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No. 96599-4

NO. 77930-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DAVIS,

Appellant.

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

The Honorable Jennifer A. Forbes, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Does the State's brief contain a misleading and prejudicial section heading that lacks support in the record?

2. Does the State's brief continue to repeat allegations regarding Davis's purported involvement in the robbery and murder, even though such testimony was thoroughly impeached, and ultimately rejected by the jury?

3. Does the State's brief incorrectly claim that Davis miscites the record regarding Costello's testimony? Similarly, are the State's related arguments that Costello's testimony was "equivocal"¹ unsupported by the record?

B. ARGUMENT IN REPLY

1. THE STATE'S BRIEF CONTAINS A HIGHLY MISLEADING HEADING SUGGESTING THAT DAVIS REPAINTED THE HONDA.

The State's brief contains the following misleading section heading as part of its recitation of facts: "**December 18, 2015: Pry, Davis, and friends return from Days Inn in Fife & repaint the Honda.**" Brief of Respondent (BOR) at 14 (bold text in original). This Court should reject

¹ Brief of Respondent at 68

this clumsy attempt, and the State's other attempts, to exaggerate Davis's involvement.

There is no indication in the record (or even in the body of the State's brief²) that Davis had anything to do with repainting, or attempting to disguise, the Honda. Instead, the evidence indicated that Davis never reunited with Pry and Rodgers-Jones after leaving Fife; indeed, the evidence indicated Davis was upset about the fate of the Honda. E.g. 37RP³ 4205. While misleading, the stratagem is obvious: To exaggerate Davis's involvement in the Hood robbery and murder.

Davis's displeasure about the fate of the Honda reveals another misleading aspect of the State's brief. It also mentions that Miranda Bond saw Davis at the duplex, which in turn suggests, misleadingly, that Davis continued to associate with the other individuals. BOR at 22. Yet the record

² BOR at 15-16

³ This brief continues to refer to the 46 verbatim reports as follows: 1RP – 2/5/16; 2RP – 2/18/16; 3RP – 2/19/16; 4RP – 2/26/16; 5RP – 3/4/16; 6RP – 3/9/16; 7RP – 3/10/16; 8RP – 3/14/16; 9RP – 3/15/16; 10RP – 3/17/16; 11RP – 3/22/16; 12RP – 3/25/16; 13RP – 4/4/16; 14RP – 4/25/16; 15RP – 4/26/16; 16RP – 4/27/16; 17RP – 4/28/16; 18RP – 5/3/16; 19RP – 5/4/16; 20RP – 5/5/16; 21RP – 5/9/16; 22RP – 5/10/16; 23RP – 5/11/16; 24RP – 5/12/16; 25RP – 5/16/16; 26RP – 5/17/16; 27RP – 5/18/16; 28RP – 5/19/16; 29RP – 5/23/16; 30RP – 5/24/16; 31RP – 5/25/16; 32RP – 5/26/16; 33RP – 6/6/16; 34RP – 6/7/14; 35RP – 6/8/16; 36RP – 6/9/16; 37RP – 6/13/16; 38RP – 6/15/16; 39RP – 6/16/16; 40RP – 6/20/16; 41RP – 6/21/16; 42RP – 6/22/16; 43RP – 6/23/16 (closing arguments); 44RP – 6/27, 6/28, 6/30, 7/5, and 7/6/16 (jury questions and verdicts); 45RP – 7/22/16 (sentencing continuance); and 46RP – 8/5/16 (Davis sentencing and plea to charge under separate case number).

indicates Davis was only at the duplex briefly while attempting to retrieve the Honda. 37RP 4205.

As shown, the State's brief takes liberties with the facts. This Court should reject the State's attempt to exaggerate the evidence regarding Davis's involvement.

2. THE STATE CONTINUES TO RECITE FACTS REGARDING DAVIS'S PURPORTED INVOLVEMENT IN THE ROBBERY AND MURDER THAT WERE CONTRADICTED BY THE EVIDENCE AT TRIAL AND REJECTED BY THE JURY.

The State's brief also persists in reciting facts that were contradicted by the evidence at trial and clearly rejected by the jury. For example, the State repeats Ocean Wilson's discredited claim that Davis dropped off Pry and Rodgers-Jones before the robbery, as well as her related assertion that Davis gave them robbery-related instructions. E.g. BOR at 8, 68-69.

As pointed out at page 17 of Davis's opening brief, Wilson's testimony on these subjects was thoroughly impeached. For example, the defense attorneys confronted Wilson with the fact that the day after her arrest, she told detectives that Pry and Rodgers-Jones left the duplex on foot, and she made no mention of Davis dropping them off. 27RP 2538; 28RP 2598; see also 40RP 4737 (detective's testimony to that effect). Moreover, another detective obtained surveillance video of the purported drop-off

location. The video showed that no car stopped at the location. 40RP 4670-74, 4677-78, 4681.

Finally, while the drop-off and related testimony formed the basis of the State's theory that Davis was an accomplice to robbery and murder, the jury acquitted Davis of those charges.⁴ 44RP 5283; CP 1468-69.

This Court should reject the State's repeated attempts to recycle this discredited testimony.

3. THE STATE INCORRECTLY CLAIMS THAT DAVIS MISCITES THE RECORD REGARDING COSTELLO'S TESTIMONY AND THAT COSTELLO'S TESTIMONY REGARDING THE REASON FOR HER PRESENCE IN FIFE WAS "EQUIVOCAL."

The State concedes that the prosecutor, in attempting to persuade the jury to find Davis guilty of second degree identity theft, misused a portion of Sheila Costello's testimony as substantive rather than impeachment evidence. BOR at 65-66; see also Brief of Appellant (BOA) at 26-32.

But the State goes on to claim that Davis's opening brief miscites a portion of Costello's testimony. BOR at 67 (citing BOA at 30). It also

⁴ The State's brief cites statements by Davis suggesting that knew a crime had been committed. E.g. BOR at 20-21 (Michelle Lamb testimony). However, given the seriousness of the underlying crimes, the statements are also consistent with Davis learning about the others' actions after the fact, yet fearing he would be implicated based merely on his presence in their ambit. This is consistent with the jury's verdict on the robbery and murder charges.

claims that her testimony, which offered another explanation for her presence, was “equivocal.” The State is incorrect in both respects.

The citation challenged by the State appears at page 30 of Davis’s opening brief, which cites to 40RP⁵ 4750 as an example the testimony at odds with the State’s closing argument. On the page cited, 40RP 4750, Costello explains that she went to Fife *not* because Davis wanted her help committing identity theft, but rather, because Davis’s friend Goodloe needed a ride, and she was promised heroin to provide the ride. Contrary to the State’s puzzling claim, this testimony certainly repudiates the State’s theory of the reason for her presence. See also 40RP 4749-61, 4769, 4772-73 (Costello’s testimony, cited in BOA at 23).

Moreover, the State’s claim that Costello’s testimony was somehow “equivocal,” or that her presence was unexplained, is—once again—at odds with her actual testimony, which clearly provided an explanation for her presence that had nothing to do with an identity theft scheme

Finally, as argued in the opening brief, the theory that Davis had Costello travel to Fife to assist in identity theft was crucial to the State’s case considering the defects in the other witnesses’ testimony. The State’s misuse

⁵ Davis’s 40RP is the State’s 44RP.

of such evidence, which it now acknowledges, prejudiced Davis's defense as to the identity theft charge.

C. CONCLUSION

For the reasons set forth above and in Davis's opening brief, his identity theft conviction should be reversed.

DATED this 2nd day of February, 2018.

Respectfully submitted,

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