NO. 101013-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUNJIE GONG,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 18-1-02954-8

ANSWER TO PETITION FOR REVIEW

MARY E. ROBNETT
Pierce County Prosecuting Attorney

Teresa Chen
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517

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I. INTRODUCTION

Carrying condoms and a Slurpee for the 13-year-old "Kaci" with whom he intended a sexual encounter, the Defendant Junjie Gong was arrested within seconds of entering the Net Nanny target house. He complains on appeal that Trooper Gasser testified without objection to the few seconds of conversation they exchanged at the door of the target house. The trooper had been unaware that another officer pressed the audio record button three seconds too soon, before the arrest was announced. Therefore, those few seconds of recording violated the Privacy Act and were not presented to the jury. However, because Trooper Gasser was not a party to the illegality and not aware of it and because she had never viewed the recording, her testimony was fully admissible. *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013, *review denied*, 83 Wn.2d 1003 (1973), *cert. denied*, 419 U.S. 849, 95 S.Ct. 87, 42 L.Ed.2d 78 (1974).

In this petition, Gong argues that the court of appeals decision conflicts with cases of this Court describing the "fellow

officer rule." He argues that this rule requires that the courts impute knowledge of the illegality to the trooper. It does not. The "fellow officer rule" acknowledges that a fellow officer is a presumptively reliable source of probable cause information. It does not require suppression of evidence which was not come at by the exploitation of any illegality. There is no RAP 13.4(b) consideration which would permit review.

II. RESTATEMENT OF THE ISSUE

Has the Petitioner demonstrated that the unpublished opinion conflicts with any opinion of this Court?

III. STATEMENT OF THE CASE

The Defendant Jungie Gong was arrested in a Net Nanny sting and has been convicted by a jury of attempted rape of a child in the second degree and communicating with a minor for immoral purposes. CP 94, 152.

The Washington State Patrol has a task force to recover missing children and investigate child exploitation, known as

MECTF (Missing and Exploited Children's Task Force). RP[1] 189, 192. MECTF developed Operation Net Nanny, a proactive model for identifying and investigating persons with a sexual interest in children *before* the harm actual children. RP 191-92. The operation uses social media sites where they know children are being exploited. RP 206; II RP[2] 10.

Using the pseudonym George, the Defendant Gong engaged in texting conversation with "Kaci Tyler", a MECTF undercover profile Gong discovered on AdultLook. RP 242, 246, 278-79. The hour-and-a-half-long, explicit, recorded communication was entered into evidence as Exhibit 2. RP 278-79. Gong solicited a sexual encounter, believing "Kaci" to be a 13-year-old girl. RP 238-39, 242, 246, 260-61, 265-70, 274-79, 341, 349, 376, 358, 401, 406-10; II RP 62-63, 66.

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[1] "RP" refers to the nine volumes of consecutively paginated Verbatim Report of Proceedings prepared by Official Court Reporter Dana S. Eby.

[2] "II RP" refers to the Verbatim Report of Proceedings prepared by Official Court Reporter Dianne Johnson for the afternoon of February 19, 2020.

When Gong asked to hear Kaci's voice, Trooper Anna Gasser assumed the role of Kaci on the phone. RP 263; II RP 29, 36. Trooper Gasser was a new officer who appeared younger than her years. II RP 17, 19-20. Dressed in a hoodie and jeans, Trooper Gasser met Gong at the door of the target location and facilitated his entrance into the house where he could be taken into custody safely. II RP 23, 25, 46-49, 68.

At trial, Trooper Gasser testified that she was not part of the arrest team, but she was aware that Gong was about to be arrested. RP 462-63. When Trooper Gasser opened the door, Gong handed her a Slurpee over the threshold and asked about parking. II RP 61-64. He then began to remove his shoes outside. II RP 63-64. She invited him to remove them inside the house, which he did. II RP 64. She asked if he had brought condoms, and he responded, "Yeah, and there are more out there," nodding toward his vehicle. II 65-66. He asked her age. II RP 67. When she told him she was 13, he looked shocked and stepped back, asking "really?". RP 430, 432-33; II RP 67-68.

But he made no attempt to leave. II RP 67-68. Heading out of the room, the trooper said she would warm the water for the shower. II RP 67. Gong followed closely, almost passing her to get to the bathroom. II RP 67-68. At that point, the arrest team appeared and took the Defendant into custody. II RP 68.

In cross-examining the trooper, defense suggested that the trooper's recollection of the brief conversation at the threshold and entrance was not a word-for-word recitation of the actual, recorded conversation. RP 449-50. Out of the hearing of the jury, the prosecution complained that it was unfair of the defense to make insinuations about the inadmissible portion of the recording. RP 464-65.

The prosecutor explained that the FBI began to record audio when they saw Trooper Gasser start to step away so that the arrest team could enter. RP 465. They inadvertently captured "about three seconds" of conversation during which the Defendant asked,

> "How old are you again?" RP 465. And she says, "13," in a high pitched squeak, and then he stepped back and he goes, "Really?" And then smiles, and that's what's in the picture, 12-B, and then she says, which you cannot hear, "I'm going to go turn on the shower for us." And she turns to walk, and smiling Mr. Gong trails right behind her like you saw in the video and then gets confronted with guns and vests.

RP 465-66.

> Mr. Wagnild either knows or should know that the audio [recording] between Mr. Gong and Anna Gasser at the door of that trap house is inadmissible as a matter of law under the Privacy Act. The reason for that is, there was no announcement beforehand that it was being audio and video recorded.

RP 464.

Under RCW 9.73.050(1)(a), before an audio recording may be made, all parties must consent. Consent may be through a recorded announcement that the conversation is being recorded. RCW 9.73.050(3). In this case, the announcement was made simultaneously with the arrest. RP 486-87.

The prosecutor explained that an officer who was unaware of a Privacy Act violation may testify as to things which occurred in the officer's presence. CP 38 (citing *State v. Williams*, 94

Wn.2d 531, 617 P.2d 1012 (1980)). Trooper Gasser did not know and could not have known the precise moment another officer had flipped the switch to begin recording. RP 566.

The prosecutor had "specifically instructed" law enforcement "not to watch audio of anything unless there had been an announcement ahead of time." RP 471. Therefore, Trooper Gasser had "testified from her memory and from her written report" only, and her testimony had not been "refreshed with any audio from the recording," RP 471.

The prosecutor proposed that the remedy for the defender's unfair insinuation was either to permit the State to play the three seconds of audio or to instruct the jury that the State was not willfully hiding any admissible evidence from them. RP 467, 469.

Initially, defense counsel did not believe that any part of the recording implicated the Privacy Act. RP 469, 472-73, 562. After a few days' reflection, defense counsel changed his tune. RP 558. He argued without evidence that Trooper Gasser "was

part of" the decision to flip the audio switch three seconds before the actual arrest. RP 557-58. He claimed the State committed misconduct deserving of dismissal by eliciting the trooper's testimony. RP 558-59. In the alternative, counsel requested a mistrial. RP 559.

The court found that the trooper had not been aware that audio was captured prior to the Defendant's arrest and first learned of this fact immediately before testifying. CP 147-48. "[H]er testimony about the verbal exchange came from her memory and her review of her written report, which was written right after the incident occurred and without any review of audio- or video-recordings." CP 148. The court held that Trooper Gasser's testimony did not violate the Privacy Act, that defense counsel was not surprised by her testimony, and that Gong failed to challenge the testimony in a timely manner. CP 148.

The court denied the motion for mistrial and instructed the jury to disregard the improper defense question. CP 66-67, 148-

49. "[T]here is no audio recording between Mr. Gong and Det. Gasser that is or will be evidence at this trial." CP 67.

The Defendant was convicted as charged and received a low-end sentence of 76.5 months to life. CP 152-53, 155.

On appeal, the court of appeals declined to review Gong's unpreserved Privacy Act claim, recognizing that the question presented to the lower court was not whether to admit testimony that had already been admitted without objection. Op. at 7; II RP 61-68; *see also* Br. of Resp. at 12-13. The lower court had only ruled upon the request for dismissal or mistrial. Op. at 5-8. The court of appeals affirmed this decision.

> Following Grant, we hold that the Privacy Act did not bar Gasser from testifying at trial about her conversation with Gong inside the target house. Thus, [the] trial court did not abuse its discretion in rejecting Gong's motion for a mistrial or refusal to grant his request to instruct the jury to disregard Gasser's testimony.

Op. at 11 (citing *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013, *review denied*, 83 Wn.2d 1003 (1973), *cert. denied*, 419 U.S. 849, 95 S.Ct. 87, 42 L.Ed.2d 78 (1974)).

IV. ARGUMENT

A. The unpublished opinion does not conflict with any opinion of this Court.

The Petitioner Gong asserts a consideration under RAP 13.4(b)(1), i.e., that the unpublished opinion is in conflict with a decision of this Court. Pet. at 11. There is no conflict.

Gong criticizes a case which both this Court and the United States Supreme Court had an opportunity to review and declined to reverse. Pet. at 13-14 (citing *State v. Grant*, 9 Wn. App. 260, 511 P.2d 1013, *review denied*, 83 Wn.2d 1003 (1973), *cert. denied*, 419 U.S. 849, 95 S.Ct. 87, 42 L.Ed.2d 78 (1974)). However, he does not identify any conflict with *Grant* or with any other privacy case.

Rather, Gong alleges that, under the "fellow officer rule," courts must impute illegal conduct to an innocent officer whose evidence is not the result of the exploitation of any illegality. Because this is neither the substance nor the reasoning of the rule, the decision in his case does not conflict with the cases describing the "fellow officer rule."

1. This Court has cited *Grant* favorably and expanded upon it.

As Gong acknowledges this Court has favorably cited *Grant* as an available exception. Pet. at 14. *Grant* and subsequent, related cases are concerned with law enforcement officers who knowingly and willfully violate the Privacy Act.

> [W]hen an officer knowingly transmits a private conversation, without court authorization or without the consent of all the parties, any evidence obtained, including simultaneous visual observation and assertive gestures, is inadmissible in a criminal trial. This decision does not hamstring the goals of law enforcement, but only preserves the integrity of the police and the privacy of individuals.
> …
> once the police step outside the boundaries delineated by the law, we have no choice but to make inadmissible any information obtained.

State v. Fjermestad, 114 Wn.2d 828, 836-37, 791 P.2d 897 (1990); *accord State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993) (Det. Johal's observations were inadmissible during the time he knowingly wore an unauthorized body wire); *State v. Porter*, 98 Wn. App. 631, 990 P.2d 460 (1999) (excluding all information obtained during unlawful police recording of

conversations). However, "the privacy act does not apply to excluding the testimony of a police officer who participates in an illegally transmitted or recorded conversation *when that officer is unaware of the illegality*." *Fjermestad*, 114 Wn.2d at 834 (citing *Grant*) (emphasis added).

Gong argues that this Court has not affirmed, but only distinguished, *Grant*. Pet. at 14 (citing *Fjermestad* and *State v. Williams*, 94 Wn.2d 531, 543, 617 P.2d 1012 (1980)). This misrepresents the significance of this Court's attention to *Grant*. Of course, a court cannot "affirm" a case that is not before it. But this Court has certainly cited *Grant* favorably and built upon it. Both *Fjermestad* and *Williams* specifically noted that they were reaching the question *Grant* left open, i.e., where the officer was "a party to the illegal recording and taping." *Fjermestad*, 114 Wn.2d at 834; *State v. Williams*, 94 Wn.2d 531, 543, 617 P.2d 1012 (1980).

In our own case, we do not have any concern that law enforcement was attempting to circumvent a judge's refusal to authorize a wiretap or otherwise willfully violating any law. The officers merely pressed the record button a few seconds before they entered, not anticipating that any conversation of import would occur in those few seconds. And, in fact, the few seconds of conversation at the door was insignificant. Everything needed to convict Gong was in his one and a half hours of text messages with the Net Nanny profile and was confirmed by the condoms in his pocket and car and the gift of the Slurpee that little "Kaci" had requested. Op. at 2-3; Exh. 2. Most importantly, the trooper who opened the door *had no knowledge* of the decision when to begin the recording.

The court of appeals correctly applied *Grant* which has been cited by this Court with favor. Gong does not demonstrate or claim a conflict with any privacy case of this Court or any published privacy case of the court of appeals.

2. The "fellow officer rule" does not impute illegality to an innocent other, nor is there a basis to suppress evidence which was not come at by any exploitation.

Petitioner Gong argues that *Grant* contradicts the reasoning behind the "fellow officer rule." Pet. at 14. It does not. The "fellow officer rule" is a rule about *probable cause* in the context of the Fourth Amendment right to be free from warrantless searches or seizures of person or property. Gong does not challenge any finding of probable cause or raise any Fourth Amendment concern. The rule is not relevant.

The "fellow officer rule" is a rule for determining the existence of probable cause based on the "cumulative knowledge of police officers." *State v. Ortega*, 177 Wn.2d 116, 126, 297 P.3d 57 (2013); *see also Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971). It provides that an arresting officer who does not personally possess sufficient information to constitute probable cause may still make a warrantless arrest if (1) they act upon the direction or as a result of a communication from a fellow officer,

and (2) the police, as a whole, possess sufficient information to constitute probable cause. *State v. Butler*, 2 Wn. App. 2d 549, 570, 411 P.3d 393 (2018) (*citing State v. Maesse,* 29 Wn. App. 642, 646–47, 629 P.2d 1349 (1981)). The fellow officer rule will not justify bad faith arrests. *State v. Alvarado*, 56 Wn. App. 454, 456–57, 783 P.2d 1106 (1989).

Gong argues that if knowledge of probable cause can be imputed to a fellow officer, then it is reasonable to impute illegal behavior to an innocent fellow officer. Pet. at 15. It is not at all reasonable. Gong completely ignores the contexts of and the reasoning behind each rule. It is not at all reasonable to assume or impute that every officer knows what any one officer knows in every context.

The fellow officer rule recognizes that probable cause can result from a third party's reasonably trustworthy information; that a fellow officer is presumed reliable and therefore a source of reasonably trustworthy information; and that a fellow officer who requests or directs an arrest understands that an arrest must

be justified by probable cause. *State v. Gluck*, 83 Wn.2d 424, 426–27, 518 P.2d 703 (1974); 12 Wash. Prac. § 2506 (3d ed.); 32 Wash. Prac. § 20:13 (2021-2022 ed.). In other words, we impute probable cause knowledge, because an arresting officer may reasonably trust a directing officer as a reliable source of information on the subject of probable cause. And if it turns out there was no probable cause, the fruits will be excluded in court.

But it is never reasonable to impute criminality to an innocent other.

The fruit of the poisonous tree doctrine suppresses evidence that is come at by the *exploitation* of an illegality. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). But no exploitation occurred here. Trooper Gasser did not learn or recall Gong's statement because other officers began to record a few seconds too early. She opened the door to the target house lawfully. She spoke to Gong lawfully. And her recollection of that conversation was not influenced by the recording, because she never reviewed the

recording. She relied entirely upon her own memory. It would not be reasonable to impute any illegality to her information.

Gong raises a strawman argument, claiming that the State is relying on a "good faith" exception. Pet. at 15. It is not that Trooper Gasser acted in "good faith" in having a fleeting conversation with Gong. It is that her knowledge of Gong's few words before arrest was not come at by the exploitation of any illegality. And it is not reasonable to impute bad faith or unlawful behavior to her. The courts suppress evidence to deter governmental misconduct. Trooper Gasser did nothing wrong. There is nothing to deter.

Grant does not conflict with the "fellow officer rule." And the lower courts made no error.

V. CONCLUSION

Because the Petitioner fails to identify any RAP 13.4(b) basis for review, the petition must be denied.

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RESPECTFULLY SUBMITTED this 15th day of July, 2022.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

s/Teresa Chen
TERESA CHEN
Deputy Prosecuting Attorney
WSB # 31762 / OID #91121
Pierce County Prosecutor's Office
930 Tacoma Ave. S, Rm 946
Tacoma, WA 98402
(253) 798-6517
teresa.chen@piercecountywa.gov

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PIERCE COUNTY PROSECUTING ATTORNEY

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