

84554-9

NO. 38705-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES GRIFFIN,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards, Judge

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BY DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's enhanced sentence, because the aggravating factor was based on inadmissible hearsay.

2. The trial court erred in admitting hearsay testimony, over defense counsel's objection, in the absence of a proper foundation.

Issues Pertaining to Assignments of Error

To prove appellant was recently released from incarceration at the time of the offense, the state offered the testimony of Travis Davis, who summarized certain jail records located in what Davis referred to as the "Spillman" database. However, the state failed to show either that the original records would be too cumbersome to bring to court or that it provided the defense a prior opportunity to examine the original records.

1. Where defense counsel objected there was no proof Davis was testifying to an "actual record," did the trial court err in overruling the objection and admitting Davis' testimony?

2. Where the only evidence admitted to establish the recently-released-from-incarceration aggravator was Davis'

inadmissible hearsay testimony, should appellant's sentence be reversed and remanded for sentencing within the standard range?

B. STATEMENT OF THE CASE

On October 3, 2008, the Grays Harbor County prosecutor charged appellant James Griffin with residential burglary and committing the offense shortly after release from incarceration, as an aggravating sentencing factor. CP 1-2; RCW 9A.52.025(1), RCW 9.94A.535(3)(t). Griffin signed a written waiver of his right to a jury trial. CP 8.

At Griffin's bench trial, Alina Serratto Navarra Alvarado testified she came home from an orthodontist appointment on October 2, 2008, to find an intruder in her second-story Aberdeen apartment. RP 9-10. Alvarado was downstairs chatting with neighbors when she heard loud banging noises upstairs. RP 9. At first, she thought it might be her dog, excited to see her, trying to get out. RP 10.

Alvarado walked upstairs and saw the top left of her door was cracked. She unlocked the top lock, but the door would not open. Her son unlocked the deadbolt – which Alvarado testified she never locked – to open the door. RP 10, 28-29. Alvarado's

son testified the doorframe looked like it had been kicked in. RP 31.

Alvarado testified that as soon as they went inside, she saw a shadow go out the back door. Followed by her son, Alvarado ran after the man yelling, screaming and demanding to know what he was doing in her house. RP 12. Alvarado convinced the man – later identified as Griffin – she would not call the police if he came back to the apartment and talked to her. RP 12-13, 47.

Back in the apartment, Griffin reportedly returned to Alvarado a jewelry box Alvarado testified she kept in her bedroom. RP 13-14, 21. Griffin was explaining he knew Alvarado's brother, when Alvarado's neighbor came in saying the police were on their way. RP 14-15.

At this news, Griffin took off. Alvarado's son chased him out the back door and down the alley. RP 17. Police arrived and took Griffin into custody. RP 26, 60. Alvarado was transported to the arrest location and identified Griffin as the intruder. RP 53.

In an effort to prove the recently-released-from-incarceration aggravator, the state called sergeant Travis Davis who works in the corrections division of the Grays Harbor County Sheriff's Office. RP 62. The state elicited the following testimony:

Q And as part of your duties, do you check records, maintain records, any of that sort of thing?

A Yes.

Q And you were asked to look up a record on James Lamar Griffin; did you do that?

A Yes.

Q Did you do that personally?

A Yes, I did.

Q Okay. Um, and based on those records, what is his name number?

A 41408

Q What is a name number?

A It's a unique number assigned by our inmate database, that's Spillman is the inmate database that we use. Each individual that has that name record is given that name record that's unique to that one individual.

Q Are you familiar with the defendant sitting here?

A Yes, I am.

Q Is that the same James Lamar Griffin that has the name number, 41408?

A Yes, it is.

Q Has Mr. Griffin been in the jail previously?

A Yes, he has.

Q On what date was he released the last time?

RP 62-63.

At this point defense counsel interjected, seeking clarification of Davis' source of knowledge:

Your honor, I would object as to is he testifying to his memory of when he was there, or is there some other form that he is testifying to?

RP 63.

The court overruled the objection, reasoning: "If he doesn't know, he will say so. You can cross examine him regarding the substance of the knowledge. [To the prosecutor] You may ask the question." RP 63.

The prosecutor repeated his last question: "What was the last date that he was released from Grays Harbor County Jail?" RP 63. Davis claimed, "[h]is last release date was August 19, 2008 at approximately 21 hundred hours." RP 63. When the prosecutor asked how he knew the date, Davis answered: "It's what time he was signed out of the Spillman system by, looks like Officer – [.]"

Defense counsel again objected:

I continue my objection as what he is testifying to is based on Spillman record. We don't have any sort of authentication or certification of what he is testifying to is the actual record or – [.] RP 64.

The court interrupted and asked whether the prosecutor wished to "lay a foundation." RP 64. The prosecutor agreed and elicited the following:

Q Did you look up previous commitments for name number 41408 in your system?

A Yes, I did.

Q And were you able to locate a previous commitment for that name number?

A Yes. And it was booking number 162490.

Q And when was the release date on that booking number?

A August 19, 2008.

RP 64.

Following this exchange, the prosecutor had no further questions. When the court asked if defense counsel wished to cross examine the witness, counsel maintained her objection:

Your Honor, I still maintain my objection as far as he doesn't have personal knowledge of it. And the foundation hasn't been laid as to the record.

RP 64.

The court disagreed, however:

He testified regarding their system, the name number system assigned. That 41408 was assigned to Mr. Griffin, and that he more recently reviewed the records in the database maintained by the sheriff's office, and for that number determined that the most recent release date was August 19, 2008. So I don't find any of that objectionable. You may cross examine him if you wish.

RP 64-65. Defense counsel had no questions. RP 65.

The court found Griffin guilty as charged and sentenced him 30 months, 10 months beyond the top of the standard range, based on the aggravator. CP 12-14, 15-22; RP 74, 84. This appeal follows. CP 23.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE SENTENCING ENHANCEMENT BECAUSE IT WAS BASED SOLEY ON INADMISSIBLE HEARSAY.

The facts supporting an aggravating sentencing factor must be proved to the fact-finder beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). To prove Griffin was recently released from incarceration at the time of the offense, the state offered the testimony of Travis Davis, who summarized certain jail records

located in the Spillman database. However, the state failed to lay the proper foundation for Davis' testimony. Specifically, the state failed to show either that the original records would be too cumbersome to bring to court or that it provided the defense a prior opportunity to examine the original records. Because Davis' testimony was the only evidence admitted to establish the recently-released-from-incarceration aggravator, Griffin's sentence must be reversed.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Generally, hearsay is not admissible except as provided by various exceptions in the Washington Rules of Evidence. ER 802.

Records of a regularly conducted activity are an exception to the general hearsay rule. ER 803(a)(6). Admission of these records is governed by RCW 5.45.020, which provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Admission of business records pursuant to the business records exception does not violate a defendant's right to confrontation. Crawford v. Washington, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

Booking records have been held admissible under the business records exception. State v. Iverson, 126 Wn. App. 329, 108 P.3d 799 (2005). David Iverson was charged with violating a court order prohibiting him from contacting former girlfriend Cara Nichols. The charge arose when officers Cracchiolo and Boudreau responded to an apartment to investigate a trespass report. On the way, Cracchiolo requested a search for protection orders related to the caller and discovered that a protection order had been issued for Nichols against Iverson. When the officers arrived, a woman who identified herself as Nichols answered the door. The officers discovered Iverson in a back bedroom. Iverson, 126 Wn. App. at 332-33.

Nichols did not appear for trial. Iverson objected to officer testimony regarding the identity of the person who answered the apartment door. The court ruled the statement would be admitted only to show the person identified herself as Nichols, not for its

truth. When the defense opined the state would not be able to prove the identity of the woman at the apartment, the court granted the state a recess to try to locate Nichols. Iverson, 126 Wn. App. at 333.

The state was unsuccessful. However, Cracchiolo testified he had obtained Nichols' arrest records from "COTS," the computer system "used in the jail facility for photographing and keeping information about the inmate population." Iverson, 126 Wn. App. at 333 (citation to record omitted). Although Cracchiolo did not know what the acronym COTS stood for, he testified the system was relied on by police officers to identify particular individuals and by investigators to get accurate photographs of individuals who have been booked into jail on prior occasions. Iverson, 126 Wn. App. at 333-34.

Iverson objected on grounds Cracchiolo was not a custodian of the record, was not qualified to answer questions about the COTS system, did not work for Snohomish County Jail where the records were created, and thus Cara Nichols' arrest records – which were not certified copies – were not admissible as business or public records. Iverson, at 334.

Without making a final ruling on the business record exception, the court allowed Cracchiolo to continue. Cracchiolo testified he found four arrest records for Nichols, and that each had the same birth date as the one associated with all the booking photos. These dates also matched the birth date on the written statement given by the person who identified herself to police as Cara Nichols, on the date of Iverson's arrest. Cracchiolo testified he recognized the person depicted in the four booking photographs to be the same person who identified herself as Nichols at the apartment. Iverson, 126 Wn. App. at 334.

Still without making a final ruling, the court heard from Boudreau. He explained that during arrest and booking, the suspect's photograph is taken and entered into the county's computer records. Boudreau stated that the photographs in the computer system are later used to obtain accurate photographs of previously booked individuals. In his experience, the booking photographs always matched the individuals for whom they were listed. Boudreau also recognized the person in the booking photographs as the person who identified herself as Nichols. Id., at 335.

The court ultimately admitted the jail records, ruling there was sufficient evidence of their authenticity and reliability. Id. Although Iverson challenged this ruling on appeal, the appellate court affirmed:

While the officers here did not actually enter Ms. Nichols' booking information into the jail's computer system, they were familiar with the booking system and used it to enter data and pictures of other persons booked into jail, in their regular course of business. They also routinely relied on the information prepared by fellow officers in their ordinary course of business to identify persons who previously had been booked into jail. Under the reasoning of Garrett,<sup>[1]</sup> the officers were qualified witnesses to identify the records – which in turn were competent evidence of the contents of the records – in this case.

Iverson, 126 Wn.2d at 339.

At first blush, Iverson may appear to support admissibility of Davis' testimony here. The Snohomish County COTS computer system described in Iverson seems somewhat similar to the Grays Harbor County "Spillman" database described by Davis. But the difference between this case and Iverson is not in the *nature* of the record described. Rather, it is in the method of its proof. Whereas the state in Iverson offered the booking records its witnesses

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<sup>1</sup> State v. Garrett, 76 Wn. App. 719, 723-25, 887 P.2d 488 (1995) (medical records properly admitted through treating physician who routinely relied on records prepared by her fellow physicians in the ordinary course of business in treating her patients).

described, the state here did not offer the Spillman records Davis described.

Granted, so long as the underlying records could have been admitted, it is not error to admit either a compilation of such records or testimony concerning such records, *if* the proponent establishes that the original records are too voluminous for easy court use. State v. Kane, 23 Wn. App. 107, 110-11, 594 P.2d 1357 (1979). In addition, the proponent must make the original records available for examination by the opposing party. Kane, 23 Wn. App. at 11 (citing State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979)).

The Supreme Court's decision in Fricks controls here. Fricks was convicted of burglarizing a gas station. At trial, the state's evidence showed that Fricks and his roommate Schlaefli approached Officer Seth on Queen Anne Avenue at 3:00 a.m. to report suspicious activity at the gas station. The men explained they had been walking by on their way home from a restaurant and saw someone standing near the station. The men also said they could see a broken window from where they were standing. According to Seth, Fricks' and Schlaefli's stories were inconsistent and vague. The men also told Seth that Schlaefli recently was fired from the gas station. Fricks, 91 Wn.2d at 393.

After the men were allowed to leave, the station manager arrived. Apart from the broken window, everything appeared to be in place. Both the safe and cash drawer, however, were empty. The manager testified at trial that station employees kept a daily count of currency and coins on a tally sheet. He had looked at the day's tally and reported to the police what the day's receipts had been. The tally sheet was not produced at trial, but the station manager was allowed to testify, over defendant's objections, that the receipts had been approximately \$102. Fricks, 91 Wn.2d at 393.

Following the manager's inspection of the station, Seth and another officer went to Fricks' apartment and arrested him and Schlaefli. At the police station, Fricks confessed, and Schlaefli was released. Fricks retracted his confession the next day, explaining he was trying to deter suspicion from his roommate. Fricks, at 394.

Meanwhile, Schlaefli vacated the apartment. When the manager cleaned the apartment, he found a towel with \$104 rolled into it behind a dresser. He gave that money to police. Id.

On appeal, Fricks challenged the admission of the station manager's hearsay testimony regarding the contents of the tally sheet. Fricks, 91 Wn.2d at 394. The manager's testimony was the

only proof offered of the amount of money stolen, and the state relied upon the similarity of that amount to the amount found in Fricks' room to create an inference the latter was in fact the stolen money. Fricks, 91 Wn.2d at 398.

The Supreme Court found the manager's testimony prejudicial error requiring reversal. Fricks, 91 Wn.2d at 398. In so holding, the court relied upon the "Best Evidence Rule:"

The document itself was not produced, nor was any explanation given why it was not available. Furthermore, no foundation was laid to establish in the first place that the contents of the tally sheet were admissible to prove the amount of money which should have been in the safe.

In seeking to prove the contents of the tally sheet, the State must comply with the so-called Best Evidence Rule. This basic principle of evidence generally requires that "the best possible evidence be produced." As applied to proof of the terms of a writing, it requires that the original writing be produced unless it can be shown to be unavailable "for some reason other than the serious fault of the proponent. In this case the State failed to produce the document or to make any showing of its unavailability. Under these circumstances the testimony of the manager as to its contents was not an acceptable method of proof.

Fricks, 91 Wn.2d at 397 (citations and quotations omitted), accord, State v. Kane, 23 Wn. App. at 110-11 (bank officer allowed to testify to contents of exhibit 3 – a computer generated summary of activity in defendant's bank account – where state established

original records too voluminous for easy court use and state made original records available for examination by defense).

As in Fricks, the state here failed to produce the record its witness was summarizing. As in Fricks, the state also failed to show it provided the defense an opportunity to examine the original. Indeed, it is clear from the nature of defense counsel's initial objection, she had no idea whether Davis was testifying from memory or some other source. That defense counsel was provided no prior opportunity to examine the original records is also evident from the court's statement when overruling defense counsel's final objection:

He testified regarding their system, the name number system assigned. That 41408 was assigned to Mr. Griffin, and that he more recently reviewed the records in the database maintained by the sheriff's office, and for that number determined that the most recent release date was August 19, 2008. So I don't find any of that objectionable. You may cross examine him if you wish.

RP 64-65 (emphasis added).

Without a prior opportunity to examine the original records Davis was summarizing, however, cross-examination would be fruitless. The trial court erred in admitting Davis' testimony when –

as defense counsel appropriately objected – the state presented no proof Davis' testimony was based on "the actual record." RP 64.

Besides failing to satisfy the Best Evidence Rule and the requirements set forth in Shaw, supra, the state likewise failed to lay a foundation to admit the Spillman record itself (assuming it exists). Davis testified that "as part of his duties" he checks records and "that sort of thing." RP 62. He explained there is a "Spillman" database that gives each inmate a "name number" and that someone had signed out Griffin's name number. RP 63. However, Davis failed to specify how entries are made in the database, whether entries are made "in the normal course of business," and at or near the time of the act, condition or event – as required under RCW 5.45.020. The state's "foundation" was in no way comparable to that found sufficient in Iverson.

Finally, the state also failed to establish the additional requirement for admission of computer-generated evidence, i.e. that the electronic computing equipment is standard. See e.g. State v. Kane, 23 Wn. App. at 111 (citing Seattle v. Heath, 10 Wn. App. 949, 520 P.2d 1392 (1974)). As the proponent of the evidence, it was the state's burden to lay the proper foundation for

Davis' testimony. For all the reasons stated above, the state failed to do so.

In response, the state may argue that any error is harmless in light of Griffin's admissions at sentencing. In response to questions from the court, Griffin admitted he had been out of custody for approximately "[a] month and 17 days" at the time of the offense. RP 83. But the court had already found the aggravating factor at the conclusion of the bench trial. There was therefore no reason for Griffin to suspect he was incriminating himself. Particularly since he was not warned his admissions could be used against him at this point. See e.g. State v. Bankes, 114 Wn. App. 280, 57 P.3d 284 (2002) (defendant's right against self-incrimination was violated by sentencing court's basing exceptional sentence on unwarned admissions made by the defendant in SSOSA evaluation; and the defendant's failure to invoke his right against self-incrimination was excused). Under Bankes, use of Griffin's unwarned admissions at sentencing would violate his right against self-incrimination. And considering that he was at the court's mercy for sentencing, his failure to invoke his right to silence and refuse to answer the court's questions must be excused.

D. CONCLUSION

The state's only evidence Griffin was recently released from incarceration was inadmissible hearsay. Once Davis' improper testimony is excluded, the remaining evidence is insufficient to support the aggravating sentencing factor. See State v. Chapin, 118 Wn.2d 681, 692, 826 P.2d 194 (1992) (once inadmissible hearsay statement excluded, remaining evidence was insufficient to support conviction). This Court should reverse Griffin's sentence and remand for imposition of the standard range.

Dated this 25<sup>th</sup> day of June, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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2009 JUN 25 PM 4:09

**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 25<sup>TH</sup> DAY OF JUNE, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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BY  DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 25<sup>TH</sup> DAY OF JUNE, 2009.

x 