

70167-3

70167-3

NO. 70167-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC DAVIS,

Appellant.

REC'D
JAN 21 2014
King County Prosecutor
Appellate Unit

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

The Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

2014 JAN 21 PM 4:25
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. THE EVIDENCE DID NOT SHOW THE ERIC DAVIS NAMED IN THE NO CONTACT ORDER WAS THE SAME ERIC DAVIS AT TRIAL.....	1
2. THE OFFICERS' TESTIMONY WAS OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED AND ITS ADMISSION WAS NOT HARMLESS.....	2
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Huber
129 Wn.App. 499, 119 P.3d 388 (2005).....2

State v. Hutton
7 Wn.App. 726, 502 P.2d 1037 (1972).....2

State v. James
138 Wn.App. 628, 158 P.3d 102 (2007).....2, 3

State v. Santos
163 Wn.App. 780, 260 P.3d 982 (2011).....2

State v. Smith
155 Wn.2d 496, 120 P.3d 559 (2005).....2

A. ARGUMENTS IN REPLY

1. THE EVIDENCE DID NOT SHOW THE ERIC DAVIS NAMED IN THE NO CONTACT ORDER WAS THE SAME ERIC DAVIS AT TRIAL

The State does not claim there was any direct evidence linking the Eric Davis on trial with the Eric Davis named in the no contact order. Instead, the State contends circumstantial evidence established that Eric Davis was the same Eric Davis named in the no contact order (exhibit 11) and judgment (exhibit 12). Brief of Respondent (BOR) at 7.

According to the State, part of that circumstantial evidence was that in both exhibits 11 and 12 an Eric Lee Davis is the named defendant, both exhibits have the same cause number, and the signatures on both exhibits are similar. BOR at 7. However, what that evidence shows is merely that it is likely it is same Eric Davis who is named in the two exhibits. But that is not the issue. The issue is whether the Eric Davis named in the exhibits was the defendant. Those exhibits do not establish that fact.

The State also points to the testimony that Sabrina Anderson initially refused to provide officers with her real name, and Davis told officers he has known Anderson for five years. BOR at 7-9. The State asserts, that Davis' statement that he had known Anderson for five years and Anderson's giving officers a false name was sufficient circumstantial

evidence to show Davis was the Eric Davis named in the no contact order.

Id.

The existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The “fact” Davis was the same Eric Davis named in the no contact order based on Anderson initially giving the officers a false name, and Davis knowing Anderson is not affirmative evidence independent of the same name. It is speculative. Independent evidence includes booking photographs or fingerprints, eyewitness identification, or distinctive personal information. State v. Santos, 163 Wn.App. 780, 784, 260 P.3d 982 (2011); State v. Huber, 129 Wn.App. 499, 502-03, 119 P.3d 388 (2005). None of that kind of evidence was presented.

The circumstantial evidence the State relies on to argue Davis was the same Eric Davis named in the no contact order is insufficient for a rational trier of fact to find the identity beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Davis’ convictions should be reversed.

2. THE OFFICERS’ TESTIMONY WAS OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED AND ITS ADMISSION WAS NOT HARMLESS.

The State cites State v. James, 138 Wn.App. 628, 158 P.3d 102 (2007), for the proposition that officer Lilje’s testimony that there was a

no contact order naming Davis as the “respondent” (based on information he received on his computer and via his radio), and officer Hill’s testimony she was aware there was a no contact order between Anderson and Davis was not offered to prove the truth of the matter asserted but to show why Anderson and Davis were detained. BOR at 11. James lends no support to the State.

In James, the officer testified another officer was told by an unnamed witness that a black male was seen talking on a cell phone when a handgun fell out of his pants in front of an apartment complex at 2712 East South Riverton just before the shooting. The James court found the officer’s testimony was offered as background information to show why the investigation was in the East South Riverton neighborhood and not offered to prove the truth of the matter asserted. James, 138 Wn.App. at 639-640. The James court also found the form of the question to the officer---“Please tell us what you did next”---did not call for hearsay. Id. at 640.

Here, by contrast, the prosecuting attorney asked Lilje what he learned from information received on his computer and radio, and he responded he learned there was a no contact order naming Davis as the “respondent” and Anderson as the “protected” party. 3RP 31, 68-69. The prosecutor asked Hill if “during your time on the scene, were you aware

that there was a no contact order between Mr. Davis and Ms. Anderson.” Hill responded with a “yes.” 3RP 49. The questions to both officers called for a hearsay response because neither officer had any personal knowledge that there was a no contact order restricting the Davis who was in the car, and who each identified at trial as the person they arrested, with the Eric Davis named in the order. Moreover, the testimony was not offered to show why Anderson and Davis were detained. The State presented evidence they were detained because they were in a car matching the description of the car someone had seen a man force a woman into. 3RP 22-25.

Both Lilje and Hill’s testimony was hearsay. Each repeated information they received from the contents of the no contact order. The information was only relevant to prove the truth of the matter asserted, that the Davis they arrested and who was on trial was the same Davis named in the no contact order. See, Brief of Appellant at 12-13.¹

In the alternative, the State argues even if the testimony was hearsay its admission was harmless. There was no evidence of booking photographs or fingerprints, eyewitness identification, or distinctive personal information that linked Davis with the Eric Davis named in the

¹ The officers did not testify they had information an Eric Davis was named in a no contact order and Anderson was named as the protected party. Instead they testified the Davis they arrested was named in the no contact order.

no contact order. The jury asked “Does the booking process include confirming the identities of a booked person by verifying uniquely identifying features or marks such as fingerprints or tattoos?” CP 22; 3RP 125. The question indicates the jury was struggling with the lack of evidence that identified Davis as the Eric Davis named in the order. It is likely the jury used the hearsay testimony to fill in that critical missing piece of the puzzle.

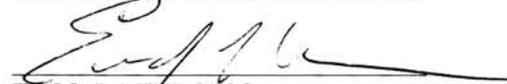
B. CONCLUSION

There was insufficient evidence to support the verdict. Davis’s conviction should be reversed. Alternatively, the improper admission of the hearsay testimony was not harmless.

DATED this 21 day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ERIC J. NIELSEN

WSBA No. 12773

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70167-3-1
)	
ERIC DAVIS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIC DAVIS
DOC NO. 962344
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JANUARY, 2014.

x Patrick Mayovsky

2014 JAN 21 PM 4:25
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE