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COA NO. 68971-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUtES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to declare a mistrial after the prosecutor violated a pre-trial order.

2. The court erred in denying appellant's CrR 3.6 motion to suppress evidence from the storage locker. CP[1] 208 (CL c.).[2]

3. The court erred in denying appellant's CrR 3.6 motion to suppress evidence of jail calls. CP 206-07 (CL a.).

4. The trial court erred in entering CrR 3.6 conclusions of law "a." and "c." CP 206-07, 208.

5. Cumulative error violated appellant's due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Where the prosecutor violated the pre-trial order excluding evidence of appellant's criminal activity in other cases, did the court err in failing to grant a mistrial?

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[1] Blair originally sought direct review in the Washington Supreme Court under No. 86373-3. The Supreme Court subsequently granted Blair's motion to transfer his appeal to the Court of Appeals, which resulted in the new appeal number of 68971-1-I. The clerk's papers are referenced as follows: "CP" for the clerk's papers designated under Supreme Court No. 86373-3; "2CP" for the clerk's papers designated under Court of Appeals No. 68971-1-I.

[2] The trial court's "Written Findings of Fact And Conclusions Of Law On CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence" are attached as appendix A.

2. Did the court err in failing to suppress evidence recovered from the storage unit because the search warrant was stale and therefore lacked probable cause that contraband would be found there?

3. Did the court err in failing to suppress the recorded jail calls between appellant and his wife under the Privacy Act?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Keith Blair by amended information as follows: count 4: attempted residential burglary involving Dolliver and Thompson on September 26, 2010; count 5: residential burglary involving LeCount on August 6, 2010; count 6: theft of a firearm belonging to LeCount on August 6, 2010; count 7: residential burglary involving Rollins and Murray between September 27 and 28, 2010; count 8: theft of a firearm belonging to Rollins/Murray between September 27 and 28, 2010; count 9: residential burglary involving Lee on October 11, 2010; count 10: residential burglary involving Chrisope on September 15, 2010; count 11: residential burglary involving Marti between September 15 and 16, 2010; count 12: residential burglary involving Paveglio on August 31, 2010; count 13: residential burglary involving Walden on September 23, 2010; count 14: residential burglary involving Bodmer on September 14, 2010; count 16: residential burglary involving Saldin on July 25, 2010; count 17:

theft of a motor vehicle belonging to Saldin on July 25, 2010; count 18: residential burglary involving Parvanta and Minakami on September 18, 2010.[3] CP 1-8; 10RP[4] 9-10.

A jury acquitted Blair of firearm theft on count 8. CP 184. It found Blair guilty of the lesser offense of first degree criminal trespass on count 11. CP 176. The jury found him guilty as charged on the remaining counts. CP 172-75, 177-83, 185.

The court imposed an exceptional sentence based on the "free crime" aggravator, running the 102 month sentence of confinement under count 6 consecutive to the other counts, resulting in a total sentence of 186 months confinement. CP 192, 211-13. This appeal follows. CP 199-201.

2. Description of Counts

Count 4: Dolliver and her husband, Thompson, lived in a Shoreline residence. 8RP 33. Upon arriving home on September 26, Dolliver noticed a man descending a ladder propped up against the house. 8RP 35. The man wore a light gray jacket and a backpack. 8RP 38. Dolliver asked if she could help him. 8RP 36. The man did not respond

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[3] Counts 1 through 3 charged Kelsey Johnson with crimes as a co-defendant but she was not tried with Blair. CP 1-2. Count 15, the money laundering count, was severed and prosecuted in a separate trial. 2CP 1.

[4] The verbatim report of proceedings is referenced as follows: 1RP - 5/10/11; 2RP - 5/11/11; 3RP - 5/12/11; 4RP - 5/16/11; 5RP - 5/17/11; 6RP - 5/18/11; 7RP - 5/19/11; 8RP - 5/23/11; 9RP - 5/24/11; 10RP - 5/25/11; 11RP - 5/26/11; 12RP - 7/15/11.

and left. 8RP 36. Dolliver described him as a Caucasian male with dirty blond hair and height-weight proportional. 8RP 39-40. Thompson ran out to the street and saw a white male walking two blocks away with a backpack. 8RP 44-45. The man ran off after Thompson engaged him and asked why he broke into the house. 8RP 46-48. At trial, Thompson described the man as about 5'10" with sandy brown hair, gaunt and pale. 8RP 49. He was unable to identify anyone from a montage. 8RP 51-53.

On September 26, Travis Testerman saw a man who did not live in the neighborhood talking on a phone as he briskly walked up the street a few blocks away from the Dolliver residence. 8RP 55, 57, 59. The man had a backpack and wore jeans with a white T-Shirt. 8RP 58. Testerman later saw him leaving a backyard without a backpack. 8RP 59-60. A black Kia approached and stopped near the man, who went inside the car.[5] 8RP 61-62. Testerman gave a partial license plate to the 911 operator as 3-6-0-Z. 8RP 62-64. The Kia drove off at high rate of speed. 8RP 62. Testerman went back and found a backpack in the yard. 8RP 65-66. Testerman picked out number 2 as the man from the photomontage and identified Blair as the man in court.[6] 8RP 69-70.

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[5] Testerman later testified "I don't know if I remember seeing a black Kia." 8RP 71.

[6] The montage itself was not admitted into evidence as an exhibit because it showed Blair in jail clothing. 8RP 219-23.

Testerman's wife testified the man jumped into a Nissan Sentra. 8RP 81-82. She later waffled on that point, saying there was no doubt it was a black sedan. 4RP 92-93. She picked number 2 out of a montage as the man she saw, but was only 40 percent sure. 8RP 85-86.

Sheriff Deputy Soderstrom responded to the 911 call. 8RP 94-95. He recovered the backpack, which contained a crowbar, T-shirt, a gray fleece coat with gloves in its pockets, and a Travelodge receipt in the name of Aaron Knapp. 8RP 95-99; Ex. 17. The next day, a citizen saw a black car stop and a young white man look towards the location where the backpack had been. 8RP 100-05.

Counts 5 and 6: The LeCounts lived in Shoreline. 8RP 136, 9RP 150. Their house was burglarized on August 6 and the following items taken: necklaces, tie clasps, cufflinks, an Xbox, walkie talkies, laptop, jewelry, coin collection, $30,000 in cash from safe, and a shotgun. 8RP 137-41, 144-48. Blair's bank records showed a cash deposit of $5000 into his savings account on August 3 and a cash deposit of $15,000 into his checking account on August 9. 9RP 17-21; Ex. 136, 137.

Counts 7 and 8: Patrick Murray and Gary Rollins lived in a house in Shoreline. 7RP 159-60. Their house was burglarized on September 27 or 28 and the following items stolen: Glock handgun, a laptop, two IPods, a camera, a glucose meter, packaged freeze dried food, watches, jewelry,

and coins. 7RP 163, 165-66, 169-72. A ladder was left leaning up against a bedroom window, which had been opened and its screen cut. 7RP 174-76. Motion sensor floodlights were removed. 7RP 177. A screwdriver was recovered from the floor of the residence. 8RP 31.

A next-door neighbor made a 911 call on September 27 upon seeing a suspicious person roaming about at around 10 p.m. 7RP 145-47. The neighbor saw the person again at around midnight at the side of Rollins's house, walking towards the back. 7RP 147-50. The man leaned to the right, as if he had a problem with his shoulder or right leg. 7RP 150-51. Sometime later, the neighbor saw the man come from the side of Rollins's house talking on a cell phone and walking toward the street with a backpack. 7RP 152-53. A black car pulled up and then parked. 7RP 153-54, 156. The man said, "Turn off the lights." 7RP 154. The man threw the backpack and more things from the house into the trunk of the car. 7RP 155-56.

Count 9: The Lee residence in Medina was burglarized on October 11. 7RP 70-72, 79-81. Various items were taken from the house, including a data projector. 7RP 70-81. Passports, social security cards, wills, a life insurance policy, credit cards, and bonds were taken from a safe. 7RP 79. A tool that did not belong to the family was left on the basement floor. 7RP 78-79. An open can of Dr. Pepper was left on a

dresser. 7RP 76-77. DNA recovered from the Dr. Pepper can matched Blair's DNA profile. 7RP 112, 115, 120, 127. Blair did not have permission to be in the house on October 11. 7RP 81. Photographic evidence showed a Mercedes with license plate 613 VZQ entering Medina that day. 7RP 140-42.

Count 10: Chrisope lived in Kirkland. 8RP 179, 9RP 150. His house was burglarized on September 15 and the following items stolen: horse jewelry, flat screen TV, motorcycle riding gear, various electronics including a hard drive, a battery for charging electronic devices, and a GPS unit. 8RP 179-85. A red Honda civic was taken but left not far from the house. 8RP 183-84.

Count 11: Marti lived in Kirkland. 8RP 169. He returned home on September 16, 2010 at 2 a.m. to find his bedroom windows broken and a kitchen window removed. 8RP 169-73. A window shelf and its items were on the ground outside the window. 8RP 171-72. It did not appear anyone had been inside the house. 8RP 173.

Count 12: Paveglio lived in Kenmore. 8RP 174. The house had an attached garage with a tarp over the garage door entrance. 8RP 175-76. On August 31, he noticed the following items were missing from his garage: a lawn mower, compressor, wire feed, grinder, and paint sprayer. 8RP 175-77.

Count 13: Walden lived in Shoreline. 8RP 163; 9RP 149. His house was burglarized on September 23 and the following items stolen: jewelry, laptop, sheriff's department patch, watch, and headphones/speakers. 8RP 166-67.

Count 14: The Bodmers lived in Forest Park. 8RP 150-51. Their house was burglarized on September 14 and the following items taken: five laptop computers (including a Dell Mini), jewelry, a watch, hard drives, and what was described as a men's street bike with thin wheels. 8RP 151-54, 158-62.

Counts 16 and 17: Saldin lived in Seattle. 8RP 188, 9RP 150. His house was burglarized between July 23 and 26 and the following taken: a safe, shotgun, jewelry, cigars, a humidor replica of the White House, and watches. 8RP 189-94. A Porsche convertible was also stolen. 8RP 195.

On July 25, a neighbor saw someone walking with a limp up a hill in the neighborhood. 8RP 198-99. She described the man as white and of average height. 8RP 199. A short time later, she saw the same person driving down the hill in what she later realized was Saldin's silver Porsche. 8RP 200-02. Trooper Casey Myers pursued a silver Porsche on August 1. 8RP 206-07. He eventually found the car crashed into a tree, abandoned. 8RP 209.

Count 18: Parvanta and Minakami lived in Shoreline. 8RP 106-07. Their house was broken into on September 18 and the following items stolen: a ring, jewelry, computers, watches, swords, and a Chanel bag. 8RP 808-16, 131-33. A ladder was propped up against the house leading to the first floor balcony. 8RP 112.

3. Investigation

Detectives Volpe and Coblantz of the King County Sheriff's Office investigated the burglaries that resulted in the charges for this case. 5RP 15, 22; 7RP 180, 183. As background, Volpe testified that he regularly contacted gold buyers to track down stolen gold. 5RP 19-20. On September 27, 2010, Detective Volpe met with gold buyer Ryan Youngberg, who advertised on Craigslist. 5RP 24. Volpe wanted to recover gold that had been stolen in a burglary and asked Youngberg if he had bought any gold from Blair. 5RP 24. Volpe also asked if anyone had brought him gold that might have come from burglaries. 5RP 25. Youngberg testified that Blair sold gold to him. 7RP 34.

Volpe also spoke with Youngberg about Kelsey Johnson. 5RP 25. Youngberg testified that Johnson sold him gold. 7RP 67-68. Volpe wanted to recover stolen property and discuss with Johnson any information she might have. 5RP 28.

Volpe confronted Johnson on September 28 at a Safeway store. 5RP 27-28. Johnson was in a Black Kia with license plate number 630 ZVJ. 5RP 29-31. Volpe seized the Kia and subsequently executed a search warrant on it. 5RP 31-32. Various items were recovered from the Kia, including (1) watches, coins, and dehydrated food belonging to Rollins/Murray (5RP 35-37); (2) a Cartier watch belonging to Parvanta (5RP 37); and (3) computer paraphernalia belonging to Chrisope (5RP 37-38). Police also recovered Employment Security Department Paperwork and a receipt with Blair's name on it.[7] 5RP 38-40.

On October 21, Volpe waited for Johnson and Blair to show up at a motel in Everett. 6RP 10-11. They arrived in Johnson's Mercedes. 5RP 11; 6RP 121. Volpe arrested Johnson for trafficking in stolen property based on selling a stolen gold ring to Youngberg. 6RP 54-57, 68. Blair was also arrested on October 21 and put in jail. 6RP 95.

Volpe obtained a search warrant for Johnson's Mercedes. 6RP 12. Items recovered from the Mercedes included: (1) dehydrated food and coins belonging to Murray/Rollins (6RP 12-16); (2) paperwork for a new phone in Blair's name (6RP 16); and (3) a receipt for a storage unit from Lynn Storage on Highway 99 in the name of Atheta Mowen. 6RP 16. On

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[7] Contrary to Deputy Soderstrom's testimony (8RP 95-99), Detective Volpe testified the Travelodge receipt in Knapp's name was recovered from the Kia. 5RP 40-41.

November 2, Volpe went to the Lynnwood storage unit referenced in the receipt but the unit was mostly empty, containing only a boat motor, a black bag, and some speakers. 6RP 18-19, 83.

After being in jail for two weeks and charged with possession of stolen property and trafficking, Johnson contacted Volpe to provide information in an attempt to get out of jail. 6RP 75-80. Johnson told Volpe that Blair's wife, Rachel Dunham, had moved the stolen property to a storage unit in Monroe. 6RP 81-83, 86-87. Following up on information provided by Johnson, Volpe checked storage units in Monroe until he found one rented in Dunham's name. 6RP 23-25; Ex. 22.

The Monroe unit was searched and the following items recovered: (1) a computer projection device belonging to Lee (6RP 39-40); (2) swords, jewelry, Rolex watch, purse, and ring belonging to Minakami/Parvanta (6RP 40-43); (3) watch and external hard drive belonging to Bodmer (6RP 43); (4) external hard drive and GPS unit belonging to Chrisope (6RP 44); (5) shotgun, jewelry, cufflinks, rings, Rolex manual, Xbox, and portable walkie talkies belonging to LeCount (6RP 44-46); (6) Porsche key, White House humidor, cigars, and watches belonging to Saldin (6RP 46-49); and (7) watches and headphones belonging to Walden (9RP 36). Also recovered from the Monroe storage

unit were a Fred Meyer Jewelers' envelope with "K Blair change" written on it and prescription pill bottle with Blair's name on it. 6RP 26-29.

Blair and his wife, Rachel Dunham, talked on the phone while Blair was in jail following his arrest on October 21. 6RP 20; Ex. 78, 139.[8] During those conversations, Blair and Dunham referenced various items in storage, including "silver dollars" and "coins." Ex. 139. Blair also asked whether Dunham had found a gold "rollie." Ex. 139 at 7. Blair further referenced "five lappys" and told Dunham not to sell a mini Dell. Ex. 139 at 2-3. Blair also told Dunham of the need to sell the coins and "shit." Ex. 139 at 5-7.

4. Informant Johnson's Testimony

When arrested by Detective Volpe on October 21, Kelsey Johnson declined Volpe's request for information. 6RP 168-69. She later contacted Volpe and agreed to cooperate after she became aware of the seven or eight charges pending against her. 6RP 170-71, 179-81, 190-91. She made a deal with the prosecutor. 6RP 190-92. She ended up pleading guilty to two counts of possession of stolen property. 6RP 174; 7RP 12, 14-15. Johnson entered into an immunity agreement with the prosecutor's office in which she agreed to be interviewed and testify against Blair. 7RP

[8] Ex. 78 is a redacted CD recording of the jail calls. Ex. 139 is a redacted transcript of the jail calls.

19-21; Ex. 95. The prosecutor's office retained the right to nullify the agreement if it determined Johnson did not give truthful information. 7RP 21. Her sentencing was postponed until after she testified at Blair's trial. 7RP 22. Johnson acknowledged the prosecutor's office could "pull the rug" out from under her if it believed she had not given correct information at trial. 7RP 23.

Johnson testified that she first met Blair in early August 2010. 6RP 99. At the time, he was driving a silver Porsche. 6RP 100. Johnson heard it was stolen. 6RP 168. She identified Saldin's Porsche as the car driven by Blair. 6RP 100. Blair told Johnson that he gave the car to another person, who then wrecked it. 6RP 168.

Blair and Johnson began a relationship. 6RP 102. Blair asked her to drive him around to steal from houses. 6RP 104, 110. Johnson agreed. 6RP 110. Johnson said she dropped him off and then picked him up to bring back the property, first in a rented black Kia for about a week and then in her black Mercedes. 6RP 115-16, 120-22. Aaron Knapp rented the Kia. 6RP 120. Johnson would pick Blair up at a location he disclosed upon calling or texting. 6RP 115-16. There were times when Blair called and had her act as a lookout. 6RP 116. Blair told her that he used a crowbar to commit the burglaries and break into safes. 6RP 124, 128. Blair sometimes walked with a limp. 6RP 109-10.

On multiple occasions, Johnson drove Blair with the property he had taken to his storage unit in Lynnwood. 6RP 118. The last time she saw property in the unit was the day before they were arrested on October 21. 6RP 118-19. Blair told her that his wife had moved the property from Lynnwood to Monroe. 6RP 119-20.

Johnson described the circumstances surrounding various charged crimes. On September 26,[9] she drove her Kia and dropped Blair off in the early morning. 6RP 137-38. He had a backpack. 6RP 139-40. He later called and said it was very important she pick him up. 6RP 137-38. He called back a few times and changed the street numbers for the pick up. 6RP 138-39. She located him at an intersection. 6RP 139. He hopped in and told her to drive. 6RP 139. He no longer had his backpack. 6RP 139. A black truck was following them. 6RP 139, 142. She drove off at a high rate of speed and eluded the vehicle. 6RP 139, 142. Blair told her someone had come home. 6RP 142. The following day, Blair drove back to the area to find his backpack but was unsuccessful in locating it. 6RP 143. Johnson identified a jacket and shirt in the recovered backpack as belonging to Blair. 6RP 139-40.

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[9] On cross-examination, Johnson acknowledged she did not independently remember the exact dates, but rather agreed with the prosecutor's suggested dates on direct. 6RP 183-85.

At some point, Blair told Johnson that he had stolen a safe with $60,000 inside. 6RP 162.

She identified a residence in Shoreline as one of the houses Blair burglarized on September 27. 6RP 130-31. She dropped Blair off around midnight from her Kia. 6RP 131. He called her about an hour later and told her to return. 6RP 131-32. Blair went into the house and then came out with some suitcases and backpacks, which contained coins, one or two laptops, and one or two guns. 6RP 133. Blair told her he climbed through a window with the aid of a ladder. 6RP 133. Johnson sold some of the coins from this house. 6RP 133-34. When Detective Volpe intercepted her at the Safeway on September 28, gold coins that she planned to show Youngberg were in her Kia. 6RP 135-37.

She identified the Lee house in Medina as one of the houses Blair robbed on October 11. 6RP 126-29. She also identified her Mercedes as the one that was photographed entering Medina that day. 6RP 121. She dropped Blair off a mile away from the house. 6RP 127-28. He called an hour later with an address and asked her to serve as a look out because he had found a safe and wanted to make sure no one came home. 6RP 128. He found only passports and birth certificates in the safe. 6RP 128.

On September 15, she picked Blair up outside Chrisope's house after previously dropping him off about a mile away. 6RP 153-55. She

remembered horse jewelry, keys, a television, motorcycle riding gear, and a red car. 6RP 154-56. Blair took the red car and parked it somewhere. 6RP 155. He gave the riding gear to Aaron Knapp. 6RP 156.

On September 15, Blair called Johnson and told her that he might need help because was stuck in a window. 6RP 157-58. By the time she arrived at the residence, Blair had freed himself. 6RP 158. Johnson identified Marti's house as the one in question. 6RP 157.

Sometime after the Labor Day weekend, Blair took items from a garage with a tarp on the doorway. 6RP 159-61. Johnson identified Paveglio's driveway as the place where she met Blair and loaded items into her truck. 6RP 159. Those items included welding gear and a lawn mower. 6RP 161.

She remembered Blair taking police or law enforcement identification during a burglary in Richmond Beach. 7RP 28. She did not remember the house. 6RP 137.

She recognized a bike that Blair took from a house around September 15. 6RP 149-52. She did not recognize the house, but her identification of the location where the bike was discarded was consistent with Bodmer's identification of a trail near Bodmer's house. 8RP 149-52, 155.

Johnson remembered seeing swords, jewelry, and watches that had been taken from another house, identifying a watch and swords claimed by Parvanta/Minakami. 6RP 144-47. Johnson sold a Rolex from this house to Youngberg. 6RP 145.

C. ARGUMENT

1. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER THE JURY HEARD EVIDENCE OF OTHER CRIMINAL ACTIVITY NOT CHARGED IN THIS CASE.

The prosecutor agreed not to introduce evidence of Blair's other criminal cases. The court ruled in limine that such evidence was excluded. The prosecutor subsequently elicited excluded ER 404(b) evidence in front of the jury. The misconduct or irregularity was serious enough to warrant a mistrial. The court erred in deciding otherwise.

a. The Prosecutor Violated The Court's Pre-Trial Order.

Defense counsel moved in limine under ER 401, 402, 403 and 404(b) to exclude evidence relating to other criminal activity for which Blair was being investigated or charged. 2CP 227-30; 3RP 16-17. In response, the prosecutor informed the court that the "State is not seeking to introduce any kind of 404(b) evidence." 3RP 17. The prosecutor noted her intent to call Youngberg to testify about buying gold from Kelsey Johnson, but that "I will not be talking about any specifics at all about any

of the other burglaries either pending in Snohomish County or already charged here. I'm only limiting the defendant to these counts. So I'm not intending on use of any 404(b) evidence." 3RP 17. The court excluded any evidence of prior King County or pending Snohomish County cases. 3RP 17-18.

Detective Volpe testified first for the State. From him, the jury learned that Volpe was trying to recover gold that had been stolen in a burglary. 5RP 24. On November 27, 2010, Volpe met with gold buyer Youngberg and asked if he had bought any gold from Blair. 5RP 24. He also asked if anyone had brought him gold that might have come from burglaries. 5RP 25.

Kelsey Johnson testified next. From Johnson, the jury knew she met Blair in early August 2010 and the two subsequently entered into a relationship. 6RP 99, 102. Johnson sold stolen gold to Youngberg. 6RP 116-17. Johnson met Youngberg through Blair. 6RP 117. Johnson claimed the gold she sold came from houses burglarized by Blair. 6RP 117.

After Detective Volpe and Kelsey Johnson testified, the State called Youngberg to the stand. 7RP 30. Youngberg testified he had a gold-buying business. 7RP 30. After starting up the business, he learned of the need to check identification and write receipts "when the Keith

Blair incident happened" in 2010. 7RP 32-34. The prosecutor asked if Youngberg had bought gold from Blair. 7RP 34. Youngberg answered, "Before, yes. Before this whole thing happened when I was called in for questioning, yes, I did." 7RP 34. The prosecutor asked "So when you talk about that you were questioned, is that when you came into contact with Detective Volpe from the King County Sheriff's Office?" 7RP 35. Youngberg responded, "It was the Bellevue Police Department was the first time that I was contacted." 7RP 35.

Defense counsel requested a sidebar and moved for a mistrial. 7RP 35-37. The jury was removed for 40 minutes while the parties and the court discussed what had happened and what should be done about it. 7RP 35-67. Counsel pointed out Youngberg's testimony about previously buying gold from Blair referred to one of the cases subject to exclusion via the pre-trial order. 7RP 36-37. Counsel argued the jury now knew that Blair was involved in other crimes, specifically "there is another gold-selling case in which the Bellevue police were involved, involving Keith Blair." 7RP 37, 39-40.

The prosecutor defended her elicitation of Youngberg's testimony on the ground that the jury needed to know how Youngberg met Blair. 7RP 41-43. Defense counsel argued the prosecutor intentionally violated the pre-trial order. 7RP 42-43, 45-46.

When the prosecutor claimed the jury heard nothing about any wrongdoing by Blair, the court jumped in: "You can appreciate, right, that you are already saying in your case that – that Kelsey sold stolen gold to Mr. Youngberg, right? And now you have a witness saying, 'Oh, I also bought gold from Keith.'" 7RP 43-44. The court confirmed with the prosecutor that there was otherwise no evidence in the present case that Blair sold gold to Youngberg. 7RP 44. The problem identified by the court was that "now the jurors know that he sold gold to Mr. Youngberg," which was not evidence in this case but in another case. 7RP 44.

The court repeatedly pressed the prosecutor for why she did not simply ask Youngberg whether he knew Blair, thus avoiding the problem of bringing up evidence from the other case. 7RP 44-45, 48. The prosecutor obliquely denied violating the pre-trial order. 7RP 46. The court responded, "In fact, the State agreed it would not discuss any evidence of prior King or pending Snohomish County cases." 7RP 47. When the prosecutor denied there was a problem with eliciting this evidence, the court responded that evidence of Blair selling gold to Youngberg could not be interpreted as innocent activity. 7RP 47-48.

The court asked whether it could give a curative instruction to disregard any evidence of Blair selling gold to Youngberg and whether such an instruction would be effective. 7RP 49. The defense position was

that no curative instruction was possible and that a mistrial was necessary. 7RP 49-50.

The court asked the prosecutor "I guess it's fair to say that when you asked the question about whether or not Youngberg bought gold from Keith, you knew it wasn't related to this case, correct?" 7RP 50. The prosecutor deflected the court's question. 7RP 50. The court persisted: "Are you saying that when you asked the question, you didn't realize the gold-selling between these two was in the prior case?" 7RP 50. The prosecutor answered, "I wasn't. No." 7RP 51.

Defense counsel attacked the prosecutor's claimed ignorance in light of the specific in limine order that forbade the prosecutor from eliciting any evidence from the earlier King County case that was prosecuted by the King County Prosecutor's Office. 7RP 51. The court asked if the prosecutor was saying "it was unintentional because you didn't realize it was the subject of a prior case." 7RP 52. The prosecutor answered, "Right." 7RP 52. But the prosecutor knew Youngberg had testified in a different case. 7RP 52. Defense counsel argued the prosecutor was flouting the court's order and reiterated his request for a mistrial: "they are basically saying that he is a human crime wave and that he – now they have expanded a new front in the war." 7RP 53.

The prosecutor downplayed the seriousness of what she described as an "irregularity," stating the jury could infer that Blair sold gold to Youngberg based on "the evidence that has been presented and the testimony by Kelsey that the defendant gave her gold to sell and the testimony that the jury will hear from the jail calls of the defendant telling his wife to sell gold or to sell property." 7RP 56-57.

Defense counsel put on the record that the court reporter observed jurors taking notes on Youngberg's testimony regarding the "Keith Blair incident" and Bellevue Police. 7RP 57-58. Counsel asked, "What are we going to do, tell them to tear out that page of their notebooks? They thought it was important enough to write down." 7RP 59-60. Counsel maintained the prosecutor's intentional violation of the court's pre-trial order cried out for a mistrial. 7RP 59-60.

The court again asked what counsel thought about a curative instruction. 7RP 60. Counsel reiterated his belief that an instruction would not cure the problem because jurors could not disregard the evidence. 7RP 60. The court asked, "You don't want a curative instruction?" 7RP 60. Counsel responded, "I am saying that a curative instruction cannot cure. In other words, this is too flagrant." 7RP 60.

According to counsel, the prejudice was that jurors were "going to think that there are other things out there that he hasn't been prosecuted for.

Or maybe they are going to think that – there was something going on with the Bellevue police. Maybe he is going to get prosecuted for that later." 7RP 62. In context, jurors know "that it's stolen golden jewelry, and they know that there is other stuff out there that even – that they are going to figure out predates where this case started." 7RP 62.

Counsel reiterated the prosecutor's intentional disregard of the court's in limine order differentiated Blair's case from those in which a witness accidentally divulged excluded evidence. 7RP 62-63. Counsel also informed the court that the case referred to in Youngberg's testimony "wasn't tried five years ago. It was tried in December, in this county, in the Superior Court, by one of this prosecutor's colleagues." 7RP 63.

When the prosecutor tried to minimize the seriousness of the problem, the court interjected by saying "this is tantamount to the defendant having a history." 7RP 64-65. The prosecutor disagreed. 7RP 65. The court ruled as follows:

> Okay. It is – I don't think there is any question. It is prejudicial. The only question is whether it is so prejudicial that the defendant won't be able to have a fair trial with these particular jurors.
>
> It is just one question. Admittedly, it wasn't blurted out by the witness. It was actually asked by the prosecutor. That's a whole other issue.
>
> There is no curative instruction. I agree. I don't think there is a curative instruction that we can give without calling attention to the whole issue.

> The real question is how serious it is. I guess I'm debating that. On the one hand, I think it is egregious because it is in violation of the motion in limine and talks about another case. I don't think jurors are going to be fooled for one minute thinking it was a legitimate business deal, the defendant selling gold to Mr. Youngberg.
>
> On the other hand, as the State has pointed out, there is, apparently, some jail tapes where the defendant is talking to his wife about gold and telling his wife to sell gold. And the defendant's girlfriend, who he has been living with, is selling gold to Mr. Youngberg.
>
> So I don't know if it is really that much of a leap for the jurors to believe that the defendant was involved in selling gold. I'm not sure that they are savvy enough to figure out which police department – which police officers worked at King County, Bellevue, Seattle, whatever.
>
> I'm going to deny the motion for mistrial, somewhat reluctantly.

7RP 65-66.

b. Prosecutorial Misconduct Deprived Blair Of His Right To A Fair Trial Where The Prosecutor Placed Evidence Of Blair's Criminal History Before The Jury In Violation Of The Court's Pre-Trial Order.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A defendant's due process right to a fair trial and the right to be tried by an impartial jury are denied when the prosecutor commits misconduct and there is a substantial likelihood the misconduct affected the jury's verdict. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. V, VI and XIV; Wash. Const. art. 1, §§ 3, 22.

"The purpose for a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation." State v. Evans, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981). Washington courts have long held that disregard for an in limine ruling is misconduct. State v. Smith, 189 Wn. 422, 427-29, 65 P.2d 1075 (1937).

The trial court here specifically found the prosecutor's elicitation of the evidence at issue was "egregious because it is in violation of the motion in limine and talks about another case." 7RP 66. Prosecutorial misconduct requires a new trial where there is a substantial likelihood that it affected the jury's verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). A trial court's decision whether to grant a mistrial is reviewed for abuse of discretion. State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987).

In reluctantly deciding not to declare a mistrial, the court did not fully take into account the magnitude of prejudice flowing from the improper evidence. The court stated "there is, apparently, some jail tapes where the defendant is talking to his wife about gold and telling his wife to sell gold. And the defendant's girlfriend, who he has been living with, is selling gold to Mr. Youngberg. So I don't know if it is really that much of

a leap for the jurors to believe that the defendant was involved in selling gold." 7RP 66.

The court seemed to hope jurors would infer that Youngberg's reference to Blair's sale of gold occurred in connection with the charged crimes. Yet the court was well aware that the jury would otherwise hear no evidence of Blair selling gold to Youngberg as part of this case. 7RP 44.

In point of fact, the jail tapes mentioned silver dollars and "coins," some of which Blair sold "for the silver value." Ex. 139 at 3, 5-7. There is no reference to Blair telling his wife to sell gold during the calls. Ex. 139. In any event, given the timing of the calls (after Blair was arrested), it is obvious that whatever Blair is referring to in the jail calls does not include the "gold" referenced by Youngberg. According to Youngberg's testimony, Blair sold him gold sometime before Bellevue Police contacted him. 7RP 34-35. At that time, Blair had not yet been arrested. The jail calls post-date Blair's contact with Youngberg. Ex. 139.

The court also stated "I'm not sure that [jurors] are savvy enough to figure out which police department – which police officers worked at King County, Bellevue, Seattle, whatever." 7RP 66. But the jury heard evidence that Detectives Volpe and Coblantz of the King County Sheriff's Office were the ones who investigated the crimes for which Blair was

charged in this case.[10] 5RP 15, 22; 7RP 180, 183. Youngberg drew a clear distinction between Volpe's initial contact and the previous Bellevue Police contact. 7RP 34-35. The jury, meanwhile, heard no evidence that the Bellevue Police were involved with investigating any aspect of the crimes for which Blair was charged. The jury heard no evidence that Blair himself sold gold in connection with any of the charged crimes.

Any reasonable juror would know Youngberg's reference to the Bellevue Police, occurring in the context of Blair selling stolen gold, referred to criminal activity that did not involve the crimes for which he was charged. Although Youngberg's improper testimony was a piece of a fairly long trial, it was a piece that the jurors paid attention to, as shown by the fact that they took notes on Youngberg's testimony on this point. 7RP 57-58. And it was not something that jurors were likely to forget, given that they were pulled from the room and kept waiting for 40 minutes after defense counsel requested a sidebar immediately following Youngberg's improper testimony. 7RP 67.

A defendant must only be tried for those offenses actually charged. State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952). ER 404(b) prohibits the admission of evidence to show the character of a person to

[10] The jury also learned a City of Medina sergeant investigated the Lee burglary. 7RP 130, 134.

prove the person acted in conformity with it on a particular occasion. "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Prior misconduct evidence is inadmissible to show the defendant is a "criminal type" and is likely to have committed the charged crime. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). The "once a thief, always a thief" rationale is not a basis to put evidence in front of the jury. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766, review denied, 106 Wn.2d 1003 (1986).

Here, the jury heard evidence that Blair was involved in criminal activity that was similar to the activity with which he was charged. A jury may place undue weight or overestimate the probative value of the other prior acts, especially where such acts are similar to the charged crime. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Evidence of other misconduct is prejudicial because jurors may convict on the basis that they believe the defendant deserves to be punished for a series of immoral actions. Bowen, 48 Wn. App. at 195. Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Id. "This forbidden inference is rooted in

the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." Wade, 98 Wn. App. at 336.

A juror's natural inclination is to reason that having previously committed bad acts, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The improper ER 404(b) evidence here allowed the jury to follow its natural inclination and infer Blair acted in conformity with his character and therefore likely committed the criminal acts charged by the State. To jurors, propensity evidence is logically relevant. Holmes, 43 Wn. App. at 400. No limiting instruction prevented the jury from considering the improper evidence for propensity purposes. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (absent a limiting instruction, "evidence admitted as relevant for one purpose is deemed relevant for others."). No such instruction was available because there was no proper purpose for this evidence. "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). The convictions should be reversed.

c. A Mistrial Was Warranted Even If The Problem Is Analyzed As An Irregularity Rather Than Misconduct.

Even if the prosecutor did not commit misconduct, a trial irregularity still exists that requires reversal of the convictions and remand for a new trial. A court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused his right to a fair trial. Escalona, 49 Wn. App. at 254. In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. Id.

An examination of the above criteria reveals the trial court abused its discretion in failing to declare a mistrial. First, this error was very serious. Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts the jury's attention to the defendant's propensity for criminality. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). Evidence establishing that the accused previously committed acts similar to the current charge is especially prejudicial because it allows the jury to shift focus from the merits of the current charge and instead focus on past behavior. State v. Trickler, 106 Wn. App. 727, 733-34, 25 P.3d 445 (2001).

The context of Youngberg's testimony, following on the heels of testimony from Detective Volpe and Johnson, made it obvious that Blair had sold stolen gold to Youngberg. In the context of the evidence as a whole, it was clear that such activity was not a part of the crimes for which he was charged. There was no evidence of Blair selling gold to Youngberg as part of the charged crimes. The only inference is that Blair sold stolen gold to Youngberg as part of criminal activity not charged in this case.

Looking at the second factor — whether the evidence was cumulative — this evidence was not cumulative of any properly admitted evidence. It was contrary to the court's efforts to keep Blair's criminal history from the jury. The second factor likewise weighs in favor of reversal.

The third factor — whether a curative instruction was given capable of curing the irregularity — also weighs in favor of Blair. The trial court did not give a curative instruction because it determined such an instruction would do more harm than good. 7RP 65-66. As a result, the jury was allowed to consider the prior misconduct in determining Blair's fate on the charged crimes. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury

against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The convictions should be reversed.

2. A DEFECTIVE SEARCH WARRANT REQUIRED SUPPRESSION OF EVIDENCE FROM THE STORAGE LOCKER.

The search warrant affidavit did not establish timely probable cause to search the Monroe storage locker. The information that contraband would be found in the place to be searched was stale. The warrant therefore did not satisfy the requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The trial court erred in failing to suppress the evidence found in the storage locker. CP 208 (CL c.)

a. Standard Of Review

The issuance of a search warrant is generally reviewed for abuse of discretion. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). While deference is owed to the magistrate, that deference is not unlimited. State v. Lyons, 174 Wn.2d 354, 362, 275 P.3d 314 (2012). No deference is given "where the affidavit does not provide a substantial basis for determining probable cause." Lyons, 174 Wn.2d at 363.

When reviewing the denial of a suppression motion, an appellate court generally determines whether substantial evidence supports the challenged findings of fact and whether the findings support the

conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are verities on appeal. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). No deference is owed to the trial court where, as here, the factual record consists solely of documents. State v. Neff, 163 Wn.2d 453, 461-62, 181 P.3d 819 (2008).

The trial court's conclusions of law and its application of law to the facts are reviewed de novo. State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012); Eisfeldt, 163 Wn.2d at 634. The trial court's assessment of probable cause is therefore reviewed de novo. Neth, 165 Wn.2d at 182.

b. The Warrant Was Stale

A search warrant must not issue unless there is probable cause to conduct the search. U.S. Const. amend. IV; Wash. Const. art. I, § 7; Lyons, 174 Wn.2d at 359. "To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." Lyons, 174 Wn.2d at 359 (citing State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)).

Probable cause must be timely. Lyons, 174 Wn.2d at 357. Facts used to support probable cause "must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched at the

time the warrant is issued." State v. Spencer, 9 Wn. App. 95, 97, 510 P.2d 833 (1973). Stale search warrants violate article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359.

Blair argued the warrant for the storage unit was stale. 2CP 71-73. The issue is whether the search warrant affidavit established probable cause to believe property taken from burglaries would be found at the place to be searched — the storage unit in Monroe.

The issue of staleness arises due to the passage of time between the informant's observations of criminal activity and presentation of the affidavit to the magistrate. Lyons, 174 Wn.2d at 360. "The magistrate must decide whether the passage of time is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale." Id. at 360-61. This is a fact-specific inquiry, but factors include the time between the known criminal activity and the nature and scope of the suspected activity. Id. at 361.

Review is limited to the four corners of the supporting affidavit. Neth, 165 Wn.2d at 182. According to the affidavit, Blair and Johnson were arrested on October 21 and booked into the King County Jail, where they remained. 2CP 89. Johnson spoke to a detective on November 3. 2CP 90. The affidavit provides:

> I asked her where the property was from the burglaries. She told me that she last saw it at a storage unit in Lynnwood that was registered in the name of Blair's brother's girlfriend, a name she didn't know. She said that she last saw some valuable swords and the rest of the coins that were stolen in the Shoreline burglary. She said that there was a lot of property filling the unit in luggage that she knew to be stolen. She confirmed that she saw a boat motor in the unit. She thought Blair had the only key for the unit, but said that he told Rachel Dunham to move the property after he got arrested. She said that she heard Blair arguing with his wife on one occasion because she had moved his property out of the storage unit into another unit in Monroe. Johnson said that Dunham was upset that Blair was with Johnson. Dunham told Blair that she would tell him where the unit was if he came home to her. Johnson said that Blair did not know where this storage unit was, but only knew it was a small private business in Monroe. She confirmed that Dunham was very aware of all the crimes that Blair was committing and that she had a methamphetamine habit so she needed money to support it.

2CP 90.

Detectives subsequently went with Johnson to the Lynnwood storage unit, which was mostly cleaned out. 2CP 90-91. On November 5, detectives determined a storage unit in Monroe was rented in the name of Rachel Dunham. 2CP 91. The rental agreement showed Dunham rented that Monroe unit on September 13. 2CP 91.

The trial court concluded the warrant was not stale, concluding: "The interview between the detective and Johnson took place on November 3, 2010. The items were moved by the wife to the Monroe location after the defendant was arrested on October 21, 2010. Unlike a

case where the search is two months after the officer formed an opinion that evidence could be found in the house, here the warrant was obtained on November 5, 2010. The information was not stale given that the information was obtained after the arrest on October 21st and not that long after Johnson spoke to the police on November 3rd." CP 208 (CL c.).

The trial court erred in concluding the warrant was not stale.[11] CP 208 (CL c.). When the informant observed the criminal activity is the critical time frame relied on to establish probable cause. Lyons, 174 Wn.2d at 361. The magistrate cannot determine whether observations recited in the affidavit are stale unless the magistrate knows the date of those observations. Id.

According to the affidavit, Johnson "said that she last saw some valuable swords and the rest of the coins that were stolen in the Shoreline burglary." 2CP 90. Johnson saw these things in the Lynnwood storage unit. 2CP 90. The affidavit does not describe a Shoreline burglary in which both swords and coins were taken. A Shoreline burglary in which swords (but not coins) were stolen occurred on September 18. (Parvanta residence). 2CP 88. A Shoreline burglary in which coins (but not swords) were taken occurred on September 27 (Rollins residence under case # 10-

[11] Blair does not challenge the trial court's conclusion that the rental agreement for the storage unit was lawfully obtained. CP 208 (CL c.).

226698). 2CP 88-89. Assuming these two separate burglaries could somehow be combined into "the Shoreline burglary," it could be inferred that the sword and coins were removed from the Lynnwood unit and taken somewhere else sometime after September 27.

Johnson "heard Blair arguing with his wife on one occasion because she had moved his property out of the storage unit into another unit in Monroe." 2CP 90. That is Johnson's basis for knowledge that property was in the Monroe unit. When did Johnson overhear this conversation with his wife? It must have been before Blair and Johnson were arrested on October 21 because Johnson would have no means of overhearing Blair argue with his wife while Johnson and Blair were both in jail. This commonsense reading of the affidavit shows Blair's wife moved property to the Monroe unit sometime before October 21. The court therefore wrongly determined "items were moved by the wife to the Monroe location after the defendant was arrested on October 21, 2010." CP 208 (CL c.).

In fact, Dunham rented the Monroe unit on September 13. 2CP 91. The fair inference, and the only inference, is that Dunham rented that Monroe unit to store stolen property. The warrant for the Monroe unit was not presented and executed until November 5. 2CP 91, 94. There is a

period of about seven weeks between when the Monroe unit was rented to store stolen property and the presentation of the warrant.

In determining staleness, the tabulation of the number of days is not the sole factor, but is one circumstance to be considered with others, including the nature and scope of the suspected activity. Lyons, 174 Wn.2d at 361; State v. Hall, 53 Wn. App. 296, 300, 766 P.2d 512 (1989). For example, in the context of a marijuana growing operation, probable cause might still exist despite the passage of a substantial amount of time. Lyons, 174 Wn.2d at 361 (citing State v. Payne, 54 Wn. App. 240, 246, 773 P.2d 122 (1989) ("[a] marijuana grow operation is hardly a 'now you see it, now you don't' event"); Hall, 53 Wn. App. at 299–300 (two months between date of informant's observations of marijuana grow and issuance of warrant not too long)).

The location of stolen property is not akin to a marijuana grow operation. Stolen property is inherently mobile. The stolen items described in the warrant include swords, jewelry, coins, purses, computers, firearms, cash, silverware and tools. 2CP 92. These things are easily picked up and moved from one place to another. The nature and scope of the suspected criminal activity involving stolen property is such that the prolonged period of time that elapsed after Johnson learned of its location rendered the warrant stale. Cf. People v. Erthal, 194 Colo. 147, 148, 570

P.2d 534 (Colo. 1977) (warrant stale where approximately seven weeks elapsed between a deputy's observation of tools of the type reported stolen in defendant's cabinet-making shop and there was no information that suspect continuously engaged in criminal activity or continued to use the stolen tools).

Again, Dunham rented the Monroe unit on September 13 and the commonsense reading of this fact is that she did so to store stolen property. 2CP 91. But the affidavit recites that Blair "told Rachel Dunham to move the property after he got arrested." 2CP 90. Move the property from where? Given that Dunham started renting the Monroe unit on September 13, the inference is that Blair was telling Dunham to move the property *out* of the Monroe unit, not *into* it. This is another factor supporting the conclusion that the search warrant was stale and there was no probable cause to believe the stolen property would be located in the Monroe unit by the time the warrant was presented. Search warrant affidavits should not be read in a hypertechnical manner, but "establishing probable cause is not hypertechnical; it is a fundamental constitutional requirement." Lyons, 174 Wn.2d at 362.

c. Evidence From The Storage Unit Should Have Been Excluded From Trial And The Error Was Not Harmless Beyond A Reasonable Doubt.

The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. Garvin, 166 Wn.2d at 254; State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Evidence recovered from the Monroe storage unit must be suppressed. The jury never should have been allowed to consider that evidence as it deliberated on whether the State had proved its case beyond a reasonable doubt.

The search conducted pursuant to a stale warrant violated Blair's constitutional right under article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The State is unable to overcome the presumption that the error in failing to suppress the storage unit evidence was harmless beyond a reasonable doubt. Johnson had many incriminating things to say about Blair and his role in the charged crimes. But her testimony was subject to challenge. She entered into a cooperation agreement with the prosecution, obtaining immunity in return for testifying against Blair. 7RP 19-21; Ex.

95. She had motive to lie as an informant seeking to avoid additional, serious charges that were hanging over her own head. 6RP 170-71, 179-81, 190-91. A reasonable juror could view Johnson as motivated by an interest in her own self-preservation and willing to pin the crimes on Blair as a result. The available inference is that Johnson wanted to ingratiate herself to the prosecutor and protect her plea agreement by testifying in a manner that produced a result desired by the prosecutor. Furthermore, Johnson had been convicted for crimes of dishonesty. 7RP 12-17; see State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980) (evidence of prior convictions under ER 609 enlightens the jury with respect to a witness's credibility).

Evidence found in the Monroe storage locker boosted Johnson's otherwise shaky credibility. Had that evidence been suppressed, the jury would likely have viewed Johnson's testimony with greater skepticism.

Aside from Johnson's testimony and evidence recovered from the storage unit, the evidence is not so overwhelming that it necessarily leads to a finding of guilt on all counts.

Police recovered property from the following people in the Monroe storage unit: (1) LeCount, including a shotgun (6RP 44-46); (2) Lee (6RP 39-40); (3) Chrisope (6RP 44); (4) Walden (9RP 36); (5) Bodmer (6RP

43); (6) Saldin, including the Porsche key (6RP 46-49); and (7) Minakami/Parvanta (6RP 40-43).

The error was not harmless beyond a reasonable doubt as to counts 5 and 6 involving the LeCount residence. Johnson did not identify the LeCount residence as one that Blair burglarized. Johnson heard only that Blair had stolen $60,000 from a safe. 6RP 162. That figure does not match the amount of $30,000 stolen from the LeCount safe. 8RP 147. The LeCount burglary occurred on August 6. 8RP 137-41. Blair's Bank records showed cash deposits of $5000 on August 3 and $15,000 on August 9. 9RP 17-21; Ex. 136, 137. The $5000 could not have come from the LeCount burglary, as it occurred after the deposit was made. The $15,000 deposit is circumstantial evidence of guilt, but its significance is ambiguous enough that the State cannot prove beyond a reasonable doubt that Blair would have been convicted of the burglary under count 5 in the absence of evidence that LeCount property was found in the storage unit.

The shotgun that formed the basis for the charge of firearm theft under count 6 was found in the storage unit. The jury acquitted Blair of firearm theft on count 8 where the jury heard no evidence that the firearm in question was ever recovered. CP 184. It is therefore reasonable to conclude the jury would not have convicted Blair of firearm theft on count 6 if the LeCount firearm had been suppressed.

The error was not harmless beyond a reasonable doubt as to counts 9 involving the Lee residence. Blair's DNA was found on a can of Dr. Pepper inside the Lee residence. 7RP 76-77, 112, 115, 120, 127. Lee's data projector — the one item recovered from the burglary — was located in the storage unit. 6RP 39-40. Again, comparison with what the jury did with counts 7 and 8 is instructive. Blair was convicted of the Rollins/Murray burglary under count 7 where evidence showed their property was found in vehicles associated with Johnson and Blair. CP 173; 5RP 35-37; 6RP 11-16, 121. The jury heard no evidence that the their missing firearm was recovered. It acquitted Blair of taking their firearm under count 8, even though it concluded by its verdict under count 7 that Blair had entered the Murray/Rollins residence and burgled it. CP 184. Similarly, Blair was clearly inside the Lee residence, as shown by the DNA evidence. But in the absence of evidence of an item recovered from the storage unit, it cannot be concluded beyond a reasonable doubt that the jury would have convicted Blair of burglarizing the Lee residence.

Johnson testified that she picked up Blair up from the Lee residence and that he had taken passports and birth certificates from a safe. 6RP 126-29. This testimony does not conclusively show Blair committed the crime charged in count 9 given Johnson's credibility problems. The

State is unable to establish beyond a reasonable doubt that evidence of Lee's property found in the storage unit did not influence the verdict.

The error was not harmless beyond a reasonable doubt as to count 10 involving the Chrisope residence and count 18 involving the Parvanta/Minakami residence. Property belonging to Chrisope and Parvanta was found in Johnson's Kia after the vehicle was seized on September 28. 5RP 27-38. Johnson, not Blair, was in control of the vehicle when it was seized. Johnson pinned the Chrisope and Parvanta burglaries on Blair, but after discussed above, she had motive to fabricate and suffered from credibility problems. 6RP 153-56. The State is unable to establish beyond a reasonable doubt that evidence of property found in the storage unit belonging to Chrisope and Parvanta/Minakami did not influence the verdicts under count 10 and 18.

The error was not harmless beyond a reasonable doubt as to count 10 involving the Walden residence. Evidence was particularly sparse on this count. A sheriff's department patch was taken from the residence. 8RP 166-67. Johnson did not remember Walden's residence. 6RP 137. She claimed to remember Blair taking law enforcement identification during a burglary in Richmond Beach. 7RP 28; Ex. 89. The strongest evidence was that Walden's watches and headphones were found in the storage unit. 9RP 36. The State is unable to establish beyond a reasonable

doubt that evidence of Walden's property found in the storage unit did not influence the verdict.

The error was not harmless beyond a reasonable doubt as to count 14 involving the Bodmer residence. Aside from evidence found in the storage unit that should have been suppressed, the only evidence linking Blair to the crime derives from Johnson's testimony involving Blair taking a bike and discarding it near the Bodmer residence. 6RP 153-56. Given Johnson's credibility issues, the State is unable to establish beyond a reasonable doubt that evidence of Bodmer's property found in the storage unit did not influence the verdict.

The error was not harmless beyond a reasonable doubt as to count 16 involving the burglary of Saldin's residence and count 17 involving the theft of Saldin's vehicle. Johnson had nothing to say about the burglary of the residence. Saldin's property recovered from the storage unit influenced the verdict on count 16 because it provided the factual basis to tie Blair to the burglary.

Count 17 was influenced as well because Saldin's Porsche key was found in the storage unit. 6RP 46-48. A neighbor saw a man with a limp in the neighborhood and later saw him driving the Porsche. 8RP 198-202. Johnson testified Blair sometimes walked with a limp. 6RP 109-10. Johnson's testimony regarding the limp and seeing Blair with the stolen

Porsche is subject to doubt due to her credibility problems. 6RP 100, 168. Evidence found in the storage unit bolstered her credibility. The State is unable to establish beyond a reasonable doubt that evidence of Saldin's property found in the storage unit did not influence the verdict on count 17.

Property from the following people was not recovered from the storage unit: Paveglio (count 12); Marti (count 11); Rollins/Murray (count 7); Dolliver/Thompson (count 4). But evidence recovered from the storage unit may still have influenced the verdicts on those counts by supporting the State's theory of the case, including the reliability of Johnson's testimony regarding those counts. The only evidence linking Blair to the Paveglio burglary and the Marti trespass was Johnson's testimony. 6RP 157-62. The suppression error was therefore not harmless as to counts 11 and 12.

Property belonging to Rollins/Murray was found in the Kia, which was driven by Johnson. 5RP 35-37. Their property was also found in the Mercedes, which was Johnson's car. 6RP 11-16, 121. A neighbor testified she saw a man leaning to the right, as if he had a problem with his shoulder or right leg. 7RP 150-51. The neighbor did not describe the man as limping. In any event, whether Blair sometimes limped was an assertion that came from Johnson. 6RP 109-10. The evidence was not so

overwhelming on count 7 that the error in failing to suppress the storage unit evidence was harmless beyond a reasonable doubt.

Finally, the attempted burglary conviction involving the Dolliver/Thompson residence under count 4 should also be reversed. A neighbor identified Blair as the man near the Dolliver/Thompson residence but the partial plate number he identified did not match the Kia's actual number. 5RP 29-31; 8RP 62-64, 69-70. His wife, meanwhile, was only 40% sure that the man she picked out of the montage was the man she saw that night. 8RP 85-86. Moreover, the husband and wife gave conflicting testimony regarding the vehicle they saw, with the husband saying it was a Kia and the wife saying it was a Nissan Sentra. 8RP 61-62, 81-82. A description of the man had him walking briskly up the street rather than limping. 8RP 55, 57, 59. Johnson's testimony tied Blair to count 4, but her credibility was subject to question. The evidence was not so overwhelming on count 4 that the error in failing to suppress the storage unit evidence was harmless beyond a reasonable doubt.

Constitutional error is harmless only if this Court is convinced beyond a reasonable doubt any reasonable trier of fact would reach the same result absent the error and "the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State cannot bear its

burden of proving the error was harmless beyond a reasonable doubt. The convictions should be reversed. Even if this error standing alone does not require reversal of all the convictions, it contributes to the cumulative error analysis set forth in section C. 4., infra.

3. THE JAIL CALLS WERE PRIVATE COMMUNICATIONS ADMITTED IN VIOLATION OF THE PRIVACY ACT.

Defense counsel moved to suppress jail calls made between Blair and his wife on the theory that they were recorded in violation of the Privacy Act. 2CP 50-59. The trial court erred in denying that motion. CP 206-07 (CL a.). Considering all the circumstances, including the fact that the calls were between a husband and wife, the communications were private and should have been suppressed.

a. The Jail Calls Between Husband And Wife Were Private Communications Protected By The Privacy Act.

The Privacy Act makes it "unlawful . . . to intercept, or record any . . . [p]rivate communications transmitted by telephone . . . between two or more individuals . . . without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1)(a).

The Privacy Act protects "private" conversations. State v. Clark, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). "Private" means "belonging to one's self . . . secret . . . intended only for the persons involved (a

conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or public." State v. Modica, 164 Wn.2d 83, 87-88, 186 P.3d 1062 (2008) (quoting Clark, 129 Wn.2d at 225) (internal quotation marks omitted).

A communication is private when parties manifest a subjective intention that it be private and that expectation is reasonable. Modica, 164 Wn.2d at 88. Relevant factors include the subject matter and duration of the call, the location of the participants, and the potential presence of third parties. Clark, 129 Wn.2d at 225–27; Modica, 164 Wn.2d at 88.

The presence or absence of any single factor is not conclusive because the privacy analysis turns on the facts and circumstances of each case. Clark, 129 Wn.2d at 224, 227. "Whether a conversation is private is a question of fact but may be decided as a question of law where, as here, the facts are not meaningfully in dispute." Modica, 164 Wn.2d at 87.

Weighing in favor of privacy here is that Blair's conversations with his wife were not "inconsequential, nonincriminating telephone conversation[s] with a stranger," which the Court has held "lacked the expectation of privacy necessary to trigger the privacy act." State v. Faford, 128 Wn.2d 476, 484-85, 910 P.2d 447 (1996). Blair communicated with his wife, not a stranger. The communications were both consequential and incriminating. The subject matter of the

conversations, which involved Blair telling his wife of the need to sell stolen property, manifests an expectation of privacy. The subject matter of the conversations weigh in Blair's favor because the conversations covered a serious matter not normally intended to be public. See State v. Babcock, 168 Wn. App. 598, 606, 279 P.3d 890 (2012) (defendant's conversation about hiring a hit man "covered a serious matter not normally intended to be public" and thus weighed in favor of reasonable expectation of privacy).

On the other hand, Blair and his wife knew the call was "subject to monitoring and recording." Pre-trial Ex. 3. Yet "[t]he mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private." State v. Townsend, 147 Wn.2d 666, 674, 57 P.3d 255 (2002); see also Faford, 128 Wn.2d at 486 ("We will not permit the mere introduction of new communications technology to defeat the traditional expectation of privacy in telephone conversations.").

In rejecting Blair's argument, the trial court interpreted Modica as holding "due to the warning that the conversation was being recorded, there was no reasonable expectation of privacy since the parties knew the call was being taped." CP 206 (CL. a.). A trial court's interpretation of

case law is reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004). The trial court misconstrued the holding of Modica.

The Court in Modica held intercepted jail calls between an inmate and his grandmother were admissible because, on the facts of that case, there was no reasonable expectation of privacy in the calls. Modica, 164 Wn.2d at 88-89. First, inmates have a reduced expectation of privacy. Id. at 88. Second, both Modica and his grandmother knew they were being recorded and that someone might listen to those recordings. Id. at 88.

However, the Court cautioned "we have not held, and do not hold today, that a conversation is not private simply because the participants know it will or might be recorded or intercepted." Id. at 88 (citing Faford for the proposition that "privacy act protects cordless telephone calls even if the participants know they can be intercepted"). The Court stressed that "[i]ntercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private. Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. However, because Modica was in jail, because of the need for jail security, *and because Modica's calls were not to his lawyer or otherwise privileged*, we

conclude he had no reasonable expectation of privacy." Id. at 89 (emphasis added).

The Supreme Court obviously meant something when it declared Modica had no reasonable expectation of privacy in his calls because they were not to his lawyer or "otherwise privileged." Id. at 89. Automated recordings that jail calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. Id. The fact that Modica was in jail and there was a need for jail security was not enough to defeat a reasonable expectation of privacy. Id. The final piece that defeated privacy was the lack of privilege associated with the call. Id.

In light of Modica, it is no answer to say that a recorded message notifying the parties that the call is being recorded destroys the spousal privilege. CP 206 (CL a.). The trial court reasoned for the privilege to exist, the conversation must be successfully kept confidential. CP 206 (CL a.). In other words, according to the trial court, only actually successful confidential communications are accorded the privilege in the jail call context.

But that could not be what the Court in Modica meant in referencing privilege as an analytically significant factor in determining a reasonable expectation for privacy in the jail call. All ordinary jail calls, such as the one between Modica and his grandmother, are subject to being

monitored or recorded. For that reason, there could never be an actually successful confidential communication between husband and wife, attorney and client, or clergy and penitent during such a jail call. A communication privilege, if measured by that standard in the Privacy Act context, would never be found. There would be no reason for the Court in Modica to caution that there was no reasonable expectation of privacy in the jail call because, despite the fact that the call was monitored or recorded, Modica's call was not to his lawyer or "otherwise privileged." Id. at 89.

Perhaps sensing this analytical impasse, the trial court attempted to distinguish the spousal privilege from the lawyer-client and clergy-penitent privileges on the basis that the latter two privileges "hold a higher standard." CP 206-07 (CL a.). But this assertion distinction does not survive scrutiny.

The clergy-penitent privilege protects only successful confidences. State v. Martin, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999) (citing State v. Barnhart, 73 Wn.2d 936, 940, 442 P.2d 959 (1968) (addressing spousal privilege); State v. Thorne, 43 Wn.2d 47, 56, 260 P.2d 331 (1953) (same)). The presence of a third person during an attorney-client conversation likewise destroys the element of confidentiality and thus the privilege. Dietz v. Doe, 131 Wn.2d 835, 850, 935 P.2d 611 (1997); Ramsey v.

Mading, 36 Wn.2d 303, 311-12, 217 P.2d 1041 (1950). The husband-wife privilege is no different in this regard. Thorne, 43 Wn.2d at 56 (spousal privilege applies to successful confidences); Barbee v. Luong Firm, P.L.L.C., 126 Wn. App. 148, 156, 107 P.3d 762 (2005) (spousal privilege applies to all actually successful confidential communications made between spouses while they are husband and wife: "In this respect, it is analogous to other privileges surrounding confidential communications, such as attorney-client, priest-penitent, and physician-patient.").

All three privileges are capable of being vitiated when it comes to admitting evidence of communications. The attorney-client and clergy/penitent privileges are not subject to a higher standard in this regard.

The trial court noted the Privacy Act "specifically exempts lawyers and priests," but not spouses. CP 206 (CL a.). RCW 9.73.095(4) provides "So as to safeguard the sanctity of the attorney-client privilege, the department of corrections shall not intercept, record, or divulge any conversation between an offender or resident and an attorney. The department shall develop policies and procedures to implement this section. The department's policies and procedures implemented under this section shall also recognize the privileged nature of confessions made by an offender to a member of the clergy or a priest in his or her professional

character, in the course of discipline enjoined by the church to which he or she belongs as provided in RCW 5.60.060(3)."

This provision says nothing about whether parties hold a reasonable expectation of privacy in a jail call based on their relationship to one another. The provision, rather, is aimed at preventing the facility from intruding into lawyer/client and clergy/penitent calls in the first place. RCW 9.73.095(4) is a prophylactic measure. But if the facility were to disregard its obligations and actually record such calls, the question still remains whether the status of those relationships tips the scale in favor of finding the communication private. Under the trial court's reasoning, neither attorney/client or clergy/penitent calls would be deemed private in the event such calls were actually monitored or recorded. But that reasoning runs counter to Modica.

The question remains whether a relationship between callers that, as a general matter, is accorded a communication privilege, weighs in favor of finding an intercepted call to be a private communication. "Marital communications are presumptively confidential." Breimon v. General Motors Corp., 8 Wn. App. 747, 750, 509 P.2d 398 (1973). The spousal privilege is intended to encourage "that free interchange of confidences that is necessary for mutual understanding and trust" and is based on the premise that "the greatest benefits will flow from the

relationship only if the spouse who confides in the other can do so without the fear that at some later time what has been said will rise up to haunt the speaker." Barbee, 126 Wn. App. at 155-56 (quoting Thorne, 43 Wn.2d at 55).

The rationale for the privilege presumes spouses are *aware* that the privilege exists; i.e. they are able to speak to one another "*without the fear* that at some later time what has been said will rise up to haunt the speaker." Id. (emphasis added). At the same time, ordinary husbands and wives untrained in legal niceties will be unaware of when the privilege will not be honored in a court of law.

The general awareness of the privilege, combined with general lack of awareness regarding when the privilege will not be honored, informs the question of whether a jail call subject to monitoring is nevertheless subject to a reasonable expectation of privacy when the call is between spouses. The existence of a privilege attaching to a given relationship between the callers, whether it be the spousal privilege or any other, is what the Court in Modica found significant in conducting its privacy calculus, aside from whether the communication at issue was successfully kept confidential. Modica, 164 Wn.2d at 89. Blair's communication with his wife should be deemed to weigh in favor of a reasonable expectation of privacy in the jail call at issue here. The trial

court erred in concluding the call was not a private communication unprotected by the Privacy Act. CP 206-07 (CL a.).

b. Admission Of The Jail Calls Prejudiced The Outcome.

Any information obtained in violation of RCW 9.73.030 is inadmissible. RCW 9.73.050. The failure to suppress evidence obtained in violation of the Privacy Act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial. State v. Porter, 98 Wn. App. 631, 638, 990 P.2d 460, review denied, 140 Wn.2d 1024, 10 P.3d 405 (1999).

There is a reasonable probability the outcome of the trial was affected here. The jails calls were significant because they provided independent evidence, in Blair's own words, of his knowledge of the storage unit that contained stolen property. Ex. 139. Evidence of Blair telling his wife of her need to sell property from the unit underscored Blair's involvement with property recovered from burglaries. Ex. 139. The jury never should have been allowed to consider that evidence.

As set forth in section C. 2. c., supra, Johnson's credibility was subject to challenge and thus her testimony linking Blair to the crimes was open to question. In addition, the storage locker containing stolen items was rented by Rachel Dunham. 6RP 23-25; Ex. 22. The connection

between Blair and the storage unit was less than rock solid in the absence of the jail call evidence. The evidence against Blair was otherwise less than overwhelming. See section C. 2. c., supra.

In the absence of the jail call evidence, a rational juror could reach the conclusion that the State had not proved its case. An insubstantial error exists where "the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). But "[w]hen the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." Martin, 73 Wn.2d at 627. Such is the case here. The convictions should be set aside and the case remanded for a new trial. Even if this error standing alone does not require reversal of all the convictions, it contributes to the cumulative error analysis set forth in section C. 4., infra.

4. CUMULATIVE ERROR DEPRIVED BLAIR OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213

(1984); U.S. Const. Amend. V and XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). As discussed above, an accumulation of errors affected the outcome of Blair's trial and produced an unfair trial. These errors include (1) prosecutorial misconduct or trial irregularity involving evidence of prior misconduct; (2) failure to suppress the Monroe storage unit evidence; and (3) failure to suppress the jail call evidence. The convictions should be reversed.

D. CONCLUSION

Blair requests reversal of the convictions.

DATED this 10th day of October 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KEITH T. BLAIR, Defendant,	No. 10-C-09211-7 SEA WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CrR 3.6 MOTION TO SUPPRESS PHYSICAL, ORAL OR IDENTIFICATION EVIDENCE

A hearing on the admissibility of physical evidence was held from May 11, 2011 through May 16, 2011 before the Honorable Judge Marianne C. Spearman. After considering the evidence submitted by the parties and hearing argument, to wit: Search Warrant No. 2010-146 for Motel 6, authored by Snohomish County Detective Dennis Montgomery (State's pre-trial exhibit No. 1); Search Warrant No. 10-360 for Storage Unit, authored by King County Sherriff's Office Detective Matt Volpe (State's pre-trial exhibit No. 2); Transcription of jail calls between the defendant and his wife, Rachel Dunham (State's pre-trial exhibit No. 3); Search Warrant No. 10-1004 for the defendant's residence, authored by King County Sherriff's Office Detective Cary Coblantz (State's pre-trial exhibit No. 4); and Search Warrant No. 10-533 for cell phone records,

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authored by Detective Coblantz; briefing and argument by both counsel, the Court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE RELEVANT UNDISPUTED FACTS FOR PURPOSES OF THE SUPPRESSION HEARING:

i. The defendant, Keith T. Blair, is married to Rachel Dunham. Their residence between July 20, 2010 and December 22, 2010 was located at 2324 167th PL SE, Bothell, WA 98012.

ii. On September 16, 2010, SCSO Detective Montgomery obtained a search warrant for the Motel 6 room where the defendant was staying.

iii. On September 16, 2010, Detective Montgomery served the search warrant on the room at the Motel 6 for evidence of drugs and drug paraphernalia. He then obtained a second search warrant and the following property, which was stolen during the commission of the respective residential burglaries, was recovered and identified by each victim:

Pamela and Robert LeCount (August 6, 2010)

a. Laptop computer.

Jeffrey Chrisope and Rachel Robinson (September 15, 2010)

b. Prescription bottles for Rachel Robinson.

c. Samsung TV.

d. Several pieces of horse jewelry.

e. Credit cards.

iv. On November 5, 2010 Detective Volpe obtained a warrant for the storage unit rented by the defendant's wife in Monroe. The following property, which was

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stolen during the commission of the respective residential burglaries, was recovered and identified by each victim:

Joseph and Delores Saldin (July 20, 2010)

a. Porsche Key.

b. White House replica humidor and cigars.

c. A pocket watch.

Pamela and Robert LeCount (August 6, 2010)

d. Shotgun.

e. Xbox.

f. Several sets of cufflinks.

g. Various pieces of jewelry.

h. Two-way radio.

i. Rolex Certificate.

Jeffrey Chrisope and Rachel Robinson (September 15, 2010)

j. GPS System.

k. Hyper Mac.

Tammy Bodmer (September 15, 2010)

l. External hard drive.

m. Watch.

Angela Parvanta and Akio Minakami (September 18, 2010)

n. Two Samurai swords.

o. Rolex.

p. Channel purse.

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q. Several pieces of jewelry.

Mary and James Lee (October 11, 2010)

v. On October 8, 2010 and on October 22, 2010, Detective Coblantz obtained search warrants for the cellular phone records and tower usage and/or ping history for a number believed to be the defendant's. The search warrant was served on Cellco Partnership DBA: Verizon Wireless. The search warrant covered Verizon and their affiliates and partners.

vi. On October 21, 2010, the defendant was arrested and booked into King County jail.

vii. While the defendant was in the King County jail, he made numerous calls to Dunham.

viii. On December 21, 2010, Detective Coblantz served a search warrant at the defendant's residence and the following property, which was stolen during the commission of the respective residential burglaries, was recovered and identified by each victim:

Patrick Paveglio (August 31, 2010)

a. Paint Sprayer.

b. Grinder.

c. Compressor.

Akio Minakami (September 18, 2010)

d. Sword with red velvet sleeve.

Gary Rollins and Patrick Murray (September 27, 2010)

e. Thousands of dollars worth of coins from a coin collection.

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f. Suitcase.

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

a. MARITAL JAIL CALLS BETWEEN THE DEFENDANT AND DUNHAM

Communications are considered private by statute and by caselaw. The law further recognizes that some communications are privileged such as attorney-client, between spouses and conversations with a priest. A person's jail status does not change the privilege of those communications. A conversation between spouses is a private affair by definition. Nonetheless, for the marital privilege to exist, the conversation must be successfully kept confidential. A recorded message notifying the parties that the call is being recorded destroys the marital privilege.

There is a distinction between having a wire obtained with a subpoena and/or a warrant and the jails calls. Unlike the wire, the person in the jail is giving consent to the recording by accepting the call. By consenting to the recording, the conversation is no longer confidential. The court in State v. Modica, 164 Wn.2d 83 (2008) held that due to the warning that the conversation was being recorded, there was no reasonable expectation of privacy since the parties knew the call was being taped. State v. Archie 148 Wn.App. 198 (2009) acknowledged the defense position in that there is no statute for county jails as there is for the Department of Corrections, however, Archie says that Modica applies the same way as there is a reduced expectation of privacy in the jail.

The Privacy Act specifically exempts lawyers and priests. However, there is nothing about spouses. Even if we all believe spouses are to hold the same privilege that attorneys and

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priests hold, that is not the case. Priests and attorneys hold a higher standard. Therefore there was no privacy violation in the recording of the calls between the defendant and his wife.

Conversations between husband and wife that are overheard by a third party do not have the protection of the spousal privilege. Therefore the defense motion to suppress the jail calls between the defendant and his wife is denied.

b. EVIDENCE RECOVERED FROM THE MOTEL 6 SEARCH WARRANTS - 2010-146 and 2010-146A

Detective Montgomery's affidavit supporting the warrant was tainted because it was the result of an illegal warrantless entry to the Motel room. Snohomish County Deputies entered the motel room looking for the defendant without a warrant. Therefore everything they see is the fruit of the poisonous tree.

Detective Montgomery mentions in his affidavit he has training and experience investigating burglaries and property crimes. He does not mention anything about drug identification.

The Lynnwood Police Department had probable cause to arrest the defendant and Johnson. When they see Johnson they knock on the door and ask if the defendant is in the room. There was no mention of the warrant for Knapp until they see Knapp in the room. The purpose on knocking on the door was to arrest the defendant. There are no facts to support the police was looking for Knapp in the room because of the warrant.

There is no probable cause to determine the deputies were in a place they had the right to be. Therefore, the motion to suppress all evidence recovered from the Motel 6 is granted.

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c. EVIDENCE RECOVERED FROM THE STORAGE PLACE IN MONROE

We look at Article 1 Section 7 of the Washington Constitution to determine if the defendant had a reasonable expectation of privacy in the rental agreement. Obviously the home receives higher constitutional protections. State v. Bobic, 140 Wn.2d 250 (2000), involves a case where the police accessed the storage unit from an adjacent wall and the court ruled that a commercial storage unit is not the kind of location entitled to special privacy protection. Therefore, the storage unit is not entitled to the heightened constitutional protection, and as such, the storage rental agreement does not have that heightened protection.

The warrant was not stale. The interview between the detective and Johnson took place on November 3, 2010. The items were moved by the wife to the Monroe location after the defendant was arrested on October 21, 2010. Unlike a case where the search is two months after the officer formed an opinion that evidence could be found in the house, here the warrant was obtained on November 5, 2010. The information was not stale given that the information was obtained after the arrest on October 21st and not that long after Johnson spoke to the police on November 3rd.

The warrant met the particularity requirement. The information provided by Johnson was that the storage was to store stolen property. From the affidavit it was reasonable to infer that everything that was stolen was to be hidden. The reviewing court cannot be hypertechnical.

Finding that there is no defect in the search warrant of the storage unit, the defense motion to suppress the evidence recovered in the Monroe storage is denied.

d. EVIDENCE RECOVERED FROM THE DEFENDANT'S RESIDENCE

The court needs to determine if there are specific facts that evidence of a crime can reasonably be expected to be found at the house. Two sets of facts establish the nexus: 1) the jail

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calls, where there is reference to the coins in the storage, the suitcase in the storage, the defendant's wife discusses the fact that the Rolex is somewhere in here, and 2) information from Johnson when she spoke to the police on December 16th when she stated she had been to the defendant's residence and had seen three safes with stolen property, one containing the stolen coins, and one with a Rolex. The problem with Johnson's statement is that it was a conclusionary opinion that the coins and the Rolex were at the residence because there was no date as to when she went to the residence. Presumably it was before October 21st, which is when they were both arrested. So she had been at the house two months before the warrant was signed.

Common sense tells us there are facts to support the idea there is property at the residence. Citing State v. McReynolds, 104 Wn. App. 560 (2000), the inquiry has to be done on a case by case basis. Under some circumstances it is reasonable to believe that there is stolen property at the house, which is different from drugs, and courts are more willing to assume the property may be at the residence. However, under this case is not reasonable to infer that the property was at the residence because the defendant had rented the storage locker in Lynnwood, and when the police found out about it, the defendant's wife moved the property to another storage location.

It is not okay to look for property in places just to see what they might find. Therefore, the court finds the affidavit is invalid and the warrant is stale. The court grants the defense motion to suppress evidence recovered at the defendant's residence.

e. EVIDENCE OBTAINED FROM THE CELLULAR PHONE WARRANT

There were sufficient facts in the affidavit for a judge to find probable cause that the defendant had committed some of the burglaries because witnesses saw the defendant on the

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phone. The police had the phone number, although not sure which carrier, and requested authority to serve a warrant on the partners and affiliates. The police had probable cause to invade the privacy interest in the records, no matter which carrier had it. This is not a case where the police found the target after having served the warrant. Therefore, the warrant was not defective as an anticipatory warrant as it was not conditioned on a future event.

Because there was probable cause to issue the warrant, regardless of who had the account, the warrant is valid and the defense motion to suppress evidence of the phone records is denied.

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

Signed this 15 day of August, 2011.

JUDGE
MARIANE SPEARMAN

Presented by:

Mafe Rajul, WSBA #37877
Deputy Prosecuting Attorney

Copy received; notice of presentation waived; opposition to rulings denying suppression noted:
MUENSTER AND KOENIG

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68971-1-I
	)	
KEITH BLAIR,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH BLAIR
DOC NO. 345896
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF OCTOBER 2012.

x Patrick Mayovsky