NO. 32866-0-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DANIEL BLIZZARD, Appellant.

BRIEF OF RESPONDENT

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On September 18, 2013, Daniel Blizzard was charged with attempted first degree murder and first degree assault. CP 14-5. Numerous aggravating factors were alleged as well. CP 14-5. The charges stemmed from a brutal attack on 78-year-old Vern Holbrook. CP 4-12. Mr. Holbrook later died as a result of the attack, and the State amended the charges to first degree murder on January 30, 2014. CP 38. Three codefendants, Luis Gomes-Monges, Adriana Mendez, and Jill Lee Taylor, were also charged. CP 38.

On March 17, 2014, prior to trial, the defense filed a motion to suppress evidence of electronic communications and text messages pertaining to three cell phone numbers. CP 115-123. Supplemental briefing and an addendum were filed thereafter. CP 589-819, 820-6, 899-908. The State filed a response. CP 405-17. One of the issues was that the search warrants were signed by a District Court judge, rather than a Superior Court judge. The court denied the defense motion and entered findings of fact and conclusions of law. CP 3281-8.

On March 27, 2014, the defense also filed a CrR 8.3(b) motion to dismiss, claiming that jail staff intercepted and viewed attorney-client mail. CP 197. The State filed a response in opposition to the motion, and supporting declarations from jail personnel, as well as the lead detective

and prosecutor. CP 338-404. A hearing was held and numerous jail officers testified, as well as the lead detective. RP 924-1090. The court denied the defense motion to dismiss and ordered that the discovery materials go back to the defense attorney. RP 1207, CP 1085. The court reasoned that there was a legitimate safety reason for searching Blizzard's jail cell, and that no information was gained from the search. CP 1202-4. The court further found that the State was not given an unfair advantage, and that there was no implication that Blizzard's confidence in his attorney was destroyed. RP 1205-6. Findings of fact and conclusions of law were filed after the hearing. CP 3281-8.

On April 28, 2014, the court ordered the prosecutor to narrow down the number of text messages he would be using at trial. RP 307. At this point, the State had reported that it would use 150 pages of text messages out of a total of 3300 pages. RP 301, 304. On May 20, 2014, the State filed a memorandum indicating that they had fully complied with the discovery obligations under CrR 4.7. CP 827-830. On July 30, 2014, the State reiterated that text messages had already been significantly narrowed down to 150. RP 1222. The State agreed to let Blizzard's attorney know if it would be seeking to admit anything outside of the 150 pages. Blizzard's attorney responded, "that's fine." RP 1222. On August 20, 2014, the court concluded, "we took care of text messages." RP 1314.

On May 21, 2014, the elected prosecutor sent a letter to Presiding Judge Elofson, stating that Judge Reukauf should recuse herself from the pending cases involving the Vern Holbrook matter. CP 833-6. Judge Reukauf sent the letter to the trial prosecutor and defense attorney in this case, and then filed the letter with the clerk. CP 831-836. The State filed a notice of abandonment of the motion for recusal of judge. CP 909-10. The prosecutor stated in the notice, "The Deputy Prosecuting Attorney, Alvin Guzman, believes a fair trial can be had before Judge Reukauf in the above captioned case." CP 910. The defense filed a motion to dismiss under CrR 8.3(b), and the State filed a memorandum in response. CP 911-34. The court denied the motion to dismiss, finding that there was no structural error. RP 572.

Trial commenced on August 25, 2014. CP 3095. Among the State's witnesses were Jill Taylor and Adriana Mendez. Ms. Taylor testified that she dated Blizzard and that the victim, Mr. Holbrook was her ex-father-in-law. RP 2410, 2414, 2420. She testified that Blizzard had tried to buy a company, Aspen Real Estate, from Mr. Holbrook. RP 2416. Because of that, Blizzard was the beneficiary of a life insurance policy on Mr. Holbrook. RP 2417-8. Mr. Holbrook ended up taking the company back and Blizzard was not happy about that. RP 2421-2. Blizzard commented that he couldn't wait to see the old man gone. RP 2428. He

would also ask Ms. Taylor's friends if they wanted to earn $10,000 to kill somebody. RP 2461. He even offered Ms. Taylor $10,000 to poison Mr. Holbrook and gave her something to put in Mr. Holbrook's drink, but she never followed through. RP 2430-1.

Later on, Ms. Taylor introduced Blizzard to Ms. Mendez, a close friend who had moved in with her. RP 2422, 2432. Ms. Mendez's boyfriend, Luis Gomez-Monges, and their children moved in as well. Ms. Taylor told Ms. Mendez and Gomez-Monges that Blizzard wanted to hire a hit-man to kill someone. RP 2436. Later on, Ms. Mendez told Ms. Taylor that they were going to kill Mr. Hollbrook for Blizzard. RP 2436. Blizzard also told Ms. Taylor several times that the couple was going to kill Mr. Holbrook. RP 2453-4.

Ms. Taylor witnessed Blizzard talking to Mendez and Gomez-Monges about killing Mr. Holbrook. RP 2437-8, 2448-9. She heard them making plans and discussing an offer of $10,000. Id. Ms. Taylor also saw Blizzard carrying $10,000 in cash. RP 2451. Blizzard lent Gomez-Mongez money for gas to follow the victim around, and helped Ms. Mendez out with rent at the Sunshine Motel where they lived after moving out of Ms. Taylor's apartment. RP 2452, 2474. Ms. Taylor described Blizzard as inpatient and tired of paying life insurance for Mr. Holbrook. RP 2455, 2464.

Adriana Mendez testified that Ms. Taylor informed her that her boyfriend was looking for someone to kill a person and was offering $10,000. RP 2506. Mendez told her boyfriend, Gomez-Monges, who was interested in the offer. RP 2506-7. Mendez confirmed with Blizzard that he was willing to pay $10,000 to kill a certain person. RP 2507. He said, "yes." RP 2507. He showed them a photo of the victim and also showed them $10,000 in cash. RP 2508-9. He said that was to let them know that he is willing to pay somebody $10,000 to complete the job. RP 2509.

Blizzard followed up over the next few months by asking what was happening and where Gomez-Monges was planning to kill the victim. RP 2569-70. Blizzard came up with the idea of setting up an appointment with the victim to view a home. RP 2571-2. He gave Mendez the number for Aspen Real Estate and told her to ask for "Vern." RP 2572. She set up an appointment but later called to reschedule. RP 2572-5. After rescheduling, Blizzard and the couple drove past the house where they would meet with Mr. Holbrook. RP 2578. The next day, the couple met Mr. Holbrook at that house. RP 2579. The attack did not take place at the first house. Mr. Holbrook showed them another house for sale that was nearby. RP 2592.

Ms. Mendez testified that she and Gomez-Monges followed Mr. Holbrook to the second house. RP 2592. They went inside, leaving their

three children in the car. While in a bedroom, she saw her boyfriend hit Mr. Holbrook in the back of the head. RP 2598-9. She felt a "thump" and saw the victim fall to the ground on his back. RP 2599-2600. She then saw Gomez-Monges hit Mr. Holbrook three or four more times in the head with his fist. RP 2602. She also saw blood coming from Mr. Holbrook. RP 2603-4. She walked out. RP 2605.

After the attack, the couple went back to their hotel. RP 2608-9. Gomez-Monges told her to text Blizzard and she did so. RP 2608. Blizzard showed up and she told him about killing Mr. Holbrook. RP 2627. However, Blizzard wanted confirmation from another source. RP 2627. The next day, he picked her up and gave her $12,000, stating that the extra cash was a bonus. RP 2630-31.

The jury found Blizzard guilty of first degree murder. CP 2696. The jury also found that he was armed with a deadly weapon, CP 2697, and that the victim was particularly vulnerable and incapable of resistance. CP 2697, 2699. He was sentenced to 320 months, plus 72 months for the aggravator, and 24 months for the deadly weapon enhancement. CP 3073. This appeal followed.

IV. ARGUMENT

A. The trial court's denial of the motion to dismiss regarding the elected prosecutor's letter to the presiding judge was not manifestly unreasonable.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995) (citing State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)). Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Appeals courts will find a decision manifestly unreasonable "if the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" Id. (quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)). A decision is based on untenable grounds "if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." Id.

A trial court's decision on prosecutorial misconduct is given deference on appeal. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). This is because the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced the defendant's right to a fair trial. Id.

To support dismissal under Criminal Rule (CrR) 8.3(b), the defendant must show by a preponderance of the evidence both (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial. Rohrich, 149 Wn.2d at 654, 658; State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Dismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003); Wilson, 149 Wn.2d at 9.

Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution. United States v. Hunt, 171 F.3d 1192, 1195 (8th Cir. 1999); State v. Lively, 130 Wn.2d 1, 18, 921 P.2d 1035 (1996). The level of governmental misconduct needed to prove a violation of due process must shock the conscience of the court and the universal sense of fairness. Hunt, 171 F.3d at 1195; Lively, 130 Wn.2d at 19.

In this case, the elected prosecutor sent a letter to the presiding judge, Judge Elofson, stating that the sitting judge, Judge Reukauf, should recuse herself from the pending cases involving the Vern Holbrook matter. CP 833-6. Blizzard's case was pending at the time. The presiding judge shared the contents of the letter with the trial judge. RP 566. The trial

court found that the letter was an ex parte communication with the trial judge and therefore, misconduct. RP 566. The manner of the communication, not the content, was the basis for the misconduct finding. However, the trial court denied a motion to dismiss, stating that "any prejudice that may still result from this conduct is premature to assess" and "isn't ripe yet" because jury selection had not begun. RP 570, RP 575.

1. There was no actual prejudice.

Assuming, for sake of argument, that Blizzard established arbitrary action or governmental misconduct by a preponderance of the evidence, there was no actual prejudice. On appeal, Blizzard claims that there was an indicator of actual prejudice in that a ruling was made in favor of the State (regarding a suppression issue), and that this favorable ruling to the State resulted solely from prosecutorial misconduct. However, the record was not preserved at the trial level. At the time the CrR 8.3 motion was argued, Blizzard did not claim any actual prejudice. Rather, his argument was that prejudice should be "presumed." RP 539.

After the trial court denied the CrR 8.3 motion and after the trial court ruled in favor of the State on the suppression motion, there was never any argument made that the court ruled in favor of the State solely because of the letter. There was no motion for recusal. Now, for the first

time on appeal, Blizzard claims that there was actual prejudice supporting the CrR 8.3 motion and that this prejudice became apparent when the trial court ruled on the 3.6 motion.

2. Assuming, *arguendo*, that there was governmental misconduct and resulting prejudice, any prejudice was cured.

Prosecutorial misconduct can be cured. For example, an objection and appropriate instruction can cure prejudice caused by a prosecutor's cross-examination. State v. Stith, 71 Wn. App. 14, 20, 856 P.2d 415 (1993). Even flagrant misconduct can be cured. State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) (citing State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008) ("prosecutor's conduct was certainly flagrant," but given the context of the total argument, issues, evidence, and jury instructions, any error was cured)).

Assuming, for sake of argument, that there was governmental misconduct in this case, to the extent that there was any prejudice caused by the letter, it was remedied when the letter was made known to all parties in the case. Had the arguments contained in the letter been filed with the court as part of a formal motion for recusal, there would have been no issue of governmental misconduct. The court, however, considered the letter an ex parte communication with the trial judge because it was sent to the presiding judge without being sent to defense

counsel. RP 566. Any prejudice, however, was remedied when the court disclosing the letter to the parties (both the defense attorneys and the trial prosecutors) and set a deadline for any motions for recusal to be filed. RP 501, CP 831-6. Blizzard's attorney chose not to file a motion for recusal and made a thorough record that he believed that they could have a fair trial before Judge Reukauf. RP 493. As such, any prejudice caused by the letter was cured by the trial judge when she sent the letter to all the parties.

3. The prosecutor's actions were not subject to structural error analysis.

Structural error is a type of constitutional error. Here, there was no structural error, let alone, constitutional error. As such, the conduct in this case was not subject to structural error analysis.

a. Constitutional Error

Assuming, *arguendo*, that there was any error, the first inquiry is whether the conduct in this case (sending a letter to the presiding judge of the court) touched upon constitutional rights. Blizzard makes references to a violation of separation of powers and the appearance of judicial unfairness. Appellant's Brief at 15-28. In both regards, he argues that the sitting judge, Judge Reukauf, was intimidated by the letter. Id. He argues that one ruling for the State, on the CrR 3.6 issue, resulted from the "obvious threatening tone" of the letter and that the letter constituted

"intimidation of the trial court." Id. However, he agreed that she could be fair, RP 493, and never raised any issue with the court's fairness after the 3.6 ruling was made. Furthermore, Judge Reukauf had no doubt that she could also be fair. RP 496. Blizzard simply has not proven a constitutional error based on the letter and the record before the court.

b. Structural Error

There is a strong presumption that errors are not structural. Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), cert. denied, 131 S. Ct. 160 (2010). A structural error is rare and courts are hesitant to classify errors as structural. See, e.g., In re Pers. Restraint of Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998) (rejecting argument that violation of the right to be present is a structural error). It is an error that "affect[s] the framework within which the trial proceeds" and renders a criminal trial an improper "'vehicle for determin[ing] guilt or innocence.'" Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting Rose v. Clark, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). In other words, the court must ask if the error necessarily rendered the trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. State v. Momah, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (internal quotation marks

omitted) (quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)), cert. denied, 131 S. Ct. 160 (2010)).

It is arguable whether a structural error analysis even applies in the context of prosecutorial misconduct. In State v. Warren, the Supreme Court declined to reach the issue of whether a constitutional error analysis might be appropriate if the prosecutorial misconduct directly violated a constitutional right. 165 Wn.2d 17, 195 P.3d 940 (2008). The Court noted that:

> Like most errors, even constitutional ones, it is subject to some sort of harmless error analysis. See Neder v. United States, 527 U.S. 1, 7-8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (misstatement of elements subject to harmless error analysis); accord Bartlett v. Battaglia, 453 F.3d 796, 801 (7th Cir. 2006) (declining to extend Sullivan's structural error analysis to prosecutorial argument misstating the burden of proof).

4. In the alternative, there was no structural error.

Assuming, for sake of argument, that structural error analysis applies to this case, which involves a claim of government misconduct, Blizzard has not shown a structural error. Here, the trial court specifically found that there was no structural error. RP 572.

Structural errors encompass only the most egregious constitutional violations. See, e.g., State v. Vreen, 143 Wn.2d 923, 930, 26 P.3d 236

(2001) (denial of peremptory challenge is structural error). As indicated in Johnson v. United States:

> Court have found structural errors **only in a very limited class of cases**. See Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) (a total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927) (lack of an impartial trial judge); Vasquez v. Hillery, 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986) (unlawful exclusion of grand jurors of defendant's race); McKaskle v. Wiggins, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (1984) (the right to self-representation at trial); Waller v. Georgia, 467 U.S. 39, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984) (the right to a public trial); Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) (erroneous reasonable-doubt instruction to jury).

520 U.S. 461, 468-469, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (emphasis added).

The conduct alleged in this case (an ex parte communication) does not fall within the limited class of cases outlined in Johnson. The record shows no basis for concluding that the ex parte communication "seriously affected the fairness, integrity or public reputation of judicial proceedings." Here, the communication was made known to all the

parties. RP 501, CP 831-6. Upon learning of the letter or at any point thereafter, Blizzard did not seek recusal of the trial judge. RP 496. There was simply no "miscarriage of justice" warranting reversal. It cannot be said that the conduct rendered the trial fundamentally unfair.

B. The trial judge properly refused to recuse herself from hearing the case.

1. The State's motion for recusal was withdrawn.

Judge Reukauf sent the letter to the trial prosecutor and defense attorney in this case, and then filed the letter with the clerk. CP 831-836. Thereafter, the State quickly filed a notice of abandonment of the motion for recusal of judge. CP 909-10. The lead prosecutor on the case stated in the notice, "The Deputy Prosecuting Attorney, Alvin Guzman, believes a fair trial can be had before Judge Reukauf in the above captioned case." CP 910. The State, without a doubt, abandoned its motion for recusal of the trial judge. Nonetheless, the trial judge went on to make an independent decision that she was not going to voluntarily recuse and made a thorough record as to her decision. RP 569.

2. Blizzard and all three codefendants made no motions for recusal and therefore, waived the issue on appeal.

A litigant who proceeds to trial "knowing of a reason for potential disqualification of the judge waives the objection and cannot challenge the

court's qualifications on appeal." State v. Perala, 132 Wn. App. 98, 113, 130 P.3d 853 (2006) (quoting Buckley v. Snapper Power Equip. Co., 61 Wn. App. 932, 939, 813 P.2d 125 (1991)). Here, Blizzard made no motion for recusal. In fact, he specifically argued to the contrary. He stated, "So it is my opinion that there is no need -- there is no evidence. There is no supporting documents. There's nothing to suggest that this court should recuse itself." RP 493. He agreed that everyone had been treated with fairness:

> I've done a couple of cases down here. To say that the courts have treated everyone that appears before them, not only your Honor, but I've been in front of others, too, not for lengthy or serious hearings, but I've always seen everyone treated with respect, integrity, and fairness. One of the jobs of a judge is to call people, lawyers specifically, when they don't do what they were supposed to do. That's the nature of the job. That's why you get paid the big bucks for. That's why you get to take the heat. That's part of the job. That's not bias or prejudice. That's part of you being a judge.

RP 493. Because he agreed that there was no basis for recusal, Blizzard has waived any objections and is now precluded from challenging the court's qualifications on appeal.

3. There was no independent basis for the trial judge to recuse herself.

Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. State v. Perala, 132 Wn. App. 98, 110-11, 130 P.3d 853 (2006). Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of that discretion. Id. at 111. The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. Id.

"'Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.'" Id. at 113. In order to establish that the trial court's involvement in the matter violated the appearance of fairness, the claimant must provide some evidence of the judge's actual or potential bias. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172 (1992). The critical concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. Perala, 132 Wn. App. at 113. The test for determining whether the judge's impartiality might reasonably be

questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

Here, Blizzard provided no evidence of the judge's actual or potential bias as required by Post. Furthermore, there was no independent basis for the trial judge to recuse herself. The trial judge was very clear that she felt that she could be fair and impartial on the case:

> I have absolutely no question in my mind that I can continue to be fair and impartial in this case. I have absolutely no question in my mind that I have been fair and impartial on this case.

RP 496. After making that declaration in open court, she followed up by reviewing the Code of Judicial Conduct and consulting with the Ethics Advisory Committee through the Administrative Office of the Courts. RP 497, 499. The trial judge then explained that if a motion for recusal is being made that it needs to be done so in writing. RP 501. However, no motions were filed by anyone, including Blizzard. Accordingly, the court concluded that the issue had been taken off of the table. RP 518.

4. There was no defense motion to recuse the trial judge after she ruled in favor of the State on the suppression issue.

The defense argue, for the first time on appeal, that the trial judge *only* ruled in favor of the State because of the "obvious threatening tone of

the letter." Appellant's Brief at 18. However, after that ruling, not one defendant moved to have the judge disqualified or questioned the judge's motive in ruling for the State. The issue was simply never raised until now, for the first time on appeal. As such, the argument is waived. Perala, 132 Wn. App. at 113 (quoting Buckley v. Snapper Power Equip. Co., 61 Wn. App. 932, 939, 813 P.2d 125 (1991)). Blizzard cannot at trial agree that the trial judge is fair and that there is no reason for her to recuse herself and then claim on appeal that she was not fair because of one ruling in favor of the State.

C. The trial court properly denied the motion to suppress text messages.

Under RCW 10.96.060, only a Superior Court judge may issue a warrant to recipients outside of the State of Washington. That statute provides as follows:

> **Issuance of criminal process.**
> A judge of the superior court may issue any criminal process to any recipient at any address, within or without the state, for any matter over which the court has criminal jurisdiction pursuant to RCW 9A.04.030. This section does not limit a court's authority to issue warrants or legal process under other provisions of state law.

RCW 10.96.060.

Here, Detective Perrault obtained phone records by way of an exigent circumstances form and then warrants signed by a District Court judge. CP 3274-6. When he realized that he needed a Superior Court judge to sign the warrants, he redid the affidavits and warrants. CP 3276. At trial, Blizzard made a motion to suppress the warrants, claiming that the phone records obtained were pursuant to invalid warrants. The court found that the independent source doctrine applies and denied the motion to suppress. CP 3279.

The independent source doctrine is a "well-established exception to the exclusionary rule." State v. Miles, 159 Wn. App. 282, 291, 244 P.3d 1030 (2011). The United States Supreme Court's decision in Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988), is the "'controlling authority' defining the contours of the independent source exception." Id. at 292. In Murray, the court held that the Fourth Amendment does not require the suppression of evidence discovered during police officers' illegal entry if that evidence is also discovered during a later search pursuant to a valid search warrant that is independent of the illegal entry. Murray, 487 U.S. at 542. The Supreme Court stated that:

> The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the

> information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Id.

Accordingly, in Washington, courts have interpreted the requirements in Murray to have two prongs, both of which must be satisfied. "Under the independent source exception, an unlawful search does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information and (2) the State's decision to seek the warrant is not motivated by the previous unlawful search and seizure." Miles, 159 Wn. App. at 285.

Blizzard argues that the independent source doctrine does not apply because the lawful seizure pursuant to a Superior Court warrant was not independent from the earlier District Court warrant. Appellant's Brief at 41. He points to information that was added to the affidavits presented in Superior Court, specifically, the name of the specific carrier possessing the cell phone records and text messages for Blizzard's phone. Appellant's Brief at 40. That part of the Superior Court affidavit stated, "However, a representative from Level 3 later told me that the number had been sold to GOGII, Inc." This was information learned after the warrants

has been issued by District Court. CP 3276. However, this is not the end of the analysis.

In State v. Green, the Court of Appeals distinguished two federal cases and noted that "valid warrants in Herrold and May specifically authorized the search and seizure of the evidence at issue (the gun and cash), providing a clear independent source to seek and seize the evidence." State v. Green, 177 Wn. App. 332, 346, 312 P.3d 669 (2013) (citing United States v. Herrold, 962 F.2d 1131 (3d Cir. 1992); United State v. May, 214 F.3d 900 (7th Cir. 2000)).

In Herrold, police officers made an initial unlawful entry into a trailer and saw drugs and a loaded gun in plain view. 962 F.2d at 1134. They waited for a search warrant to seize the drugs but seized the gun during the initial entry. Id. at 1134-35. The search warrant affidavit included observations of the gun and drugs inside the trailer. Id. at 1135. They executed a search warrant later that night and seized the drugs. Id. The Third Circuit held that the drugs and gun were admissible under the independent source doctrine because, *even excluding information obtained during the initial entry*, the warrant was still supported by probable cause. Id. at 1140-44. The court concluded that although the gun was seized during the illegal entry, it should be treated as seized under the search warrant, which specifically authorized the seizure of firearms. Id. at 1143.

Like the gun in Herrold, this court should conclude that although the records were subpoenaed pursuant to an invalid District Court warrant, they should be treated as seized under the valid Superior Court search warrant that was subsequently issued. Even striking language in the subsequent warrant that was derived from the first warrant, there is probable cause. Here, the court found that there was "more than enough probable cause for issuance of those warrants as have been related into the record." RP 636. The fact that a new carrier now possessed Blizzard's phone number did not change the probable cause analysis.

Probable Cause

Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. In re Pers. Restraint of Yim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). The magistrate's determination of probable cause will not be reversed absent an abuse of discretion. State v. Clark, 143 Wn.2d 731,

747, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 151 L. Ed. 2d 389, 122 S. Ct. 475 (2001).

Here, the affidavits contained sufficient evidence to establish probable cause. The affidavits described in detail the information provided by Adriana Mendez, including what she witnessed happen to Mr. Holbrook. The affidavit included the fact that "Adriana said that she knew Vern's name because of her friendship with Jill and Daniel." CP 737. Included in the affidavit was the fact that "there were several text messages between her phone and a number that she identified as belonging to Daniel Blizzard on the day of the attack." CP 771.

In addition, Ms. Mendez said that "Daniel came to her hotel room on Saturday afternoon, and drove her around to run errands." CP 771. Her boyfriend and young daughter confirmed this. CP 771. It was further established that Gomez-Monges had purchased a new iPhone from the "Phone Lot" despite having trouble paying his rent and buying groceries. RP 730-40. Gomez-Monges stated he had been given a phone by his mother but his mother denied that. CP 761.

The affidavit also contained information about the failed business deal between Blizzard and the victim:

> Terry said that approximately three years ago Daniel Blizzard and his brothers made a deal to buy Aspen Real Estate from Vern.

> As a part of the deal the Blizzards formed a new company called Aspen Blizzard, and hired Vern to manage the day to day operations of the business. Aspen Blizzard took out a $1 million life insurance policy on Vern through New York Life Insurance. The deal went forward and operated for approximately one year. Aspen Blizzard paid the life insurance premiums, but failed to make the payments to Vern for the purchase of the company. Therefore, Vern took the business back from them. Reportedly, there were hard feelings over the deal, threats were made against Vern, and the Blizzards filed a civil law suit. Since then, they have continued to pay the premium on the life insurance policy.

CP 783, 794. The affidavit also included the amount of the life insurance policy, 1.58 million dollars. CP 741.

Ms. Mendez was staying at the Sunshine Motel. The affidavits contained additional information that Blizzard's phone number was found on a piece of paper inside of a garbage bag during a search of the motel room where Ms. Mendez was staying. CP 740. On top of that, Blizzard told the motel manager that he was about to come into a large sum of money, and was going to take Adriana, Luis, and their kids on a cruise to the Bahamas. CP 740.

In addition to these facts, there was information in the affidavits from Chris Briskey, who owns a cell phone business. Chris said that he believed that Daniel had given Jill Taylor's phone to his business partner,

Walter Blizzard, so that Walter could swap out the motherboard. CP 763. Chris said that he found Daniel and Walter's behavior to be very suspicious in light of the attack on Vern. CP 764. Mr. Briskey described Daniel Blizzard as stressed out and tired the first business day after the attack on Vern. CP 763. In addition, friends and family members were concerned that Daniel Blizzard weas involved in the attack on Vern. CP 758. Family members reported that Jill Taylor had made indirect threats to Vern saying things similar to "Vern needs to be careful who he makes an enemy." CP 759.

All of these facts and circumstances were sufficient to establish a reasonable inference that Blizzard was involved in the attempted murder and that evidence of that crime could be found in his phone records. Blizzard had a motive to kill Vern in that he benefitted from a $1 million dollar life insurance policy. There were bad feelings between him and the victim. There were threats made. And he was in direct contact with Ms. Mendez by phone on the day of the attack. Shortly thereafter, he ran errands with her.

Exigent Circumstances Request Form

The trial court also relied on the existence of an exigent circumstances request form in reaching its conclusion that the independent source doctrine applied. The detective applied for a search warrant for the

victim's phone number on the same day he submitted an exigent circumstances request for the same information. RP 617. The court made the following ruling regarding the exigent circumstances request:

> On May 26th, 2013, Detective Perrault knew that Vernon Holbrook had a cell phone. Although the cell phone was not found on or near his person, he contacted Mr. Holbrook's cell phone company, AT&T, to request call records and cell phone location for his phone. Those records revealed several calls made and received that day, including two calls received by a cell number found to be issued by Sprint. He then contacted Sprint to request those records. Detective Perrault made the exigent circumstances request for records, AT&T, on an AT&T form which referenced federal statute 18 U.S.C. sections 2702(b)(8) and (c)(4). That statute in relevant part states, voluntarily disclosure of customer communication or records. RP 630.
> ...
>
> Using the information received from AT&T, Detective Perrault made the same request of Sprint on a substantially similar form, although that form did not reference the federal statute. Both AT&T and Sprint apparently released call records and cell phone location records to Detective Perrault. Through those records Detective Perrault identified Adriana Mendez as a potential witness. Detective Perrault requested the records from both AT&T and Sprint when he knew only that a person had been seriously injured and that the perpetrator was unknown and a

> potential danger to the public. The request met the standard of 18 U.S.C. section 2702, which governs voluntary disclosure of records by the cell phone companies. Therefore, it is this court's finding that there was no search warrant necessary when that information was received.
> ...
> It does not appear that Detective Perrault gained any additional information from the search warrant than he did from the exigent circumstances request. Because the federal statute gave Detective Perrault authority to request the information he obtained, he was authorized to use it in his interview of Adriana Mendez. Ms. Mendez's statement essentially gave the basis that led to Mr. Blizzard, Ms. Taylor and Mr. Gomez-Monges.

RP 632-641. Thus, Detective Perrault had an independent source for the phone records, as they were obtained not only pursuant to the warrants, but also pursuant to the exigent circumstances request. Furthermore, the phone companies provided the same records that were provided in response to the District Court warrants. The trial court found that the evidence did not change and that the State was not placed in a better position after the second set of warrants. RP 637-8.

20-day Notice

Blizzard also claims that the Superior Court warrants were deficient in that they omitted some language required by RCW 10.96.020. That statute, in pertinent part, states as follows:

> Criminal process issued under this section must contain the following language in bold type on the first page of the document: "This [warrant, subpoena, order] is issued pursuant to RCW [insert citation to this statute]. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply."

RCW 10.96.020(2). In this case, notice of this 20-day deadline was omitted from the warrants. CP 3277. The trial court concluded that this did not invalidate the warrants because the provision was for the benefit of the out-of-state company holding the records in that it provided for more time to respond. RP 639-40, CP 3280. The court further held that there was no evidence that the companies needed more time, and that they simply provided the same records that they had provided previously. RP 640, CP 3280.

This is consistent with caselaw on how to interpret search warrants. "The crucial test of a search warrant is its basis in probable cause, not its hypertechnical adherence to a particular form." See State v. Kuberka, 35 Wn. App. 909, 911-12, 671 P.2d 260 (1983). Courts test and interpret a search warrant "in a commonsense, practical manner, rather than in a hypertechnical sense." State v. Perone, 119 Wash. 2d 538, 549. 834 P.2d 611 (1992). As explained in State v. Dodson:

> The trial court's additional conclusion that the warrant was invalid because it failed to specify the time for its execution and return does not withstand scrutiny. The rules for execution and return of a warrant are generally ministerial in nature and will not invalidate a warrant absent a showing of prejudice to the defendant. State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114 (1996). None of the defendants has shown or argued that the warrant's failure to specify the time of its execution and return prejudiced him or her in any way. Consequently, suppression of the evidence on this basis was not warranted. Id. at 312.

110 Wn. App. 112, 122, 39 P.3d 324 (2002).

The analysis in Dodson can readily be applied to the case here. The requirement to provide a timeframe to the recipient is a benefit to the party seeking the warrant – in this case, the State. The purpose is so that the company responds within 20 days, and does not delay compliance. This rule is similarly, ministerial in nature. Furthermore, there has been no showing or argument that omission of this language from the warrant caused any prejudice to Blizzard. As such, the trial court correctly denied his motion to suppress on this ground.

D. The trial court correctly denied the motion to dismiss Blizzard's claim of misconduct regarding his discovery packet.

On March 27, 2014, the defense also filed a CrR 8.3(b) motion to dismiss, claiming that jail staff intercepted and viewed attorney-client

mail. CP 197. The State filed a response in opposition to the motion, and supporting declarations from jail personnel, as well as the lead detective and prosecutor. CP 338-404. A hearing was held and numerous jail officers testified, as well as the lead detective. RP 924-1090. The testimony at the hearing showed that a discovery packet was confiscated from Blizzard's cell when corrections officers were searching for a "shank" or homemade knife in Blizzard's unit. RP 929. Discovery packets were not allowed in jail cells due to safety concerns. RP 1089. The packets are allowed to be kept in a particular spot on the officer's desk. RP 999.

The court denied the defense motion to dismiss and ordered that the discovery materials go back to the defense attorney. RP 1207, CP 1085. The court reasoned that there was a legitimate safety reason for searching Blizzard's jail cell (to locate a weapon), and that no information was gained from the search. CP 1202-4. The court further found that the State was not given an unfair advantage, and that there was no implication that Blizzard's confidence in his attorney was destroyed. RP 1205-6.

Blizzard claims on appeal that attorney client communications were intercepted. Appellant's Brief at 46. However, this was not a case involving attorney-client communications or attorney-client mail. It was a packet of discovery with some notes on it that had been made by Blizzard.

Appellant's Brief at 47. The court noted that there were eight or nine pages of discovery that had notes on them and that they were not extensive. RP 1205.

Blizzard also claims that there was a close examination of his discovery. Appellant's Brief at 52. This was also not the case. The court found the testimony of Lieutenant Keagle to be credible. RP 1203. She testified that she did not read the discovery or the notes. RP 1203. The court noted that she was the only person who could have had the opportunity to do so. RP 1203. Furthermore, following the search, nothing was provided to the prosecutor's office or to the detectives on Blizzard's case. RP 1011-2, 1085, 1203.

Blizzard claims that the court should have found prejudice. However, the court went through all the factors from State v. Fuentes, 179 Wn.2d 808, 820, 318 P.3d 257 (2014). RP 1181-1208. A trial court's decision to dismiss an action based on State v. Cory and under CrR 8.3(b) is reviewed for abuse of the court's discretion. State v. Starrish, 86 Wn.2d 200, 209, 544 P.2d 1 (1975). Blizzard has not persuasively explained how the trial court in this case abused its discretion. This was not a case of eavesdropping or a purposeful intrusion into the attorney-client relationship. Furthermore, there was no prejudice to Blizzard as no one read his notes or conveyed anything to the Sheriff's office or prosecutors.

As such, this case is factually dissimilar from the ones cited by Blizzard, State v. Granacki, 90 Wn.App. 598, 959 P.2d 667 (1998), and State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963). Appellant's Brief at 51. Granacki involved a detective reading defense counsel's notes during a trial recess. 90 Wn.App. at 598. Cory involved the State eavesdropping via microphone on conversations between prisoners in the jail and their attorneys. 62 Wn.2d at 372. Here, the only thing shown at the hearing was that a corrections officer seized a discovery packet out of safety concerns and that it happened to have notes on it written by Blizzard. No one read the notes or relayed the notes to anyone. As such, the trial court did not abuse its discretion in denying Blizzard's motion to dismiss.

E. Blizzard has failed to preserve any claim of misconduct regarding the State's identification of text messages that it intended to use at trial.

On April 28, 2014, the court ordered the prosecutor to narrow down the number of text messages he would be using at trial. RP 307. At this point, the State had reported that it would use 150 pages of text messages out of a total of 3300 pages. RP 301, 304. On May 20, 2014, the State filed a memorandum indicating that they had fully complied with discovery obligations under CrR 4.7. CP 827-830.

On June 9, 2014, Blizzard raised the issue of text messages again during a motion hearing. RP 545. At the time, the issue of the text

messages was not the basis for his motion for dismissal. Defense counsel admitted that the issue was "probably better saved for another hearing." RP 544-45. Later on that same date, he raised the issue of the text messages again. RP 578-9. The prosecutor again represented to the court that he intended to use all 150 pages of text messages at trial. RP 585, 587. The prosecutor stated, "I did actually go back and look at the text messages, which is why I can say we'll be utilizing the whole full 150 pages." RP 590. He explained that there was a relevant basis to put forth the messages in each case. RP 591.

Later on, on July 30, 2014, the State reiterated that text messages had already been significantly narrowed down to 150 messages. RP 1222. The State agreed to let Blizzard's attorney know if it would be seeking to admit anything outside of the 150 pages. Blizzard's attorney responded, "that's fine." RP 1222. On August 20, 2014, the issue appeared to be settled between the parties. The court pointed out, "we took care of text messages." RP 1314.

Now, for the first time on appeal, Blizzard claims that the failure to identify text messages led to the "...surprise testimony from codefendant Jill Taylor that Blizzard caused her three abortions..." Appellant's Brief at 55. However, when defense counsel elicited the testimony about the abortions, he did not object on the basis that this was "surprise testimony."

He never asserted that he was not aware of the content of the text messages or that these particular text messages were not identified to him. He also made no motion to strike the testimony. When the prosecutor followed up on the testimony on redirect, he objected solely on the basis of relevance. RP 2546. After Ms. Taylor left the stand, the court had the following exchange with defense counsel:

> THE COURT: Mr. Mazzone, anything for purposes of the record?
> MR. MAZZONE: Not that I can think of your Honor.

RP 2552. The defense never renewed its motion for prosecutorial misconduct or asked for any sort of cure or remedy. As such, Blizzard has failed to preserve any claim of prosecutorial misconduct regarding the State's identification of text messages to be used at trial.

F. Blizzard waived any claim of misconduct regarding cell phone records and expert testimony on cell phone locations by failing to raise the claim when the records and testimony was admitted.

Testimony of Christopher Burden

On appeal, Blizzard argues that Mr. Christopher Burden, a radio frequency engineer for Sprint, should not have been allowed to testify with respect to cell phone placement because the cell phone maps were not drawn to scale. Appellant's Brief at 65. He also argues that the maps did not show the entire area involved. Appellant's Brief at 64. The testimony

at trial was that the map did not have a scale bar on it. RP 2368. There was no testimony that the map was not drawn to scale. There was testimony that part of one sector went beyond the areas of the map. RP 2368. However, there was no objection during Mr. Burden's testimony. A failure to object to testimony precludes appellate review. RAP 2.5(a); State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). Furthermore, objections must be timely to allow an opportunity to cure any errors.

Later during the trial, after Ms. Mendez testified, defense counsel complained about the map. RP 2620. Because there was no timely objection, Blizzard has waived any claim that the court should not have allowed Mr. Burden's testimony. Furthermore, his complaints about the map go to the weight of the evidence and not admissibility, and the admission of Mr. Burden's testimony certainly does not form a basis for prosecutorial misconduct.

Testimony of Detective Perrault

Blizzard claims that prosecutorial misconduct also occurred during Detective Perrault's testimony. He points to a place in the record where he objected but was overruled. This is at VRP 2330 and during direct examination:

> Q. State's Identification 100 lists out call detail records?
> A. Yes, it does.
> Q. Are those call detail records consistent, without going into the substance of them, consistent with what you received as a result of your request made on the date of the incident?
> MR. MAZZONE: Your Honor, I'm going to object to this.
> THE COURT: Well, I'll note your objection to that question. It's overruled.

Blizzard's objection was a general objection, with no evidence rule or basis set forth. The objection made by defense counsel was not specific enough to inform the trial court of the actual alleged issue and give the State and the trial court an opportunity to correct any error. See State v. Casteneda-Perez, 61 Wn. App. 354, 363-64, 810 P.2d 74, (objection not containing specific valid reason for exclusion of evidence inadequate to preserve error), review denied, 118 Wn.2d 1007 (1991); State v. Hubbard, 37 Wn. App. 137, 679 P.2d 391 (1984) (only objection to exhibit at trial was a lack of proper foundation, with no particularity as to the nature of the deficiency, therefore trial judge did not err in admitting exhibit), rev'd on other grounds, 103 Wn.2d 570, 693 P.2d 718 (1985). In sum, the objection was not sufficient to preserve any error on appeal. Furthermore, Blizzard never raised the issue of prosecutorial misconduct. As such, his claim must be denied.

The second objection that Blizzard points to is at VRP 2332:

> MR. MAZZONE: Your Honor, again, this is all hearsay. It calls for hearsay answers. Perhaps the questions could be asked in a different fashion and that wouldn't be the case.
> THE COURT: Mr. Cashman.
> MR. CASHMAN: I'm not asking for statements. I'm asking for -- in essence, it's the effect on the listener, your Honor. What did it cause him to do in the investigation?
> THE COURT: I'm going to allow it.
> A. As I said, the first number I called, I left my work cell phone number. I asked for a return call. That person called me back the following morning, the 26th, and explained to me who they were and why they had been talking to Vern.
> Q. As a result of that phone call back, as the lead investigator, was your investigation continuing into that individual?
> A. Based on the information that caller gave me and the notes that I had found in Vern's pickup, I did not pursue that lead any further at the time.

RP 2332-3. At this point in the testimony, Detective Perrault was outlining what steps he took in the investigation and why. RP 2329-2335. The court properly allowed his testimony over the defense attorney's hearsay objection because this testimony was not hearsay. Furthermore, it was not prosecutorial misconduct and Blizzard did not object on the basis of prosecutorial misconduct. His claim on this ground must be denied.

G. Blizzard waived any claim of prejudice when on cross examination, his attorney elicited evidence that Blizzard did not pay for three abortions, and did not move to strike said testimony, and then declined to object to the prosecutor's closing argument in which the testimony was referenced.

During his cross-examination of Jill Taylor, the defense elicited testimony that Blizzard did not pay for three of Ms. Taylor's abortions. RP 2504. The cross-examination went as follows:

> Q. (By Mr. Mazzone) Yes. After you sent that text, he wrote back and he said, where is all this coming from? Isn't that what he said to you?
> A. No, that's not correct. I texted him. I killed three kids for you and paid for it, too, and he said that after that.

RP 2504. He did not move to strike the testimony or have any curative instruction given. Because the defense elicited the testimony, the prosecutor was entitled to follow up during cross-examination. The defense then followed up further during re-cross, establishing that Ms. Taylor never asked Blizzard to pay for any abortions. RP 2548.

On appeal, Blizzard claims that prejudicial character evidence was admitted. However, it was admitted by his attorney, and not the State. Further, when defense counsel followed up during re-cross examination, the witness explained that she paid for the abortions but never asked Blizzard to pay for them. Because Blizzard elicited the testimony, and

thus, "opened the door," the State was entitled to follow up to explain the testimony.

It has been a long-recognized rule that when a party opens up a subject of inquiry, that party "contemplates that the rules will permit cross-examination or redirect examination in which the subject matter was first introduced." State v. Berg, 147 Wn.App. 923, 939, 198 P.3d 529 (2008). Otherwise, "[t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." Id.

Blizzard also now claims for the first time on appeal that the prosecutor's closing argument was improper. First of all, the prosecutor did nothing wrong in reciting Ms. Taylor's testimony and it was accurately recited for the jury:

> For part of these text messages she's telling Mr. Blizzard, you know I'm paying you back. If you would have stopped asking me to kill Vern like I told you to, because it was driving me nuts, I would maybe care about myself and you, but you didn't. I never asked you to pay for life insurance. She goes further, and I'm talking about Ms. Taylor, again, on January 13, 2013. All you want is to do him in. She was talking about Vernon Holbrook. You'll probably kill me, too. You don't care, only if it benefits you, and you

> proved that finally. That's why I can't stand being around you. She also talked about, I killed three kids for you and paid for it, too, talking about abortions. What was the response from Mr. Blizzard? Where is all this coming from?

RP 3082. The point of the prosecutor's argument was to show that Blizzard did not deny wanting to kill Mr. Holbrook and did not deny asking Ms. Taylor to kill him. This was a proper argument.

Second, Blizzard never objected during the State's argument. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted). Misconduct in the form of improper argument cannot be urged as error unless the aggrieved party had requested the trial court to correct it by instructing the jury to disregard it, and had taken exception to the court's refusal to do so. State v. Case, 49 Wn.2d 66, 72, 298 P.2d 500 (1956). Therefore, without an objection, there is nothing for this court to review and his claim should be denied.

H. The trial court correctly ruled that evidence of text messages was admissible at trial.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of

discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

On appeal, the defense claims that the court allowed testimony as to text messages for which a foundation was not laid. He does not state which text messages lacked foundation. He does point to three specific parts of the record where he claims he objected due to lack of foundation.

The first section of the record that he cites to is the page range of 1740-1755. During this part of the record, Blizzard never once objected on the grounds of foundation. The parties and the court had a discussion about Exhibit 83, the 19-page "Extraction Report from Defendant's iPhone (Dustin Baunsgard Report)" CP 2667, RP 1746. Blizzard complained he was not given a summary of expected testimony for Mr. Baunsgard, a criminal intelligence specialist with the Washington State Patrol. RP 1747. The court expressed concern about defense counsel having additional time to review the report. RP 1753. Defense counsel responded to the court's concern. Significantly, Blizzard's attorney stated had no problem with testimony being elicited about the text messages, but did have a problem with the late disclosure of the extraction report:

> MR. MAZZONE: I haven't seen this ever. This is the first time today. Remember what—I mean, I think we have to clear on what happened here. What happened here is we were having this big discussion about text messages. They subsequently said they had the witnesses in their camp.
> THE COURT: Right.
> MR. MAZZONE: That ends the discussion. **If they want to ask about the damn text messages, I don't have a problem.** I have a problem with this.

RP 1754 (emphasis added).

The next section of the record that Blizzard points to consists of pages 1925-1931. Appellant's Brief at 57. This also pertains to Exhibit 83, the extraction report. Mr. Baunsgard made a detailed offer of proof by testifying extensively as to the report. RP 1860-1875. He testified similarly in front of the jury. RP 1913-23. The State moved for admission and the defense objected, claiming that there was no connection established between Blizzard's phone and the case. RP 1926. The court admitted the extraction report, but it was not allowed to go back to the jury room during deliberations. RP 1941, CP 2667.

On appeal, the defense claims that the promised foundation was never established in that Adriana Mendez did not testify what Blizzard's phone number was. Appellant's Brief at 59. However, this specific testimony was not needed in order to lay a foundation for the extraction

report. Another witness, Jill Taylor, testified as to what Blizzard's phone number was (509-654-0283) and that AT&T was his cell phone company. RP 2457, 2462. She testified that she called Blizzard several times a day and texted him 20 times a day or more. RP 2457-8. She said that it was always to the same phone number. RP 2458. She looked at Exhibit 83 and testified that it contained conversations between Blizzard and her. RP 2459. She talked about specific text messages exchanged on January 13, 2013. RP 2465. This was more than enough to link the extraction report to Blizzard's phone number.

Furthermore, Adriana Mendez testified that she also talked to Blizzard daily. RP 2780. She said that she texted Blizzard and that he used an app called "GOGII" for texting. RP 2574, 2779. While she was not able to remember his phone number, she was able to identify the conversation number and the messages. RP 2665. As such, there was a sufficient foundation to allow the admission of Exhibit 83.

The third section of the record that Blizzard points to is section 1971-82. Appellant's Brief at 57. This section pertains to Exhibit 72, GOGII textPlus cell phone records. CP 2666. Mr. Moises Garcia testified regarding this exhibit. He is a safety, security and privacy agent as well as a customer service agent for textPlus. RP 1958. He testified that Exhibit 72 is a set of documents produced by textPlus that are sent to law

enforcement when they request user information, and are maintained in the ordinary and regular course of business. RP 1965-6. He described in detail what information is recorded when a text message is sent and received. RP 1958-65. The State moved for admission. RP 1969. The defense objected on the basis of foundation. RP 1969. The Court reserved ruling, and later admitted the exhibit with the provision that it not go to the jury room. RP 1969, 1983, 1985. Blizzard has failed to explain how this exhibit lacked proper foundation.

Blizzard also briefly mentions that Exhibit 85 was admitted over his objection. Exhibit 85 contains three discs that are "Blizzard's phone download." CP 2667. Mr. Baunsgard testified that Exhibit 85 was a copy of the data downloaded from the phone using a program called Cellebrite. RP 1853, 1859, 1874. He testified that the discs contained the information used to create the extraction report, Exhibit 83, which was discussed previously. RP 1873-4. The defense objected, but the State argued that a sufficient foundation had been laid through the testimony of Mr. Baunsgard and Detective Perrault. RP 2971. The court admitted the exhibit, but noted it would not go back to the jury room. RP 2971. On appeal, Blizzard has not explained how admission of the exhibit was in error.

In his argument regarding a lack of foundation for text messages, Blizzard also mentions that Exhibit 99 was admitted over his objection. Exhibit 99 is labeled "AT&T subscriber information for Maria Blizzard." CP 2668. This exhibit was described by Mr. Kenneth Carter, an engineer, cell support manager, and records custodian for AT&T. RP 2397-8, 2403. Mr. Carter described the exhibit as a set of documents called a CDR, or call detail report, associated with phone number 509-654-0283. RP 2400, 2403, 2406. He testified that they are documents maintained in the ordinary course of business. RP 2404.

Detective Perrault also testified regarding the exhibit—stating that they are call details for Daniel Blizzard's cell phone number, 509-654-0283. RP 2848. He testified that the records were received in response to his search warrant. RP 2849. The State moved for admission. RP 2849. The defense objected, stating "I'm going to object to that." RP 2849. The court reserved ruling. RP 2849.

The exhibit was brought up later that same day. The court summarized the exhibit as follows:

> No. 99, again, this was the information, subscriber information as well as call detail records from, again, the phone number 654-0283, which we talked about is the user information, the billing party identified as Maria Blizzard. Again, this has been

> testified to as a number that was utilized to reach Mr. Blizzard.

RP 2976. The State agreed there was no reason to let the jury have the exhibit:

> That one, there's actually no detail records that the jury -- that the state would want the jury to see from that record. That record is being admitted for the purpose of establishing that this was his phone number. It corroborates the testimony of Jill Taylor that it was his phone number. It corroborates the testimony of Detective Perrault that that was the phone number that he was able to determine was associated with Mr. Blizzard. Also, it corroborates the testimony of Mr. Baunsgard regarding that was the number that was contained on the extraction report that was attached to that phone that he did the data dump to. So the state would be moving for it to be admitted for purposes of the record but not to go back to the jury.

RP 2976-7. The defense objected, stating that it was a "bunch of gibberish." The defense failed to state any valid basis for the objection under the rules of evidence. The trial court ruled that a foundation was established for where the document came from and what it was about. RP 2978. The court properly allowed the admission for the record, but agreed with the State that it would not go to the jury. RP 2978.

On appeal, Blizzard fails to explain how Exhibit 99 lacked foundation. Clearly, the entire point of having the record was simply to

establish Blizzard's phone number. There was substantial testimony in the record to this effect by Jill Taylor. RP 2457. Any error in admission would have been harmless.

Authentication Claim

Blizzard claims that text messages were not authenticated and that he objected on the basis of authentication, citing to a specific page in the record, RP 1906. However, in looking at RP 1906, he never objected on that basis. On page 1906, he objected to admission of Blizzard's iPhone on the basis of foundation. He then objected during the State's direct examination of Mr. Baunsgard, a criminal intelligence specialist:

> Q. (By Mr. Cashman) Let's talk about Identification 85,
> Mr. Baunsgard. Do you recognize that?
> A. Yes, I do.
> Q. How are you able to recognize it?
> A. From my initials on the disk.
> Q. What is it?
> A. It is the download of the data that was extracted from the iPhone.
> Q. How did you extract that data?
> A. I used a Cellebrite universal forensic extraction device. I used the physical pro model of that device.
> MR. MAZZONE: Judge, I have to object to this line questioning. There is no foundation for this line of questioning. There is absolutely none.

RP 1906. The State responded by noting that the witness had testified about his extensive computer forensic training. RP 1907. The court

overruled the defense objection. RP 1907. The witness proceeded to testify about the Cellibrite program and hardware, the de facto standard in the industry for examining cell phones. RP 1907.

From the verbatim report of proceedings on page 1906, it is clear that there was no objection to the authentication of text messages. The defense was objecting to a line of questioning, not the admission of any evidence. The State had not made a motion to admit evidence at this point. The State was asking about how the analyst extracts data from a cell phone. Blizzard's claim of lack of authentication must fail as he did not object on this ground. Furthermore, his claim of "no foundation" is a general objection, without any explanation of what more the trial court was supposed to do. Nonetheless, a sufficient foundation was laid for the witness's testimony.

In sum, there is nothing to support the argument that admission of any of the text messages was a manifest abuse of discretion. The State called numerous witnesses to establish a solid foundation for the testimony that was admitted pertaining to text messages. Further, most of the underlying documents were admitted, but the jury was not allowed to have them during deliberations. Given the thorough record in this case, Blizzard has not shown that the trial court's exercise of its discretion was manifestly unreasonable or based upon untenable grounds or reasons.

I. Blizzard was provided a fair trial under the cumulative error doctrine.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant has not had a fair trial when, considering the trial's scope, the errors' combined effect materially affected its outcome. See State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). However, the cumulative error doctrine does not warrant reversal when a trial has few errors with little or no impact on the outcome. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Blizzard argues that reversal is warranted by the cumulative effect the errors he alleges. But considering the full scope of the trial, for sake of argument, if there were any errors, they did not materially affect the outcome. Russell, 125 Wn.2d at 94. Because Blizzard had a fair trial, the cumulative error doctrine does not warrant reversal of his convictions. State v. Greigg, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

V. CONCLUSION

Based on the above arguments, the State asks this court to affirm Blizzard's conviction and sentence.

Respectfully submitted this 16th day of February, 2016,

TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on February 16, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Mr. Peter Mazzone and Mr. Peter Connick at peterm@mazzonelaw.com and peterconnick@gmail.com.

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

DATED this 16th day of February, 2016 at Yakima, Washington.

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