72713-3

FILED
January 4, 2016
Court of Appeals
Division I
State of Washington

NO. 72713-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ZAKARIA AWEIS DERE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TANYA THORP

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Statutes

Rules and Regulations

Washington State:

Other Authorities

A. ISSUES PRESENTED

1. Were recordings of jail calls from a codefendant to Dere legally obtained and properly admitted at trial?

a. Were these jail phone call recordings outside the scope of the Privacy Act because there is no expectation of privacy in calls that are known to be recorded?

b. Should this court follow its own precedent and hold that statements during jail phone calls made with knowledge that they are recorded are not private affairs protected by Washington Constitution Article I, Section 7?

c. Does the recipient of jail calls lack any special status that would prohibit admission of the calls?

2. Did the trial court properly admit evidence relating to the license plate number of Dere's Cadillac? Is any error in admission of that evidence harmless?

3. Has Dere failed to establish error by juxtaposing two correct evidentiary rulings: admission of a factual inference drawn by witness Mohamed based on his firsthand observations and exclusion of a prior statement of Mohamed expressing his opinion as to Dere's state of mind during the crime?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Zakaria Aweis Dere, was charged with robbery in the first degree with a firearm enhancement and unlawful possession of a firearm by a felon. CP 1-8. Two others were charged with the same robbery: Bashir Abdirashid Mohamed and Mohamed Abdi Ali. CP 1-2. A joint trial of the three codefendants began with pretrial hearings before the Honorable Tanya Thorp on September 3, 2014. RP 57.[1] The firearm charge against Dere was dismissed during pretrial motions. RP 59. The trial of Dere was severed from the others, with the State's agreement, because Dere intended to cross-examine the alleged victim, Nasir Abdulkadir, as to Abdulkadir's knowledge about previous bad acts of codefendant Ali. RP 593-98.

The trial of the other two defendants proceeded first. RP 598. Mid-trial, Bashir Mohamed negotiated a plea agreement with the State that included Mohamed's agreement to testify in several trials, including Dere's. RP 1369-70, 1429-30. After Ali's trial, Dere

[1] The entire report of proceedings is consecutively paginated and will be referred to in this brief simply by page number.

was tried and the jury found him guilty as charged. RP 842-51, 1430; CP 371-72.[2] Based on Dere's offender score of six, his standard sentence range was 77-102 months, with an additional 60 months for the firearm enhancement.[3] CP 382. The court imposed a standard range sentence of 150 months, including the enhancement. CP 38-42.

2. SUBSTANTIVE FACTS

On December 13, 2013, Nasir Abdulkadir was robbed by three men, including defendant Dere. RP 875-76, 880-88, 897. Dere characterizes this as an eyewitness identification case[4] and the evidence did include two eyewitness identifications of Dere as one of the robbers – he was identified by both Abdulkadir and by one of the other robbers, Bashir Mohamed. RP 881, 932, 1292, 1354-56. Neither of these witnesses was a stranger to Dere, however. Mohamed was a close friend of Dere's. RP 1337-38. Abdulkadir had not met Dere formally, but knew him as a fellow

---

[2] The jury deliberated slightly more than one day. Supp. CP __ at 24-28 (Sub No. 89, Jury Trial (minutes), 11/4/14).

[3] Dere states that he was sentenced to 60 months "on the firearm count" consecutive to the time imposed "for the robbery offense" (App. Br. at 4). This may be a clerical error, as he was convicted and sentenced on only one offense, with a firearm enhancement.

[4] App. Br. at 1.

member of the Somali community in Seattle. RP 865-67, 887. Jail telephone calls from Mohamed Abdi Ali, the third robber, to Dere established their close relationship and corroborated Dere's involvement. Ex. 102; RP 1372-77, 1461-87, 1798-1810. At trial Dere did not concede that he was one of the participants but, in closing argument, he characterized the issue as whether he was an accomplice to the robbery that was occurring when he assaulted Abdulkadir. RP 1737, 1765.

Mohamed testified that on December 13, 2013, he and Ali planned to commit a robbery. RP 1340-43. (At trial, Mohamed and Abdulkadir usually referred to Ali by the nickname "Shamarke." RP 914, 1340.) Mohamed had a loaded revolver in his pocket. RP 1347, 1396. He said they were socializing with Dere and a number of other men in an area outside a bar and looking for a target (victim) when Abdulkadir drove by. RP 1342-48, 1387-90. Later in his testimony, Mohamed said that the plan was that while Ali was searching the car "we were supposed to hold [the victim] down." RP 1361-62 (emphasis added).

Abdulkadir was driving a cab when he was flagged down by Ali. RP 863, 868-71. Ali got into the front seat of the cab and picked up Abdulkadir's phone, purportedly to adjust the music

playing. RP 873-74. Abdulkadir parked and Ali signaled to Mohamed that this was their target. RP 875-76, 1351, 1395-96.

Mohamed walked over to the cab and pulled out his revolver. RP 1351-52, 1396-97. He opened the driver's door and pointed the gun in Abdulkadir's face, demanding money. RP 880-83, 1352, 1397. Dere was standing at Mohamed's side, inside the driver's door. RP 880-83. Dere also had a weapon – Abdulkadir thought it was a box cutter, but Mohamed testified that it was a collapsible baton. RP 884, 1354. Mohamed testified that Dere demanded money too, but later said it could have been Ali that he heard make that demand. RP 1356, 1403-05.

Abdulkadir testified that both Mohamed and Dere struck Abdulkadir in the face and head with their weapons. RP 884-86. Mohamed testified that it was only Dere who repeatedly struck Abdulkadir. RP 1357-59, 1402-03. Abdulkadir managed to get out of the cab and run across the street. RP 888, 1359. Mohamed testified that Ali handed the GPS from the cab to Mohamed. RP 1359-61. The car keys and Abdulkadir's phone also were stolen from the cab. RP 911-12.

Abdulkadir saw the robbers flee the scene in two cars, a white or silver Cadillac and a white Chevrolet. RP 903, 1260. He

described those cars to the police at the scene. RP 1044, 1089, 1239-40, 1260. Police observed that Abdulkadir had fresh injuries to his face and head. RP 1134.

Mohamed testified that Dere had a silver Cadillac and that Dere was driving the Cadillac that night. RP 1399; Ex. 99. Mohamed testified that after the robbery, Dere went to his Cadillac, and the Cadillac then drove away. RP 1339, 1363, 1407-09. Ali refused to give Mohamed a ride, so Mohamed found a ride with a man driving a Chevrolet Caprice. RP 1089-92, 1364-69. Police stopped the Caprice nearby, with Mohamed in the back seat; Mohamed's revolver was found under the front seat, where he put it when he realized the police were in pursuit. RP 1091-92, 1131-33. Abdulkadir's GPS device was found on the floor of the car, where Mohamed admitted he had dropped it. RP 1092, 1133, 1368.

Abdulkadir identified Mohamed as one of the robbers in a show-up identification the night of the robbery. RP 906-07, 1241-42. Abdulkadir did not tell the police that night that he knew who the other two robbers were – he testified that he knew they were members of the Somali community, and he hoped that he could recover his losses from the families of the robbers, a common

practice in that community.[5] RP 887, 914-15. That effort to resolve the matter informally was unsuccessful, so the next week, Abdulkadir informed the police that he knew the identity of the other two robbers. RP 914-17, 932, 935-36. He identified Ali by providing photographs from Ali's Facebook page, and he identified Ali in a photo montage as one of the robbers. RP 913-14, 931-32, 1292.

Abdulkadir identified the third robber as a man named Zakaria. RP 1281. Detective Dag Aakervik knew that Zakaria Dere was a suspect in another investigation, so he included a photograph of Dere in a montage that he showed to Abdulkadir. RP 435. Abdulkadir immediately identified Dere as the robber. RP 1292. At trial, Dere successfully moved to exclude any evidence explaining why Aakervik included Dere in the montage. RP 435-38.

The cab that Abdulkadir was driving had a camera installed that was programmed to take still photographs of its interior at intervals that varied based on several triggers. RP 877, 1220-24. Images recovered from the camera show two men standing inside

[5] Dere introduced evidence suggesting that Abdulkadir might have had a grudge against Dere's sister, a dispatcher for the same cab company. RP 1014-15, 1047-48, 1651-56.

the driver's side door during the robbery. Ex. 30, images 65-69;[6] RP 884-86. The images show the person that Abdulkadir and Mohamed identified as Dere with a weapon that appears to be baton-shaped. Ex. 30, images 66, 68; RP 885-86, 1357-58. The faces of the robbers are outside the frame of the photographs. Ex. 30, images 61-71. At trial, Mohamed identified himself as the man on the right, with reflective markings on his jacket. RP 1352. He identified the man standing next to him as Dere. RP 1357-58. Abdulkadir also identified Mohamed as the man on the right, with the gun, and Dere as the man standing to the left of that man. RP 885-86.

Dere was the registered owner of a silver Cadillac. RP 1110, 1115, 1300. On December 26, Dere's Cadillac was stopped by police; Dere was the driver. RP 1102-04, 1111.

Mohamed testified that while the three codefendants were awaiting trial, Ali and Dere discussed paying off the victim so that he would not come to court. RP 1370. They said if that did not work, they would keep him away by putting him in a trunk or shooting him. RP 1370-72.

---

[6] The numbers referred to in the transcript refer to the order of the images in the exhibit. The numbers do not appear in the file names attached to each image, but when an image is viewed, its number in the sequence appears at the top of the screen. Ex. 30.

Ali placed calls to Dere, from jail, in which Dere asked whether Abdulkadir had appeared to testify at Ali's trial. Ex. 102, 9/25/14, 20:50 (2:04-4:27 excerpt) at 0:05-07; RP 1472, 1808. The two discussed Abdulkadir's testimony about the robbery obliquely, referring to both of them being there and that the victim was trying to "pop it with us." Ex. 102, 9/25/14, 20:50 (2:04-4:27 excerpt) at 00:19-1:02; RP 1473-74; 1808-09. Dere said that because Mohamed had been caught with "everything," he should take "one for the team." Ex. 102: 9/16/14, 18:18 at 1:55-2:08; RP 1728, 1807. Dere notes gaps in the transcription of the calls, but the evidence is the recordings. The variation in transcription of the four times the recordings were played illustrates only that the trial record varied in its clarity. RP 1373-77, 1461-87, 1728-30, 1798-1810.

C. ARGUMENT

1. THE JAIL PHONE RECORDINGS WERE PROPERLY ADMITTED.

Dere claims that the trial court erred by admitting portions of recordings of jail phone calls made by Ali to Dere, alleging violation of the Washington Privacy Act and constitutional privacy rights. These arguments should be rejected. The trial court properly

concluded that no there was no reasonable expectation of privacy in the calls, so they did not fall within the Privacy Act, and that the calls were not constitutionally protected private affairs. The court properly concluded that if there was any protected privacy right in the calls, Dere knew the calls were being recorded and consented to recording. Thus, the call excerpts were properly admitted at trial.

a. Relevant Facts.

Dere was arrested on this charge on December 26, 2013. RP 1107, 1110-13, 1561. He remained in the King County Jail[7] until he posted bail and was released on July 15, 2014. RP 1423, 1442, 1561. The telephone system at the King County Jail allows inmates to make calls to persons outside the jail. RP 1531-32. Posted next to each phone is a notice that advises inmates that all calls are recorded except calls to an attorney. RP 1532-33. The inmate rulebook given to each inmate on arrival also provides notice that jail phone calls are monitored. RP 1532. When an inmate makes a telephone call, there is a warning at the beginning of the call advising that the call is being recorded. RP 1533. After that warning, the inmate must push a number on the phone to

[7] The King County Jail exists in two locations: one is the Maleng Regional Justice Center in Kent and the other is in Seattle. RP 1423, 1541, 1548, 1561.

acknowledge that he or she accepts. Id. On every call, the person who receives the call immediately hears a recorded message, as follows (inserting the inmate caller's name).

> Hello. This is a free call from Mohamed Ali, an inmate at King County Correctional Facility. This call is from a correctional facility and is subject to monitoring and recording. If this call's being placed to an attorney, it should not be accepted unless the attorney name or number is on the do not record list. If an attorney name and number is not on the do not record list, this call will be recorded. If the attorney name and number is not on the do not record list, contact the jail immediately and have that attorney's name and number added to the attorney list.
>
> After the beep, press 1 to accept this policy or press 2 and hang up.

RP 1546-47, 1798; Ex. 102: 8/25/14, 20:16, at 0:00-0:40. The call will not continue until the recipient pushes 1, agreeing to the recording policy. RP 1533.

After Dere was released, codefendant Ali remained in custody in the King County Jail. RP 1538-39. Ali made a number of calls to Dere using the inmate telephone system; portions of five calls were admitted at trial. Ex. 102; RP 657-58, 1545-46. Ninety percent of the conversation during these calls was in English, the rest was in Somali. RP 78; Ex. 102. No transcript of the calls was prepared. RP 1811.

The jury heard some of the recordings during the testimony of Bashir Mohamed, who identified the speakers. RP 1372-77. Bashir testified that Dere's nickname was "Zu" and that Dere identified himself using that nickname during the calls. RP 1338, 1373. Mohamed, who was a native Somali speaker, interpreted some of the Somali spoken during these excerpts. RP 1375-77.

Later in the trial, the admitted portions of all the calls were all played and the Somali portions were interpreted by a Somali interpreter who testified as a witness. RP 1460-87. The prosecutor played portions of the calls during closing argument. RP 1728-30. The jury heard all of the calls again when they asked to hear them shortly after they began deliberating. RP 1787, 1797-1810.

Dere objected to admission of jail calls that were made by him and jail calls that were made to him on the same statutory and constitutional grounds. RP 618. The trial court concluded that the calls were not private, because it was clear that Dere was notified of the recording, and because the content of the calls (referring to the stupidity of a codefendant making incriminating statements in recorded jail calls) made it clear that Dere was aware that the calls would be recorded and possibly used against him. RP 622-23; Supp. CP __ at 3-6 (Sub No.106, CrR 3.6 Findings of Fact and

Conclusions of Law, 2/12/15) (attached as Appendix A) (hereafter referred to as "CrR 3.6 Findings"). The trial court rejected arguments that the calls were not relevant, were confusing, or were more prejudicial than probative. RP 654-58. The court noted that there was very little Somali in the portions of the calls being offered in Dere's trial. RP 656-57.

b. The Jail Phone Recordings Did Not Violate The Washington Privacy Act.

Dere claims that the jail phone recordings admitted at trial were recorded in violation of the Washington Privacy Act, RCW 9.73.030(1), alleging they were recorded without proper consent. This claim is meritless. The calls were not subject to the Privacy Act because there was no reasonable expectation of privacy in them. Even if the Privacy Act applied, the three claims now raised were not preserved for review. The substance of the claims also is without merit: the warning on the recordings is sufficient under the Act and the Act does not require that the warning be included in exhibits admitted at trial.

Dere's arguments that the recorded warning is inadequate are based on his contention that the warnings do not satisfy the standard established for obtaining consent for recording

communications that *are* subject to the Privacy Act, RCW 9.73.030(3). However, that provision is irrelevant to the predicate question of whether the Privacy Act is applicable to the jail phone recordings. Under the Privacy Act, if there is no reasonable expectation of privacy in a conversation, it is unnecessary to obtain consent to record, so compliance with RCW 9.73.030(3) is not necessary. State v. Modica, 164 Wn.2d 83, 87-90, 186 P.3d 1062 (2008).

The Washington Supreme Court has concluded that recording inmates' phone calls from jail under circumstances virtually identical to those in the case at bar does not violate the Washington State Privacy Act, RCW 9.73.030,[8] because there is no reasonable expectation of privacy in the calls. Modica, 164 Wn.2d at 87-90. The court held that a communication is private under RCW 9.73.030, "(1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." Id. at 88. The court concluded that inmates making phone calls from the King County Jail, who receive notice that calls are subject to

[8] "(1) Except as otherwise provided in this chapter, it shall be unlawful . . . to intercept, or record any: (a) Private communication transmitted by telephone . . . without first obtaining the consent of all the participants in the communication . . .." RCW 9.73.030.

recording through posted notices and an automatic warning at the beginning of every call, do not have a reasonable expectation of privacy in those calls (unless the call is to his lawyer or otherwise privileged). Id. at 89. Therefore, recording of Modica's calls did not violate the Privacy Act. Id. at 90.

This Court followed that reasoning in State v. Haq, 166 Wn. App. 221, 259-60, 268 P.3d 997 (2012). The court in Haq rejected the argument that security concerns must be involved in order to defeat an expectation of privacy or that the prosecutor's office may obtain jail phone recordings only if the calls include matter affecting security. Id. at 260.

The trial court in this case relied upon the holdings in Modica and Haq in rejecting Dere's challenge under the Privacy Act. CrR 3.6 Findings at 5; RP 622-23. The court cited additional evidence in this case that supports the conclusion that there was no reasonable expectation of privacy in the calls: Dere had been an inmate himself and was aware of the recording policy, and the calls included a discussion of the foolishness of a codefendant who made incriminating statements in jail calls. CrR 3.6 Findings at 3, 5; RP 622. Dere has not assigned error to the trial court's findings that he knew the calls were being recorded, so that finding is a

verity on appeal. State v. Ross, 141 Wn.2d 304, 309-11, 4 P.3d 130 (2000); RAP 10.3(g).

Even if there was a reasonable expectation of privacy in the jail phone calls, the Privacy Act permits recording if both parties consent, as both parties did in this case. Ali made the calls knowing that they would be recorded. CrR 3.6 Findings at 5. Dere was required to press a number on the phone to accept the call, after having been given notice that it was subject to monitoring and recording. CrR 3.6 Findings at 5; RP 1533, 1546-47. Under these circumstances, the court of appeals in Modica concluded that the parties consented to any recording. 136 Wn. App. 434, 450, 149 P.3d 446 (2006), aff'd on other grounds, 164 Wn.2d 83 (2008). The Supreme Court decision in Modica and the decision in Haq did not reach the issue of consent because each found no expectation of privacy. However, the trial court here concluded that if the calls were subject to the Privacy Act, both Ali and Dere consented to the recordings. CrR 3.6 Findings at 5. That is an alternative basis to affirm the finding of admissibility.

RCW 9.73.030 provides:

> (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(3). A party "will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded." State v. Townsend, 147 Wn.2d 666, 675-76, 57 P.3d 255 (2002) (person who sends an email knows that it will be recorded by the receiving computer, so that person implicitly consents for purposes of the Privacy Act). The Supreme Court in Townsend held that where the privacy policy of computer software warned of the possibility that a recipient could record a communication, the sender had impliedly consented to the recording of his messages. Id. at 675-79.

The automated warning at the beginning of each jail call clearly communicated more than the possibility of recording – it stated that unless the number called was registered as an attorney's number, "this call will be recorded." RP 1546-47, 1798; Ex. 102: 8/25/14, 20:16, at 00:20-00:26. This warning was sufficient to establish Dere's knowledge that the call was going to be recorded. The trial court found that Ali and Dere knew the

conversations were being recorded, so that alone establishes their implied consent under the Privacy Act.

Even under the specific terms of RCW 9.73.030(3), the automated warning here was sufficient. Dere claims that the automated warning did not satisfy RCW 9.73.030(3) because it was not an announcement by a party to the conversation. But the jail phone system is a party to the communication, as it makes a statement during the call and requires responsive action (pressing a button) upon which the jail acts (by terminating or allowing the call to continue). Even if the jail is not considered a party to the communication, the announcement is made by the recording as an agent of the inmate placing the call. It is the caller's action that generates the announcement and the inmate must obtain the recipient's consent to the conditions of the call (recording or monitoring) in order to converse. Thus, the announcement is made on his behalf, to accomplish completion of the call.

The announcement that the call is "subject to recording and monitoring" satisfies the statutory requirement of communicating that the call is "about to be recorded" in "any reasonably effective manner." RCW 9.73.030(3). This Court has used the term "subject to recording and monitoring" to describe an announcement that

stated the call "will be recorded and is subject to monitoring." State v. Archie, 148 Wn. App. 198, 201, 199 P.3d 1005 (2009).[9] But the advisement given here went further, stating that if a number is not registered as an attorney's number, "this call will be recorded." RP 1546-47, 1798; Ex. 102: 8/25/14, 20:16, at 00:20-00:26. Although the exact words "about to be recorded" are not used, the words "will be recorded" effectively convey the same meaning.

Finally, Dere argues that admission of three of the calls violated the Privacy Act because the portions of the recordings admitted did not include the automated notice. This statutory argument was waived by failure to raise it in the trial court. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The argument also fails on its merits. Dere relies solely on RCW 9.73.030(3), which provides that where consent is required under the Privacy Act, the recording must include the announcement that recording will occur. The evidence in the trial court was that the

[9] The Webster's dictionary definition relied upon by Dere is definition 2b of "subject," meaning "Prone; disposed." App. Br. at 19. However, definition 2a in that dictionary is "suffering a particular liability or exposure," indicating a much greater certainty. Webster's Third New International Dictionary 2275 (1993). These definitions do not resolve the issue of the announcement's adequacy.

automated notice occurs at the beginning of every call. RP 1546-47. There was no contradictory evidence. The State announced its intention to play for the jury only the recording at the beginning of one call, and Dere responded that he had no objection to that procedure. RP 567. Dere has cited no authority in support of his claim that the exhibits admitted at trial must include the recorded notice, and that claim should be rejected.

c. The Recipient Of A Phone Call From Jail Who Consents To Recording Has No Statutory Right To Suppression Of The Recording.

For the first time on appeal, Dere claims that the jail phone recordings were admitted in violation of the Washington Privacy Act, RCW 9.73.030(1), because Dere was the recipient of the calls, not the inmate caller. This statutory claim should not be considered on appeal, as a claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Further, the substance of this claim is meritless for the reasons stated in section C.1.b, supra: the calls were not subject to the Privacy Act because there was no expectation of privacy in

them, and even if there was an expectation of privacy, Dere consented to the recording.

Dere asserts that "strict scrutiny" applies to this claim, relying on the reference to that standard in State v. Haq, 166 Wn. App. at 254. However, that reference in Haq was to the legal standard applicable to the equal protection claim that was made in that case, challenging the difference in treatment of inmates in the King County Jail as opposed to inmates in the State Department of Corrections. Id. at 253-56. There is no equal protection claim in this case, so the legal standards used in equal protection analysis are inapposite.

Dere asserts that a reasonable expectation of privacy is "enshrined by" the Privacy Act. App. Br. at 25. But the Privacy Act does not create an expectation of privacy, it protects from nonconsensual recording those communications as to which there is a reasonable expectation of privacy.

Dere's assertion that he had a subjective expectation of privacy is unsupported by the record. It is apparent that Dere and Ali knew calls were being recorded, as they mocked a codefendant who made incriminating calls during jail calls and appeared to switch from English to Somali when discussing incriminating

details. Ex. 102: 8/25/14, 20:16 at 3:37-43; RP 1481-86, 1798-1802. Dere's inaccurate gauge of whether his own calls would be incriminating does not establish that he was unaware they were being recorded. Moreover, Dere's subjective expectation is irrelevant unless it was an objectively reasonable expectation of privacy, and Modica[10] and Haq[11] already have held there is not an objectively reasonable expectation of privacy in such calls.

Dere's characterization of the State as having "[run] an 'end around' the judiciary to violate" Dere's rights is unjustified. App. Br. at 25. The recording of jail calls and the use of recorded jail calls at trial had been explicitly approved by Washington appellate courts before the recordings in this case.[12] Dere's analogy of the jail phone call recordings to a microphone hidden under the tables used by the defense at trial[13] is entirely inapposite. There was no surreptitious recording here – Dere was informed at the beginning of each call from Ali that he would be recorded and Dere had to affirmatively indicate his understanding of that to continue with each

[10] Modica, 164 Wn.2d at 87-90.

[11] Haq, 166 Wn. App. at 259-60.

[12] The calls at issue occurred in August and September of 2014. RP1538, 1545. Modica was decided in 2008, and Haq in 2012.

[13] App. Br. at 26.

call. Dere's suggestion that he should have been advised that the recording could be used against him[14] is a reference to the advice of constitutional rights that is required by Miranda v. Arizona, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), before custodial interrogation by a state agent. As the trial court found, Dere was not in custody and Ali was not a state agent, so the requirements of Miranda were not applicable here. RP 621-22.

d. Admission Of A Jail Phone Recording Against The Recipient Of The Call, Who Consents To Recording, Does Not Violate Constitutional Privacy Rights.

For the first time on appeal, Dere claims that the constitutional right to privacy of a recipient of a call from an inmate differs from the rights of an inmate and precludes admission of the call against the recipient unless the calls were recorded (and the recordings obtained) under authority of a search warrant. This argument was not preserved for review and should be rejected under RAP 2.5 on the basis that Dere has not established manifest constitutional error. On its merits, this argument fails because Dere consented to the recordings and so they were not protected private affairs.

[14] App. Br. at 26.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333. Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to the defendant's rights. Id. Because Dere actually knew that the calls from the jail were being recorded, based on the information he received while in the jail and the notification at the start of each call, he did not have an expectation of privacy in the calls, and he has not established actual prejudice to his rights.

Dere's claim that the jail phone recordings violated the Fourth Amendment is contrary to federal cases that uniformly conclude that recording of jail phone calls does not violate any federal expectation of privacy. E.g., United States v. VanPoyck, 77 F.3d 285, 290 (9th Cir. 1996); United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988); United States v. Hearst, 563 F.2d 1331, 1345 (9th Cir. 1977). The only federal case the State has found that addresses the argument that non-inmates have greater privacy rights than inmates rejected that claim. Willoughby, 860 F.2d at 21-22. The court observed that contacts with inmates have often been held to justify otherwise impermissible intrusions into the

noninmates' privacy. Id. (citing Procunier v. Martinez, 416 U.S. 396, 408-09, 412-14, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (mail to prisoners may be subject to inspection); United States v. Harrelson, 754 F.2d 1153, 1169-70 (5th Cir. 1985) (visitors may have their conversations with inmates monitored); Hunter v. Auger, 672 F.2d 668, 673-75 (8th Cir. 1982) (visitors may be subject to strip searches based on reasonable suspicion)). The court held that the public is on notice that prison officials must establish procedures to monitor inmates' calls, because that requirement is published in the Code of Federal Regulations, and given the institution's strong interest in preserving security, interception of calls to noninmates does not violate the federal privacy rights of noninmates. Willoughby, 860 F.2d at 21-22. Because Dere received explicit notice that the calls were subject to recording, he had no federal privacy right in the calls.

Dere's Fourth Amendment argument is based entirely on two cases, neither involving jail phone calls. The first is Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), which held that a phone conversation conducted in a public phone booth was protected by the Fourth Amendment. However, the electronic eavesdropping at issue in Katz was surreptitious; unlike the calls

recorded in this case, the phone conversation in Katz was intended to be private and the participants had no reason to believe it was not private. Id. at 348.

The second case on which Dere relies is Riley v. California, 573 U.S. __, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), which held that the data on a private cell phone falls within constitutionally protected privacy rights, even after the phone has been lawfully seized. That case does not establish a privacy interest in jail phone calls, however. The data protected by the court in Riley was data created when the user of the telephone had no reason to believe it would be exposed to government intrusion. The Riley opinion emphasized that the digital data on a cell phone included vast quantities of sensitive personal information, noting that for many people, cell phones hold the "privacies of life." 134 S. Ct. at 2489-91, 2495 (quoting Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886)). This is the opposite of the expectations of a person called by a jail inmate, who is informed that the call is subject to monitoring and will be recorded unless the telephone number is registered as an attorney's number, and who must press a number indicating acceptance of that condition.

Dere's challenge to the jail phone recordings under Article I, Section 7 of the Washington Constitution[15] has been rejected by this Court, in Archie, 148 Wn. App. at 204, and in Haq, 166 Wn. App. at 256-59. The trial court relied on Archie and Haq in rejecting this argument, concluding that Dere had no expectation of privacy in the jail phone calls and that he consented to the recording of the calls. CrR 3.6 Findings at 5; RP 622-23. Whether undisputed facts constitute a violation of this constitutional provision is a question of law reviewed de novo. Archie, 148 Wn. App. at 201.

This Court concluded in Archie that jail phone calls made under circumstances virtually identical to those in this case were not "private affairs" protected by Article I, Section 7. Id. at 204. The court noted that the Supreme Court has found no invasion of privacy when other forms of inmate communication are inspected, as long as inmates have been informed of that practice. Id. at 204, citing State v. Hawkins, 70 Wn.2d 697, 704, 425 P.2d 390 (1967).

The court in Haq affirmed the holding that phone calls from the jail are not private affairs deserving of Article I, Section 7 protection. 166 Wn. App. at 258. Dere's argument on appeal that

[15] Article I, Section 7 provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

use of the recordings violated the Washington Constitution relies on the prohibition of warrantless searches, but where the matter at issue is not a private affair protected by the Constitution, there is no warrant requirement. Id.

Dere relies upon the analysis of Modica in this section of his brief, but Modica analyzed only whether jail phone recordings violated the Privacy Act; there was no constitutional analysis. Modica, 164 Wn.2d at 86-90.

Dere's argument that the calls were recorded in violation of the Washington Constitution, or used at trial in violation of the Constitution, includes the assertion that the content of the calls determines the legality of the recordings. There is no legal authority for that position (except for calls to an attorney). The actual content of the calls recorded does not define the constitutional protection provided. The jail records all inmate calls and cannot know until afterward whether security issues are implicated, an escape is planned, or other crimes (such as intimidating a witness or violating a no contact order) are committed during the calls. If the jail obtains information that an inmate is contemplating or instigating violence or an escape, or attempting contact with victims, reference to the contents of jail calls is critical.

The expectation of privacy is not dependent on whether law enforcement has a previously existing individualized security concern as to a specific inmate.

Dere offers no authority for his claim that a recording properly obtained by the jail can still be a "private affair" protected by Article I, Section 7. To the contrary, the Washington Supreme Court has concluded that once the State has properly seized an item, an inmate no longer has a privacy interest in it. State v. Puapuaga, 164 Wn.2d 515, 523-24, 192 P.3d 360 (2008); State v. Cheatam, 150 Wn.2d 626, 641-43, 81 P.3d 830 (2003). Because Dere's claim that the release of recordings from the jail to the prosecutor warrants separate constitutional protection under Article I, Section 7 is unsupported by analysis or authority, the court should refuse to consider this claim. RAP 10.3(a)(6), (g); State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

The United States Supreme Court's decision in Riley is distinguishable. The phones had been seized but the data in the phones had not been seized when the data was searched. 134 S. Ct. at 2477. Here, the content of the calls was already recorded and in the hands of the jail, a public entity. No additional data was obtained when the calls were provided to the State.

Finally, the alternative holding of Archie was that when a call recipient who is informed of the recording presses a button to continue the call, as was required in each call in this case, that party has expressly consented to the recording and there is no constitutional violation. Id. at 204. It is well established that if one party in a conversation consents to a recording, the recording does not violate Article I, Section 7. State v. Clark, 129 Wn.2d 211, 221, 916 P.2d 384 (1996). The trial court here concluded that Ali and Dere consented to the recording of these calls. CrR 3.6 Findings at 5. Both Ali and Dere had to press a button on the phone to continue with the call after being warned that it would be recorded; as the court concluded in Archie, they expressly consented to the recording. Because at least one party consented to each recording, there was no constitutional violation.

2. ADMISSION OF OFFICER MEDLOCK'S TESTIMONY THAT HE WAS PROVIDED A LICENSE NUMBER OF THE FLEEING CADILLAC WAS NOT REVERSIBLE ERROR.

Dere claims that the trial court erred in allowing Officer Medlock to testify that Abdulkadir provided the license number of the silver Cadillac that fled the scene of the robbery. Dere asserts

that this testimony was inadmissible hearsay. Officer Medlock's statement was not hearsay and the court did not abuse its discretion in permitting it. Further, any error in its admission was harmless.

Dere's assignment of error and issue statements relating to this claim refer to hearsay statements, plural, but the State has been unable to identify any statement other than Medlock's that Dere identifies as improperly admitted. The State's response is premised on that understanding. While Dere asserts that "the State insinuated Abdulkadir's supposed identification of the license plate number in a number of different ways,"[16] he has not identified any error in the testimony that he then describes.

Dere's issue statements relating to this claim aver a violation of his constitutional right to confront witnesses. App. Br. at 2. However, Dere does not mention any constitutional right to confrontation in his argument, so that claim has been waived. A party that offers no argument on a claimed assignment of error waives the assignment. Brown v. Vail, 169 Wn.2d 318, 336 n. 11, 237 P.3d 263, 272 (2010) (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

[16] App. Br. at 33.

Dere's briefing as to this claim of error repeatedly characterizes the behavior of the deputy prosecutor who tried this case as unethical and even deceitful. These characterizations are not supported by the record, which is described below. Neither defense trial counsel nor the trial court ever suggested that the prosecutor was acting in bad faith or committed misconduct of any kind. These assertions of unethical motives and behavior should not play any part in the analysis of the legal issues presented.

a. Relevant Facts.

Abdulkadir saw the men who robbed him leave the scene in two cars, a Chevrolet Caprice and a white or silver Cadillac. 903, 995-96, 1044, 1260, 1524. Another cab driver, Ahmed Jama, arrived as the robbers began to flee, and drove after the Cadillac. RP 890-91, 924-25, 1054-55. Before trial, Abdulkadir stated that the person who pursued the Cadillac obtained the license number and gave the number to Abdulkadir, who provided it to the police. CP 76 (Dere trial brief); RP 1253.

Pretrial, the trial court ruled that Abdulkadir would not be permitted to testify to the license plate number of the Cadillac. RP 611. However, the court ruled that law enforcement could testify to

the license number of the silver Cadillac registered to Dere, which was obtained from public records. RP 440-41, 611.

At trial, after testimony about the men stopped in the Chevrolet, the prosecutor asked Abdulkadir if he told officers the license number of "the vehicle." RP 909. There was no objection. Id. Abdulkadir responded that he did not. Id. The prosecutor asked questions about whether Abdulkadir was aware that a license number had been provided to police, but objections to those questions were sustained. RP 909-10. The prosecutor explained to the court that it was relevant that the number was given to the police because of the defense allegation that Abdulkadir was not entirely forthcoming with the police.[17] RP 919-20.

Before the testimony of Officer Medlock, the prosecutor informed the court that Medlock recalled that Abdulkadir provided a license plate number of the Cadillac on the night of the robbery. RP 1251. The court noted that it had no reason to believe that was not true, as the parties had previously stated that Abdulkadir got the plate number from someone else and provided it to the police. RP

[17] Dere cross-examined Abdulkadir at length about details of Abdulkadir's report of his activities the night of the robbery. RP 946-55. He questioned Abdulkadir's reason for being in the area and reason for stopping for Ali. RP 947-50.

1253. The court ruled that Medlock could testify that a license plate number was provided, but not what the number was. Id.

Officer Medlock testified that Abdulkadir described two vehicles that were involved in the alleged robbery, a white Chevrolet Caprice and a white or silver Cadillac, and gave the officer a license plate number for the Cadillac. RP 1260, 1265. Officer Medlock did not testify to the license number. RP 1260.

Abdulkadir testified that he selected Dere's photograph from a montage as one of the robbers. RP 917-18, 932. The montage identification sheet was dated December 23, 2013. Ex. 45. Detective Aakervik testified that on December 23 he presented Abdulkadir with a photo montage including Dere and that Abdulkadir immediately identified Dere as one of the robbers. RP 1290-92.

Bashir Mohamed testified that he was a close friend of Dere. RP 1335-38. He testified that Dere had a silver Cadillac and was driving it on December 13, 2013. RP 1339. Mohamed said that Dere's Cadillac was parked near the scene of the robbery and that after the robbery, he saw Dere go to the Cadillac and get in, and then the Cadillac left. RP 1407-09. Mohamed identified Dere's

silver Cadillac in a photograph; that photograph showed the car's license number, AKE8954. RP 1339, 1363; Ex. 99.

Detective Litsjo testified that on December 26 he intended to apprehend Dere and was looking for a silver Cadillac that was registered to Dere, plate number AKE8954. RP 1110, 1115. Litsjo spotted the car at the address where it was registered. RP 1114-15. After the car left that address, it was stopped – Dere was the driver. RP 1111-12. Burien Deputy Ghrmai acted as backup to the traffic stop on December 26. RP 1102. Ghrmai confirmed that Dere was driving a silver Cadillac with license plate AKE 8954. RP 1103-04. Dere was arrested and taken to jail. RP 1107.

b. Admission Of The Testimony Was Not An Abuse Of Discretion.

Officer Medlock's testimony that Abdulkadir provided a license plate number for the Cadillac that fled the scene was not hearsay. Hearsay is defined as "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). Medlock described the statement made by Abdulkadir (as a description that included a plate number) but did not repeat Abdulkadir's statement (the plate number). The testimony that a

license number was provided could not have been offered for the truth of the license number, because the jury was not told the license number. The probative value of the statement was that Abdulkadir provided that information to the police, and the truth of that contention depends on the credibility of the testifying officer, not the out-of-court declarant (Abdulkadir).

A trial court's ruling as to the admissibility of evidence will not be disturbed absent an abuse of the court's discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or reasons. Id. The trial court properly exercised its discretion because the testimony was not hearsay. It is notable that Dere's original hearsay objection, in his trial brief, was to the number itself, not to testimony that a plate number was provided. CP 76.

Dere misplaces his reliance on State v. Aaron, 57 Wn.App. 277, 787 P.2d 949 (1990), in which the out-of-court declarant's description of an item used by the burglar as a "blue jeans jacket" was admitted through an officer's testimony. When a car with Aaron riding in it was stopped nearby, there was a jacket containing jewelry stolen in the burglary. Id. at 279. Aaron was identified as

the burglar by the homeowner who interrupted the burglary. Id. The court concluded that the only purpose for admitting the "blue jeans jacket" statement was to suggest that the jacket found in the car belonged to Aaron. Id. at 280. In contrast, the purpose of the testimony in this case was to establish that Abdulkadir was being cooperative at the scene. RP 919-20. Medlock did not provide the license number of the Cadillac, and the testimony that a number was provided did not connect Dere's Cadillac to the robbery.

The additional testimony about the license number of Dere's Cadillac did not suggest that Abdulkadir provided Dere's license number at the scene. Mohamed identified Dere's car based solely on his personal knowledge, through his friendship with Dere. RP 1338-39. The attempt to apprehend Dere on December 26 was facilitated by information that a silver Cadillac was registered to Dere. RP 1110-11, 1115. However, Abdulkadir had identified Dere in a photo montage on December 23, three days earlier. RP 917-18, 932, 1290-92; Ex. 45. Given the timing of events, the evidence established that after Abdulkadir identified Dere, and then the police used Dere's car registration to find him; it did not imply that Abdulkadir provided Dere's license number at the scene.

The prosecutor did not argue that Abdulkadir had provided Dere's plate number to the police, as Dere asserts. The prosecutor argued that Abdulkadir described the car as a white or silver Cadillac, that Mohamed identified Dere's Cadillac (with license AKE8954) as the car Dere was driving that night, and that Dere was arrested in that silver Cadillac. RP 1717, 1725, 1769.

Dere argues that Detective Aakervik's testimony also implied that the license plate number provided the night of the robbery was Dere's license number. But Aakervik's testimony that he was aware of a "description of a vehicle" that fled implies nothing more than Abdulkadir's description of a white or silver Cadillac. RP 1300. The introduction of the Cadillac's registration at that point did establish that Dere owned a silver Cadillac – the testimony did not suggest the license number matched the number provided the night of the robbery. RP 1300. Dere argues that testimony that his photo identification cards were found in his car bolstered Abdulkadir's identification of Dere as one of the robbers, but it is difficult to see how it established anything other than that the car was used by Dere.

c. Any Error In Admitting Medlock's Testimony Was Harmless.

Even if the trial court erred in permitting the testimony that Abdulkadir provided a license plate number to the police the night of the robbery, that error was harmless. Evidentiary error is reversible only if, within reasonable possibilities, the outcome of the trial would have been materially affected if the error had not occurred. State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006).

The challenged testimony established that Abdulkadir provided a license number for the Cadillac in which at least one of the robbers fled. As explained in the previous subsection of this brief, none of the other references to the license number of Dere's Cadillac implied that Abdulkadir had provided that number. Each of the references had an independent source – either Mohamed's personal knowledge or the registration of the Cadillac, which was under the name of Zakaria Dere, the person who Abdulkadir had identified as one of the robbers.

In addition, identification was not the central issue in this case. At trial Dere did not concede that he was one of the participants but, in closing argument, he characterized the issue as

whether he was aware that a robbery was occurring, and acting as an accomplice, when he assaulted Abdulkadir. RP 1737, 1765. The testimony at issue had no relevance to that issue and did not materially affect the result of the trial.

3. TWO CORRECT EVIDENTIARY RULINGS DID NOT CREATE REVERSIBLE ERROR

Dere claims that the court erred in allowing a question the prosecutor asked of Mohamed when a similar question was disallowed on cross-examination. He argues that the former question elicited an impermissible opinion as to his guilt and that the question on cross was intended to elicit impermissible opinion as well, but that since the former was allowed the latter should have been allowed as well. This argument was not preserved in the trial court and should not be considered here. As to the merits, the question that was permitted did not call for an impermissible opinion as to guilt, so no error occurred.

Bashir Mohamed testified that as he stood inside the driver's door of the cab and demanded money of Abdulkadir at gunpoint, Dere was at his side and attacked Abdulkadir with a collapsible baton. RP 1352-59. Mohamed said that there was a slight opening

and Abdulkadir "found his escape," running away. RP 1360. Dere challenges this exchange during direct examination:

> Q. And Mr. Abdulkadir had fled from the car as a direct result of what you and Mr. Dere were doing together; correct?
> MR. MINOR: Objection, Your Honor. It's argumentative.
> THE COURT: Overruled.
> Q. Correct?
> A. What did you say?
> Q. Mr. Abdulkadir fled from the car as a direct result of what you and Mr. Dere were doing together, right?
> A. Yeah.

RP 1378.

Because at trial Dere objected only to the form of the question, RAP 2.5(a) bars consideration of this issue. If grounds for an objection were specified, as a general rule the claim of error on appeal may only be based on the specific ground stated below. State v. Mak, 105 Wn.2d 692, 718-19, 718 P.2d 407 (1986); State v. Blake, 172 Wn. App. 515, 529-31, 298 P.3d 769 (2012). Dere has not established a "manifest error affecting a constitutional right." RAP 2.5(a)(3);State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). He has not made a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." State v. Kirkman, 159 Wn.2d 918, 926-27,935, 155 P.3d 125 (2007). Even if it was an opinion as

to guilt, it was not prejudicial. See State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) (explicit opinion not prejudicial).

Lay witnesses may testify to opinions or inferences that are based on rational perceptions, helpful to a clear understanding of the testimony or determination of a fact in issue, and not based on specialized (expert) knowledge. ER 701; Montgomery, 163 Wn.2d at 591. Mohamed's testimony that Abdulkadir fled the cab as a result of what he and Dere were doing together was a firsthand observation based on his own direct perception of events. It was proper lay testimony. It was not an opinion as to whether Dere was guilty of robbery because even if the joint assault facilitated the robbery, Dere was an accomplice to robbery only if he acted with knowledge that it would promote or facilitate the robbery. CP 342. Mohamed's testimony was an inference concerning the victim's behavior based on Mohamed's observation of the events as they occurred. Such an inference is permissible testimony, even if it may be relevant to ultimate issues. Blake, 172 Wn. App. at 523-29.

In any event, Abdulkadir had testified that he was assaulted by both men as they stood in the door of his cab, and the photographs from the cab camera placed two men in the door. RP 880-86; Ex. 30, images 65-69. Abdulkadir escaped from the car,

and there is no dispute that he fled because the two men were attacking him. Mohamed's statement was not manifestly prejudicial. See Blake, 172 Wn. App. at 529-31 (where jury is properly instructed, inferences by witnesses based on their own perceptions were not unfairly prejudicial).

In contrast, the opinion sought by defense counsel was opinion as to Dere's intention to commit robbery, which is clearly inadmissible. Opinions as to the intent of the accused, particularly in the form of expressions of personal belief, are prohibited. Montgomery, 163 Wn.2d at 591. Dere concedes that his question was improper. App. Br. at 36.

Because there was no error in admission of Mohamed's inference on direct examination, this court need not reach the novel argument that an error in admitting that statement required the court allow inadmissible opinion as to Dere's guilt. In any event, that argument is given only passing treatment and is unsupported by legal authority or analysis and for that reason, should not be considered. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Dere's conviction and sentence.

DATED this 4TH day of January, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix A

CrR 3.6 Findings of Fact and Conclusions of Law

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. ZAKARIA AWEIS DERE, Defendant.	No. 14-C-00051-7 SEA CrR 3.6 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE ABOVE-ENTITLED CAUSE came on for a CrR 3.6 motion before the Honorable Tanya L. Thorp. The State of Washington was represented by Senior Deputy Prosecuting Attorney William Doyle, and the defendant appeared in person and was represented by his attorney, Don Minor.

The judge advised the defendant of his rights regarding his option whether or not to testify and the consequences of that decision. The defendant chose not to testify.

After considering the evidence submitted by the parties and hearing argument, to wit: any relevant pretrial exhibits offered into evidence, any attachments to briefing, and the testimony of King County Sheriff's Office (KCSO) Deputy Robell Glumai, KCSO Det. Kurt Litsjo, and SPD Detective David Clement; the court enters the following findings of fact and conclusions of law as required by CrR 3.6:

FINDINGS OF FACT

A. Arrest of Dere and Impoundment of Dere's Vehicle

Daniel T. Satterberg,
Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

1. On December 26, 2013, King County Sheriff's Office Detective Kurt Litsjo was attempting to locate Zakaria Dere, a suspect wanted for a felony warrant for a robbery that had occurred in Seattle under SPD #13-441959. Det. Clement was the case detective for the Seattle robbery. At the time, Dere also had two additional felony warrants issued for his arrest out of the Department of Corrections and King County Superior Court for felony Escape and felony Fraud.

2. Litsjo had learned that Dere typically drove a 2001 Silver Cadillac with the plate of AKE8954. This vehicle was registered to Dere. On December 26, 2013, Litsjo drove by a possible location for Dere at 609 S. 186th Street in King County; this was Dere's father's address. When Litsjo drove by that location, he saw Dere's silver Cadillac with the license plate AKE8954 parked in front of the residence.

3. Litsjo made contact with King County Sheriff's Deputy Gerald Meyer, who responded to Litsjo's general location to assist him.

4. Around 4:45 p.m., Litsjo saw Dere's vehicle leave the residence and drive eastbound on S. 186th Street to 8th Ave. South, where the vehicle turned northbound. Deputy Meyer then followed the Cadillac as it went north on Highway 509. As the Cadillac exited to turn east onto Highway 518, Deputy Meyer activated his emergency lights. Litsjo and Meyer then conducted a high risk felony stop on the vehicle.

5. Dere stopped his Cadillac in the middle of a lane in Eastbound Highway 518, blocking a lane of travel.

6. Litsjo could see that the Cadillac was occupied only by the driver, who matched the physical description of Dere and the photos of Dere that Litsjo had been reviewing while attempting to locate Dere. Litsjo could clearly see that the driver was Dere.

7. After the Cadillac had been stopped, KCSO Deputy Robell Ghrmai arrived to assist. After Dere was ordered out of the Cadillac, Deputy Ghrmai advised Dere of his constitutional Miranda rights. Litsjo then asked Dere if he had any ID with him. Dere said that he wanted to make a phone call to have someone pick up the vehicle. Litsjo told Dere that that was not what he had asked him, and again asked for Dere's ID. Dere said that he did not have any, and that he left it at home.

8. Dere then asked if he could get his phone out of the car. Litsjo told him that he could not have anything out of the car because Dere was being placed in the rear seat of Deputy Ghrmai's car. Deputy Ghrmai then transported Dere to the King County Jail, where he was booked on his outstanding felony warrants.

9. A tow was called to the scene to impound the vehicle, remove it from the scene, and secure it. Even after the impoundment, officers did not conduct an inventory search of the vehicle. Rather, the search of the vehicle was conducted only after SPD Det. David Clement obtained a court-approved search warrant authorizing the search. SPD Det. David Clement's Affidavit for the Search Warrant and the Search Warrant (signed by Judge Douglas A. North), as well

Daniel T. Satterberg,
Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

as the Inventory and Return of Search Warrant, dated December 27, 2013, was attached as Appendix A to the defendant's CrR 3.6 Motion/Affidavit to Suppress Evidence.

10. SPD Det. Dag Aakervik's Affidavit for the Search Warrant and the Search Warrant (signed by Judge Helen Halpert), dated July 8, 2014, was attached as Appendix B to the defendant's CrR 3.6 Motion/Affidavit to Suppress Evidence.

11. The court finds that the testimony of Det. Litsjo, Det. Clement, and Deputy Ghrmai is credible.

B. Jail Telephone Recordings

1. For trial, the State offered evidence of telephone calls made by co-defendant Mohamed Ali to Zakaria Dere, while Ali was housed in the King County Jail awaiting trial.

2. Before receiving calls from Ali, Zakaria Dere had been an inmate at the King County Jail. While in jail, Dere had made phone calls from the phones provided at jail, and knew that the calls were recorded and subject to monitoring.

3. Before each jail telephone call, a recorded message informed the caller and receiver that the call will be recorded and subject to monitoring at any time. To accept the call after hearing the recorded warning, both parties needed to press or dial a number on the phone. Either party also had an option to refuse the call after hearing the warning that the calls are recorded and subject to monitoring.

4. In addition, posted near the jail's telephones were signs warning that all calls were subject to recording and monitoring.

CONCLUSIONS OF LAW

A. Impoundment of Vehicle and Seizure of Phones

1. Pursuant to RCW 46.55.113 and RCW 46.61.560, impoundment of Dere's vehicle was proper. The court finds that the impoundment was not a pretext to search the vehicle.

2. Impoundment was justified because Dere was the sole occupant and driver of his vehicle, and that he chose to stop his vehicle in the middle of Highway 518, a state highway. The vehicle was unattended upon a highway, obstructing traffic, and would have jeopardized public safety if it remained in the location where it had been stopped. Further, the vehicle was left after the vehicle's driver was arrested and taken into custody. Statutory authority permitted the impoundment of the vehicle.

3. The arresting officers had no reasonable alternatives to impoundment. Law enforcement did not have to drive the vehicle to the shoulder, which would have potentially jeopardized evidence in the case and still would not have ensured the safety of the vehicle.

Daniel T. Satterberg,
Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

4. Regarding the search warrant, the approving trial judge did not abuse its discretion in approving the search warrant because the warrant affidavit contained facts and circumstances sufficient to establish a reasonable inference that Dere was probably involved in criminal activity and that evidence of the crime of robbery could be found in the place to be searched.

5. Det. Clement's affidavit contained more than enough facts to support a finding of probable cause and that evidence of the robbery could be located in Dere's car. The affidavit specified that Dere had a firearm during the robbery, and a firearm was not located on Dere. The silver Cadillac was registered to Dere, and the affidavit specified that Dere was "very anxious" about having the vehicle kept in police custody. Based on these facts alone, Det. Clement's affidavit contained particularized information that was sufficient to establish a common-sense, reasonable inference that Dere was probably involved in criminal activity and that evidence of the robbery could be found in his car.

6. The magistrate who issued the initial warrant properly interpreted the affidavits in a "commonsense, practical manner."

7. Det. Aakervik's July 2014 affidavit for a search warrant for Dere's phones did not include any information that Det. Clement had obtained by turning on Dere's phone in December 2013. Thus, the warrant obtained by Det. Aakervik was valid, as the affidavit contained facts independent of any illegally obtained information sufficient to give rise to probable cause.

8. Thus, the court denies the defendant's motion to suppress any evidence obtained from Dere's vehicle or obtained as a result of the stop of Dere.

B. Jail Telephone Recordings

1. The defendant has the burden of proof on a CrR 3.6 motion to suppress evidence.

2. Under RCW 9.73.030(1), it is unlawful for any person or entity to intercept or record any "private" communication transmitted by telephone without first obtaining the consent of all the participants in the communication. There are exceptions to this rule.

3. RCW 9.73 and RCW 9.73.030 apply only to private communications.

4. In determining if a communication is private, the court may consider factors such as the parties' subjective intention and factors bearing on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication and the presence of potential third parties, and the role of the nonconsenting party and his or her relationship to the consenting party.

5. The relevant calls to be played at trial involved co-defendant Mohamed Ali (an inmate at the King County Jail) calling the receiver, Zakaria Dere. Dere was not in custody at the

Daniel T. Satterberg,
Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue,
Seattle, Washington 98104

time. When Ali called Dere from jail, neither Ali nor Dere had a reasonable expectation of privacy regarding these telephone calls. Therefore, RCW 9.73 did not apply to these telephone conversations.

6. Ali's and Dere's knowledge that the jail telephone conversations would be recorded has been established, pursuant to Washington law, because they were informed by and heard a recorded message that each phone call "will be recorded and subject to monitoring at any time." In addition, both Ali and Dere knew that the phone calls were recorded and subject to monitoring because of signs posted near the jail telephones.

7. Inmates in jail have a reduced expectation of privacy, and do not have the same expectation of privacy as other citizens. Jail telephone calls are made from a public phone in a public area in the jail. The presence of third parties in these public areas further reduces any reasonable expectation of privacy in the defendant's calls from the jail.

8. Even if the defendant's calls were subject to the Washington State Privacy Act, Ali and Dere impliedly consented to the calls being recorded. A communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the message will be recorded. When Ali spoke to Dere from jail, both parties impliedly consented to having their communications recorded because they knew that the communications would be recorded. Further, by pressing numbers to continue the phone call, both Ali and Dere expressly consented to the recording.

9. The Washington Supreme Court and Court of Appeals have addressed similar challenges to jail telephone recordings and rejected them in the following three cases: (1) State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008); (2) State v. Archie, 148 Wn. App. 198, 199 P.3d 1005 (2009); and (3) State v. Haq, 166 Wn. App. 221, 249-262, 268 P.3d 997 (2012). The court finds these cases persuasive.

10. The court further finds that no warrant is required to record or monitor jail telephone recordings. The recordings are not "private affairs." Moreover, both parties expressly consented to the recording by affirmatively pressing a number on the phone to continue the call after the recorded warning. Further, no Miranda warnings are required because the recorded statements are not the product of custodial interrogation.

11. Dere's citation to the recent U.S. Supreme Court case, Riley v. California, does not support his motion to suppress. Riley addresses the validity of an officers' warrantless search of a suspect's cell phone. This case does not address situations involving a reduced expectation of privacy when inmates use jail telephones, and when callers and receivers are expressly warned that the calls are monitored for security purposes. It also does not address circumstances in which both the caller and receiver impliedly and expressly consent to the recording of calls. In short, Riley has no bearing on this case.

Daniel T. Satterberg,
Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 12 day of February, 2014.

Honorable Tanya Thorp

Presented by:

William Doyle WSBA #30687
Senior Deputy Prosecuting Attorney

Approved as to form by:
Defense pleadings and oral arguments against presented at trial, are incorporated by reference.

Don Minor, WSBA #16702
Attorney for Defendant Zakaria Dere

Daniel T. Satterberg,
Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Robert Goldsmith, containing a copy of the Brief Of Respondent, in State v. Zakaria Aweis Dere, Cause No. 72713-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

01-04-16
Date