that it is peer review by having someone make a decision on a legal case to find that a defendant is exonerated. At this point I don't find that the door has been open. And I'm not going to allow questions about individual case results.

8RP 80.

The prosecutor then asked Sandor again whether his work was peer-reviewed, and he responded, "I don't submit my work for peer review." 8RP 81. He confirmed that his work in Davis-Bell's case was not peer-reviewed. Id.

b. Sandor's Prior Work On A Different Case Was Not Relevant.

A defendant does not have a constitutional right to the admission of irrelevant evidence. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). "Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (emphasis in original). The trial court has great discretion

when deciding whether proffered evidence is relevant. State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). The trial court has similar discretion in determining whether a party has opened the door to otherwise inadmissible evidence and that decision is reviewed for an abuse of discretion. Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 787 (2003).

Davis-Bell has not shown that the trial court abused its discretion. He agreed that Sandor's prior work on other cases was not relevant. His attorney acknowledged that Sandor used different processes and that it would be inappropriate to solicit testimony about it during direct examination.

There is no merit to the notion that the prosecutor somehow opened the door to this evidence by asking Sandor about peer review. Sandor's work was not peer-reviewed; he admitted that fact. The fact that a prior case that he worked on was ultimately dismissed was not probative of any fact at issue and would raise collateral issues. Davis-Bell acknowledged that Sandor had used a different process in the other case and that he did not know the full details of why the prosecutor decided to dismiss the case. Thus, testimony about the prior case would not establish that the process that Sandor used in Davis-Bell's case was valid. The subject would

have raised collateral matters, and the trial court acted well within its discretion in prohibiting inquiry about the prior case.

In any event, any error was harmless. An error excluding evidence is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt beyond a reasonable doubt. State v. Dixon, 159 Wn.2d 65, 79, 147 P.3d 991 (2006). As discussed more fully above, the evidence of Davis-Bell's guilt was overwhelming, and it is inconceivable that brief testimony about a prior case that Sandor had worked on would have resulted in a different verdict.

3. THE COURT SHOULD REJECT DAVIS-BELL'S BELATED CHALLENGE TO THE FIREARM INSTRUCTION.

a. Davis-Bell May Not Challenge An Instruction That He Proposed.

Davis-Bell, citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), challenges his firearm enhancements, arguing that the instruction erroneously told the jury that it had to be unanimous in order to answer "no." Davis-Bell has waived this issue because (1) he invited the error by requesting this instruction, and (2) the issue is not of constitutional magnitude.

The instruction for the firearm special verdicts stated in pertinent part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 97.

Davis-Bell joined in the request that the trial court give this instruction,¹⁹ and, therefore, he is barred from challenging it on appeal. Under the doctrine of invited error, a party may not set up an error at trial and then claim on appeal that the trial court erred on that basis. State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under this doctrine, a party cannot challenge an instruction that he proposed. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999).

Even if he had not proposed the instruction, Davis-Bell could not challenge it for the first time on appeal. Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when

¹⁹ CP 44.

it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

In Bashaw, the Supreme Court held that an instruction similar to that given in Davis-Bell's case was erroneous because it told the jury that it had to be unanimous to answer "no." 169 Wn.2d at 145-47. However, the court further stated that the right to a non-unanimous "no" special verdict was not of constitutional dimension, but came from common law precedent. The court explained:

This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg.

169 Wn.2d at 146 n.7. Accordingly, Davis-Bell cannot raise this issue for the first time on appeal.²⁰

b. Davis-Bell Has Not Shown That He Received Ineffective Assistance Of Counsel.

Anticipating that he may have invited the error, Davis-Bell alternatively claims that he received ineffective assistance of counsel because his attorney agreed to the special verdict instruction. To prevail on a claim of ineffective assistance of counsel, Davis-Bell must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35,

²⁰ Currently, there is a split of authority in the Court of Appeals as to whether a Bashaw claim presents a constitutional issue that can be raised for the first time on appeal. Division III and a two-judge panel of Division I have held that a Bashaw claim cannot be raised for the first time on appeal. State v. Morgan, 2011 WL 3802782 (No. 67130-8-I, filed August 29, 2011); State v. Nunez, 160 Wn. App. 150, 157-63, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011). However, a different Division I panel held that a Bashaw claim could be raised for the first time on appeal because it involved an issue of constitutional magnitude. State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011). The Washington Supreme Court has accepted review of Nunez and Ryan, consolidated the two cases, and will likely resolve this split of authority.

899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

With respect to deficient performance, the court must begin with "a strong presumption counsel's representation was effective," and must base its determination on the record below. McFarland, 127 Wn.2d at 335. "[T]his presumption will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). The failure to anticipate a change in the law does not constitute ineffective assistance. In re Personal Restraint of Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998).

Though the Supreme Court's Bashaw decision was issued after Davis-Bell's trial, he insists that his attorney should have anticipated the holding of that decision based upon the court's earlier decision in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). However, prior to the start of Davis-Bell's trial, the Court of Appeals had held that the pattern special verdict instruction was a correct statement of the law. State v. Bashaw, 144 Wn. App. 196, 200-03, 182 P.3d 451 (2008), rev'd, 169 Wn.2d 133, 234 P.3d 195 (2010). In that opinion, the court rejected the argument that the instruction was flawed in light of Goldberg. Davis-Bell's attorney

cannot be characterized as providing deficient representation given the state of the law at the time of this trial.

c. Any Error Was Harmless.

Even if the issue is not waived, this Court should hold that any error in the instruction was harmless. An instructional error is harmless if the court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error."

Bashaw, 169 Wn.2d at 147. In Bashaw, the instructional error was not harmless because it resulted in a "flawed deliberative process" based on the court's erroneous instruction to the jury that it had to be unanimous to acquit on the special verdict. Id. at 147. The special verdict in Bashaw required the jury to determine whether the defendant delivered a controlled substance within 1,000 feet of a school bus stop. Id. at 137. The defendant objected to the State's measurements and there was conflicting evidence about the distance involved in one of the drug transactions. Id. at 138, 144.

In contrast, in this case, any error is clearly harmless. The fact that the crimes were committed by someone armed with a firearm was not in dispute. The only issue was the identity of the shooter. Before even turning to the firearm special verdicts, the jury

unanimously found that Davis-Bell committed the crimes and that he was guilty of unlawfully possessing a firearm. Unlike the jury in Bashaw, which had to resolve a contested factual issue for the first time during special verdict deliberations, this jury necessarily found the firearm enhancements when finding that Davis-Bell committed the crimes. This Court can conclude beyond a reasonable doubt, in light of these circumstances, that the error did not impact the jury's special verdicts.

D. CONCLUSION

This Court should affirm Davis-Bell's convictions and sentence.

DATED this 28th day of October, 2011.

Respectfully submitted,

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