

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, ) No. 65246-0-I  
 )  
Respondent, ) DIVISION ONE  
 )  
v. ) UNPUBLISHED OPINION  
 )  
REY DAVIS-BELL, )  
 )  
Appellant. ) FILED: July 16, 2012

Grosse, J. — A trial court’s failure to suppress a videotaped recording of telephone calls a suspect made while in police custody when he was not re-advised of his Miranda<sup>1</sup> warnings before the recording began amounts to harmless error, when, as here, there was other overwhelming evidence of guilt. Accordingly, we affirm.

**FACTS**

Rey Davis-Bell dated Claressa Scott for several months, but the two eventually broke up in April 2007. He then began dating Satrinna “Dee Dee” Thomas in the summer of 2007. Unbeknownst to Thomas, Davis-Bell resumed a sexual relationship with Scott. They tried to keep this a secret from Thomas, but she became suspicious after finding Scott’s phone number on a piece of paper.

Davis-Bell also continued to allow Scott to use his car. On January 29, 2008, Scott called Davis-Bell and left him a voicemail message asking for his help to get the car out of impound. Later that night, Scott received a call from a woman angry about her getting help with the car. The next morning Scott called Davis-Bell again and told him about the car and he said he would help her. Scott’s friend Rasheena Thomas

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

(Rasheena) and her young daughter were visiting Scott at the time at her West Seattle apartment. A few minutes after the phone call ended, Davis-Bell called Scott back and began arguing with her. He was very angry, told her that he hated her, and accused her of ruining of his life. Scott hung up on him.

Davis-Bell then called his grandmother, Janiece Jackson. He was upset and told Jackson that he was going to West Seattle "to take care of business." Jackson was very concerned and worried about what he intended to do to Scott. She tried unsuccessfully to talk him into coming to her house and after their conversation ended, she called other family members, urging them to contact Davis-Bell.

Approximately 15 minutes after she ended her last conversation with Davis-Bell, several shots were then fired through the window of Scott's West Seattle apartment. Scott, Rasheena, and her young daughter managed to avoid being hit, but there were nine bullet holes in the wall. A construction worker who was outside at the time heard the gunshots and saw a man walking across the parking lot near where the shots came from, but could not discern the man's race. Scott called her cousin and her case manager and both told her to call the police. She was reluctant at first to do so because she was on house arrest at the time and had been smoking marijuana in the apartment that morning. But she eventually called the police, approximately 20 minutes after the shooting.

Meanwhile, Davis-Bell's grandmother called him again on his cell phone and asked him not to go to Scott's apartment. He told her that he had already been there, stating that he saw her in the window and shot at the window. He also added that he

was “going to take care of the rest of them,” and that he had enough ammunition to take care of anybody that had hurt him. Davis-Bell also had several conversations with Thomas during this time, who could barely understand what he was saying because he was so angry. He complained to her that Scott threatened to have her cousins do something to him and said that he was going to do something to everybody that had done something to him.

Later that morning, at approximately 11:00 a.m., a man driving a black Lincoln came to the Philadelphia Cheese Steak restaurant in Seattle and shot the owner and a customer. He also shot at a restaurant worker, but missed her as she ran out for help. Shortly after, police and paramedics arrived. The owner was dead on arrival at the hospital and the customer suffered life-threatening injuries and was hospitalized for two weeks.

Meanwhile, at approximately 11:30 a.m., paramedics responded to the home of Davis-Bell’s grandmother who had suffered an anxiety attack after her phone conversation with Davis-Bell. She told paramedics about that conversation and one of the paramedics contacted the police, suspecting that Davis-Bell might have been involved in the restaurant shooting. The police then focused the investigation on Davis-Bell and showed a photomontage to the restaurant worker who had missed being shot at the restaurant. She selected Davis-Bell’s picture, stating she was 75 percent certain that he was the shooter.

Sometime after 12:00 p.m., a Seattle police officer saw Davis-Bell’s black Lincoln make an illegal U-turn. The officer heard a sound similar to gunshots and the

car passed him again. He later found two .40 caliber shell casings in the area that had been fired by a gun owned by Davis-Bell.

Later that day, Davis-Bell called Thomas again and told her he had gotten into a fight with his cousin and asked her to pick him up in West Seattle. He told her that he had “gotten into it” with Scott, that he had shot a man, and that he did not know whether the man survived. When she asked him why he did it, he said that Scott “had him so mad he didn’t know what to do.” He then told Thomas he did not want to give her more information because the police might try to force her to testify. He then began crying and apologized to her.

Police eventually arrested Davis-Bell. He was advised of his Miranda rights and he requested an attorney. The police did not question him and transported him to police headquarters. He was placed in an interview room and a detective advised him that everything he did in the interview room was being recorded. The detective gave Davis-Bell a telephone and told him he could use it. For the next 30 minutes, Davis-Bell made several phone calls to various people in which he stated that the police had been to his grandmother’s and sister’s houses, described how he was arrested, insisted that the never had a gun, warned that the police might “hit the house,” and maintained his innocence, claiming that the phone records would show he was on the phone with his grandmother when the crime happened.

Davis-Bell also made a call to an attorney, told the attorney that he was being recorded, and then asked the detective to come into the room to speak to his attorney. The detective gave the attorney his desk phone number and left the room.

Approximately 20 minutes later, the detective came back into the room and told Davis-Bell that his attorney had called and wanted to speak with him. The detective then moved Davis-Bell to another room and gave him her cell phone to call his attorney and speak with him privately. After the call, the detective moved Davis-Bell back into the interview room and re-advised him of his Miranda rights. Davis-Bell stated he would not speak without his attorney present and the detective left the room. Davis-Bell then continued to make phone calls and was later taken to the jail.

Police recovered bullets and shell casings from Scott's apartment, the Philadelphia Cheese Steak restaurant, and the area where police saw Davis-Bell driving his car and heard gunshots. Police also found a box of ammunition in Davis-Bell's car with rounds missing. Forensic analysis showed that all the casings were fired from the same gun, which was the type and model of gun Davis-Bell regularly carried. Cell phone records also confirmed that he had been in West Seattle at the time of the shooting at Scott's apartment, he had been in the area of the Philadelphia Cheese Steak restaurant at the time of the shootings there, and he was in the area where police observed him driving when the gunshots were heard.

The State charged Davis-Bell with one count of first degree murder, three counts of attempted first degree murder, and one count of first degree unlawful possession of a firearm. Before trial, Davis-Bell moved to suppress evidence of the videotaped recording of him in the police station interview room, claiming that the detective's failure to re-advise him of his Miranda rights when the recording began required suppression of the tape. The trial court denied the motion. At trial, Davis-Bell claimed he was not

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the shooter, arguing among other things, that the shooter was described as much taller than him. A jury found him guilty as charged.

## ANALYSIS

Davis-Bell contends that the police violated the privacy act (Privacy Act)<sup>2</sup> by recording telephone calls he made to third parties while in the interview room at the police station without re-advising him of his Miranda rights before the recording began. As a result, he claims that evidence of the recording should have been suppressed. The State counters that the Privacy Act does not apply because there was no recording of a private conversation.

“[T]he protections of the Privacy Act apply only to private conversations.”<sup>3</sup> RCW 9.73.030 restricts the recording of a “[p]rivate communication” or “[p]rivate conversation.” A communication is “private” when the parties have a subjective expectation that (1) it is private, and (2) that expectation is objectively reasonable.<sup>4</sup> RCW 9.73.090(1) provides an exception to this prohibition when police record communications of a person in police custody under the following circumstances:

(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 or her 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 or her constitutional rights, and such statements informing him or her shall be included in the recording;

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

Davis-Bell contends that because he was not re-advised of his Miranda warnings

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<sup>2</sup> Ch. 9.73 RCW.

<sup>3</sup> State v. Clark, 129 Wn.2d 211, 224, 916 P.2d 384 (1996) (emphasis omitted).

<sup>4</sup> State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004).

before the recording began, the police failed to comply with these statutory requirements and the recording was therefore inadmissible. He relies on case law holding that failure to strictly comply with the statutory requirements results in a suppression of a recording.<sup>5</sup> The State contends that the statutory requirements do not apply here because the recorded statements were not private conversations subject to the restrictions of the Privacy Act.

In Cunningham and Mazzante, the court held that recordings of a defendant's statements to police that did not contain a full advisement of his constitutional rights were inadmissible because they did not conform strictly to statutory requirements.<sup>6</sup> But in State v. Modica,<sup>7</sup> the court held that a phone call made by a defendant to his grandmother while in the jail was not a private conversation protected by the Privacy Act and was therefore admissible. The court noted that he was informed that all calls made in the jail may be recorded or monitored, but cautioned that this fact alone does not defeat a reasonable expectation of privacy. The court reiterated that "a conversation is not private simply because the participants know it will or might be recorded or intercepted," and that "[i]ntercepting and recording telephone calls violates the [P]rivacy [A]ct except under narrow circumstances."<sup>8</sup> Nonetheless that court concluded that the defendant did not have a reasonable expectation of privacy because he was in jail, there was a need for jail security, and his calls were not to his attorney or otherwise privileged.<sup>9</sup>

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<sup>5</sup> See State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980); State v. Mazzante, 86 Wn. App. 425, 936 P.2d 1206 (1997).

<sup>6</sup> 93 Wn.2d at 831; 86 Wn. App. at 430.

<sup>7</sup> 164 Wn.2d 83, 186 P.3d 1062 (2008).

<sup>8</sup> 164 Wn.2d at 88-89.

<sup>9</sup> 164 Wn.2d at 89.



The State contends that likewise here, the conversations were not private because Davis-Bell knew the calls were being recorded, he was in police custody during the time, and there were no recordings of his call to an attorney because he asked the detective to speak to his attorney, which was done privately and not recorded. Thus, the State argues, the protections of the Privacy Act do not apply and strict compliance with RCW 9.73.090(1) was not required in order to admit the recordings. But as the State also acknowledges, existing law is unclear about whether the requirements of RCW 9.73.090(1)(b) apply to all recorded conversations, private or not.

On the one hand, as the State notes, by its plain language RCW 9.73.090(1)(b) provides an exception to prohibiting recordings of private conversations, evidencing an intent to apply only to private conversations. RCW 9.73.090(1) states: “The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police . . . in the following instances.” And as noted above, RCW 9.73.030 prohibits the recording of any “[p]rivate communication” or “[p]rivate conversation.”<sup>10</sup>

But in Lewis v. State, Department of Licensing, the court held that strict compliance with the statute was required regardless of whether the recorded communication was private.<sup>11</sup> There, the court concluded that a videotaped conversation between the defendant and police officer during a DUI (driving under the influence) stop was not private, but held that the officer’s failure to properly inform the

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<sup>10</sup> RCW 9.73.030(1)(a),(b).

<sup>11</sup> 157 Wn.2d 446, 467, 139 P.3d 1078 (2006) (“[W]e hold that officers must strictly comply with the provisions of RCW 9.73.090(1)(c) when recording traffic stop conversations regardless of whether recording those conversations would also violate RCW 9.73.030.”).

defendant about the recording required suppression of the recording.<sup>12</sup> Based on Lewis, it appears that strict compliance with the statute is required, which, as the State concedes, did not happen here and should therefore warrant suppression of the recording.

Nonetheless, we agree with the State that any error the trial court committed in admitting evidence of the recording was harmless, given the additional overwhelming evidence of guilt. Admission of evidence in violation of the Privacy Act is a statutory, not a constitutional, violation.<sup>13</sup> 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.<sup>14</sup>

Indeed, in Cunningham, where the court concluded that the failure to strictly comply with the statutory requirements rendered the recordings inadmissible, the court ultimately held that the trial court's error in admitting them was harmless. After a review of the entire record, the court was convinced that even had the recordings been excluded, the jurors could have reached no other rational conclusion than that the defendants were guilty as charged.<sup>15</sup>

Likewise here, Davis-Bell fails to show that had evidence of this recording been suppressed, the outcome of the trial would have been different. The recorded conversations were not overly incriminating and in fact were mainly denials that he committed the crimes. There was other evidence at trial that overwhelmingly

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<sup>12</sup> 157 Wn.2d at 473.

<sup>13</sup> State v. Courtney, 137 Wn. App. 376, 383, 153 P.3d 238 (2007).

<sup>14</sup> Cunningham, 93 Wn.2d at 831.

<sup>15</sup> 93 Wn.2d at 831.

demonstrated his guilt as described above. He argued with Scott shortly before shots were fired at her; he admitted this shooting to his grandmother and told her he was on his way to “take care of” the rest of them; he made similar comments to his girlfriend; he was positively identified by witnesses to the restaurant shootings; his cell phone records placed him at the location of the shootings at the time they occurred; the shell casings from both scenes were linked and likely fired from the same gun he owned; and he admitted to his girlfriend that he had shot a man and did not know whether that man had survived.

Davis-Bell next claims that he was deprived of his right to present a defense because the court did not permit him to elicit testimony about his expert’s work on another homicide case. He claims that when the prosecutor asked his expert on cross-examination whether his work was peer reviewed, this opened the door to testimony about his work on other cases. We disagree.

“Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence.”<sup>16</sup> The trial court has broad discretion when deciding whether proffered evidence is relevant.<sup>17</sup> Similarly, the trial court has discretion to determine whether a party has opened the door to other inadmissible evidence.<sup>18</sup>

Here, Davis-Bell called as an expert witness, Thomas Sandor, who has a background in video production. Sandor examined a video of the shooter at the scene of the Philadelphia Cheese Steak restaurant. He attempted to determine the shooter’s

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<sup>16</sup> State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

<sup>17</sup> State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

<sup>18</sup> Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d 878 (2003).

height by enhancing this video and taking several other videos and concluded that the shooter was approximately 5 feet 8 inches tall.

Before Sandor testified, the prosecutor asked the court to rule that he not testify about another homicide case that had been dismissed as a result of his work. Defense counsel agreed, stating, "The process . . . and the expertise that Mr. Sandor utilized in those other cases are different than 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 up in dismissals and his expertise on this particular case." The court agreed that this was not relevant and ruled that Sandor could not be asked to make comparisons with the results from other cases.

During cross-examination, the prosecutor asked Sandor whether his work was peer reviewed and defense counsel then requested a side bar. The court excused the jury and defense counsel asked that Sandor be permitted to testify about the other cases he had worked on. The court denied the defense request, stating:

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.

The prosecutor then resumed cross-examination and asked Sandor again if his work was peer reviewed, to which he responded, "I don't submit my work to peer review."

Davis-Bell fails to show that the trial court abused its discretion by ruling that Sandor's work on other cases was irrelevant and not admissible. That he worked on another case that was ultimately dismissed was not probative of any fact at issue in this

case and would only raise collateral issues. Davis-Bell in fact acknowledged that Sandor had used a different process in the other case and that he did not even know all the details or circumstances under which that case was dismissed. Thus, testimony about this other case would not establish that the process Sandor used in this case was valid. Nor did the prosecutor open the door to such testimony. The prosecutor simply asked whether his work was peer reviewed and he answered the question and admitted that it was not. This has nothing to do with the disposition on another case he worked on.

Finally, Davis-Bell challenges his firearm enhancements, contending that the jury was erroneously instructed that it had to be unanimous in order to answer “no” to the special verdict question of whether he was armed with a firearm at the time of the offense. He relies on State v. Bashaw,<sup>19</sup> which held that such an instruction is erroneous. But in the recent opinion of State v. Nunez, the court overruled Bashaw, as follows:

The nonunanimity rule adopted in Bashaw was based on an incorrect rule announced in State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). This rule conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity. Accordingly, we take this opportunity to reconsider this portion of our holding in Bashaw and hold that the nonunanimity rule cannot stand.<sup>[20]</sup>

Thus, Davis-Bell’s claim is without basis.

#### Statement of Additional Grounds

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<sup>19</sup> 169 Wn.2d 133, 234 P.3d 195 (2010), overruled by State v. Nunez, No. 85789-0, 2012 WL 2044377 (Wash. June 7, 2012).

<sup>20</sup> No. 85789-0, 2012 WL 2044377, at \*1 (Wash. June 7, 2012).

Davis-Bell filed a statement of additional grounds in which he contends that the trial court erred by failing to suppress evidence that he was seen by officers driving his car in the same area that another shooting occurred. He argues that it should have been suppressed as unduly prejudicial because he was not charged with this shooting. Because Davis-Bell did not object to this testimony at trial and fails to show that its admission is a manifest error affecting a constitutional right, he may not now raise this issue for the first time on appeal. Accordingly, we deny review of this claim.

We affirm the judgment and sentence.

Grosse, J.

WE CONCUR:

Leach, C. J.

Becker, J.