Supreme Court No. 90272-1
Court of Appeals No. 68971-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH THOMAS BLAIR,
Appellant,

ON APPEAL FROM THE KING COUNTY SUPERIOR COURT
The Honorable Marianne Spearman, Judge

APPELLANT'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Keith Thomas Blair, Appellant, asks this Court to accept review of the Court of Appeals decision designated below.

B. COURT OF APPEALS DECISION

Mr. Blair seeks review of the decision by a panel of Division One of the Court of Appeals filed March 10, 2014. The decision affirmed: (1) the denial of our motion for mistrial based upon the prosecutor's intentional violation of an order in limine, (2) the denial of our motion to suppress the fruits of an invalid warrant, and (3) the denial of our motion to suppress warrantless recordings of marital telephone calls. *State v. Blair and Johnson*, No. 68971-1-I, 2014 WL 953492. [1]

The Court of Appeals panel denied our motion for reconsideration on April 8, 2014.[2]

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[1] A copy of the decision is reproduced in the Appendix, pages A-1 to A-16.

[2] A copy of the order is reproduced in the Appendix, page B-1.

This Court should grant review, reverse the Court of Appeals, reverse the judgment, and remand to the Superior Court for further proceedings.

C. ISSUES PRESENTED FOR REVIEW—PROSECUTOR'S INTENTIONAL VIOLATION OF ORDER IN LIMINE RESULTING IN PREJUDICE.

1. The trial court found: (a) the prosecutor intentionally elicited testimony in violation of an order in limine; (b) the violation was egregious; (c) Mr. Blair was prejudiced; and (d) the prejudice could not be cured by an instruction. Given these findings, did the prosecutor's elicitation of the improper testimony and denial of Mr. Blair's motion for mistrial violate his fundamental right to a fair jury trial and due process of law secured by the Sixth and Fourteenth Amendments to the United States Constitution?

2. Given findings (a) through (d) above, should this Court apply the constitutional harmless error standard, requiring proof beyond a reasonable doubt that the improper evidence did not affect the verdict?

3. Given findings (a) through (d) above, should this Court place the burden on the prosecution as wrongdoer, rather than on the defense, the victim of the misconduct?

D. ISSUES PRESENTED FOR REVIEW: INVALID SEARCH WARRANT

1. Is information on a storage unit rental agreement (driver's license information, date of birth and Social Security number) filled out by Mr. Blair's wife a "private affair" under Article I, section 7 of the Washington state constitution?

2. Is Mr. Blair entitled to assert automatic standing to challenge the warrantless seizure of his wife's rental agreement information, where he is charged with burglary and theft of property located in the storage unit?

3. Does the warrant fail for lack of probable cause because the factual basis of the informant's claims (including the time and circumstances statements were allegedly heard) is not stated in the warrant affidavit?

E. ISSUES PRESENTED FOR REVIEW—WARRANTLESS INTERCEPTION OF MARITAL PHONE CALLS FROM JAIL

(1) Did the warrantless monitoring and recording of marital privileged telephone calls between Mr. Blair (while a pretrial detainee in jail) and his wife violate the privacy act, RCW 9.73.030, and the marital communications statute, RCW 5.60.060?

(2) Is a telephone conversation between spouses (one of whom is a pre-trial detainee in jail) a "private affair" under Article I, Section 7 of the Washington constitution?

(3) Does a jail sign and taped message that the spousal call will be recorded (i.e., that "Big Brother is listening to you") trump the privacy act, the marital communications statute, and Article I, Section 7?

F. ISSUE PRESENTED FOR REVIEW—THE EXCEPTIONAL SENTENCE BASED ON THE "UNPUNISHED OFFENSES" STATUTE

1. Should a jury determine whether a current offense is "going unpunished" due to a "high offender score" based on other current offenses?

G. STATEMENT OF THE CASE

Keith Blair was charged with several counts of residential burglary, one count of attempted residential burglary, two counts of theft of a firearm, and one count of taking a motor vehicle. CP 1-8. He was acquitted on one firearm theft count, acquitted on one burglary count, and convicted of trespass as a lesser. CP 176, 184. He was convicted on the remaining counts. CP 172-75, 177-83, 185.

The trial court imposed an exceptional sentence of 102 months on Count 6 consecutive to the other counts based on the so-called "free crime" aggravator statute, resulting in a total sentence of 186 months.

The prosecution's case against Mr. Blair rested primarily on (1) the testimony of an accomplice who pled guilty to possession of stolen property charges in exchange for dismissal of others, and (2) testimony about stolen property recovered from a Monroe storage unit. *See State v. Blair*, 2014 WL 953492, at *2-3.

H. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED: PROSECUTOR'S INTENTIONAL VIOLATION OF ORDER IN LIMINE RESULTING IN PREJUDICE AND MOTION FOR MISTRIAL.

The decision of the Division One panel applies an incorrect standard of review. No authoritative decision of this Court appears to address or decide the issue presented here. Review should be granted under RAP 13.4(b)(3) and (4).

1. **Deprivation of constitutional right (Issue C-1).** The elicitation of the improper testimony and denial of Mr. Blair's motion for mistrial violated his fundamental right to a fair jury trial and due process of law secured by the Sixth and Fourteenth Amendments to the United States Constitution.

The defense motion in limine, prosecution misconduct and resulting mistrial motion are summarized in the decision of the court of appeals panel, 2014 WL 953492 at *3-5. In sum, the prosecutor elicited witness testimony from another case, excluded by the court's order, that the witness bought gold from Mr. Blair. The witness stated that he had been brought in for questioning by the Bellevue police "when the Keith Blair incident happened." The court reporter noticed that the jurors

were writing down the testimony about the Bellevue police and "the Keith Blair incident" in their notebooks. 7RP 57-58. Defense counsel moved for a mistrial. 7RP 37-64.

After hearing argument and considering the record, the trial court found:

(a) The prosecutor intentionally elicited the testimony. 7RP 44, 47-48, 50, 65.

(b) The violation was egregious. 7RP 66.[3]

(c) The testimony was prejudicial, 7RP 65. The trial court stated: "[T]his is tantamount to the defendant having a history." 7RP 65.

(d) The prejudice could not be cured by an instruction. 7RP 65-66.[4]

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[3] The trial court noted that prosecutor had agreed she would not discuss any prior King or pending Snohomish cases. 7RP 47.

The trial court noted that the prosecutor had claimed the prejudice was less because allegedly there were jail tapes where Mr. Blair talked to his wife about selling gold. 7RP 66. In fact, there was no discussion of selling gold on the jail tapes. *See* Exhibit 139 at 3, 5-7; see *Appellant's Opening Brief* at 26.

"The Bill of Rights sought to guarantee certain fundamental rights, including the right to a fair and impartial trial." *State v. Monday*, 171 Wash.2d 667, 680, 257 P.3d 551 (2011). Given these facts and findings, the introduction of the testimony and denial of the mistrial motion violated Mr. Blair's fundamental Sixth and Fourteenth Amendment rights to a fair jury trial and due process of law. *See State v. Miles*, 73 Wash.2d 67, 68-71, 436 P.2d 198 (1968); *see, e.g., State v. Belgarde*, 110 Wash.2d 504, 507-512, 755 P.2d 174 (1988).

2. Constitutional harmless error standard (Issues C-2 and C-3). Given findings (a) through (d) above, this Court should apply the constitutional harmless error standard, requiring proof beyond a reasonable doubt that the prejudicial evidence did not affect the verdict.

In some cases, justice demands, and this Court has required, that prosecution misconduct be reviewed under the

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[4] Since the jurors took notes about the improper testimony, defense counsel asked: "What are we going to do, tell them to tear out that page of their notebooks?" 7RP 59-60.

constitutional harmless error standard. *State v. Monday*, 171 Wash.2d 667, 679-681, 257 P.3d 551 (2011) (appeals to racial prejudice in questioning of witnesses and closing argument).[5] Three justices in *Monday* supported reversal "because the integrity of our justice system demands it." *Monday*, 171 Wash.2d at 685.

This is such a case. The defense timely filed the appropriate motion in limine. The motion was granted. The prosecutor intentionally violated the order. The violation was egregious. The testimony was prejudicial. The violation could not be cured by an instruction.

There are three reasons why constitutional harmless-beyond-a-reasonable-doubt standard should apply on these facts. (1) First, the standard protects the constitutional right to a fair jury trial and to due process of law. (2) The standard ensures accountability—the burden is placed on the prosecution as wrongdoer, rather than the defense, the victim of the

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[5] *See also State v. Easter,* 130 Wash.2d 228, 242, 922 P.2d 1285 (1996) (applying constitutional harmless error standard to improper testimony and argument re: prearrest silence); *State v. Fricks,* 91 Wash.2d 391, 396–97, 588 P.2d 1328 (1979) (prosecution misconduct re postarrest silence).

misconduct. (3) The integrity of the justice system is protected if an intentional, egregious violation of a court order has consequences.

The court of appeals panel placed the burden of proof on the defense to show "a substantial likelihood that the misconduct affected the jury's verdict." *State v. Blair*, at *5. This standard apparently first appears in *State v. Music*, 79 Wash.2d 699, 714-15, 489 P.2d 159 (1971). There is no discussion in *Music* of what reason there might be for that standard. *Music* cites no authority for it. "It is not clear from *Music* where this standard came from." *State v. Monday*, 171 Wash.2d at 675-676. The *Music* standard should not apply here.[6]

On this record, the Court cannot find the error harmless beyond a reasonable doubt. The denial of the mistrial motion should be reversed.

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[6] We also contend that the panel erred in affirming the mistrial denial under the *Music* standard.

I. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED: THE STORAGE UNIT SEARCH WARRANT IS INVALID; THREE IMPORTANT ISSUES ARE PRESENTED.

The defense timely moved to suppress evidence seized from a storage unit. 2CP 60-95. The trial court denied the motion. CP 208. The court of appeals panel affirmed the denial. *State v. Blair*, *7-9, Appendix pages A-7 to A-9.

The decision of the Division One panel is in conflict with decisions of the Supreme Court. Review should be granted under RAP 13.4(b)(1) and RAP 13.4(b)(3).

1. Spouse's identification information a private affair (Issue D-1). Information on a storage unit rental agreement (driver's license information, date of birth and Social Security number) filled out by Mr. Blair's wife is a "private affair" under Article I, section 7 of the Washington state constitution.

The "private affairs" protection of Article 1, section 7 is implicated where a search potentially reveals personal information. *See, e.g.*, *State* v *Jorden,* 160 Wash.2d 121, 129-30, 156 P.3d 893 (2007)(hotel guest registry); *State v. Miles*, 160 Wash.2d 236, 247-252, 156 P.3d 864 (2007) (banking records); *State v. Jackson,* 150 Wash.2d 251, 262, 76 P.3d 217

(2003) (GPS device attached to vehicle); *State* v. *Young,* 123 Wash.2d 173, 181-82, 183-84, 867 P.2d 593 (1994) (heating pattern in home a private affair),

The information obtained from the storage rental agreement is likewise a private affair. It included Mrs. Blair's driver's license information (which includes date of birth and other vital statistics), her address, and her Social Security number. It revealed a choice to store items in private.

The police obtained the rental agreement information without a warrant or judicially-issued subpoena. 2CP 91. It was obtained without authority of law. Article 1, section 7 was violated.

The illegally obtained evidence cannot be used to support the issuance of a search warrant. *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, at 343, 945 P.2d 196 (1997); *State* v. *Young,* 123 Wn.2d at196, 867 P.2d at 605. The storage unit rental information must be excised from the warrant affidavit. Without it, there is no connection between the Blairs and the unit. The warrant fails.[7]

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[7] This issue was briefed by undersigned counsel and presented to the trial court. 2CP 66-67. It apparently was not raised by prior appellate counsel in his opening brief.

2. Automatic standing (Issue D-2). Mr. Blair is entitled to assert automatic standing to challenge the warrantless seizure of his wife's rental agreement information, as he is charged with burglary and theft of property located in the storage unit.

In Washington, a defendant has automatic standing to challenge the legality of a seizure "even though he or she could not technically have a privacy interest in such property." *State v. Simpson,* 95 Wash.2d 170, 175, 622 P.2d 1199 (1980); *State v. Evans*, 159 Wash.2d 402, 406-407, 150 P.3d 105 (2007). Mr. Blair meets both parts of the test for automatic standing: (1) possession is an "essential" element of the offense, and (2) he was [allegedly] in possession of the contraband at the time of the contested search or seizure. *Simpson,* 95 Wash.2d at 181, 622 P.2d 1199, *Evans*, 159 Wash.2d at 407.

Part (1) of the test is the only part in dispute. Mr. Blair was charged with theft. Possession is an "essential element" of theft because one must exercise control over the property of another to steal it. Mr. Blair is also charged with burglary. There are two court of appeals decisions which note this issue. In *State v. Foulkes*, 63 Wash.App. 643, 821 P.2d 77 (1991), the defendant, charged with burglary, conceded that he was not entitled to automatic standing. 63 Wash. App at 647, fn 2. In

State v. Stone, 56 Wash.App. 153, 157, 782 P.2d 1093 (1989), the court simply stated: "Possession is not an element of burglary." No authoritative decision of this Court appears to address or decide this issue.

In this case, the prosecution contended that Mr. Blair entered buildings, took property without permission, and possessed the stolen property in the storage unit. We ask the Court to hold that in this case, possession was an element. Mr. Blair's possession of the stolen property found in the storage unit was central to both the theft and the burglary charges. The "automatic standing" doctrine fulfills the same function here as it does in other cases in which it has been applied. *Foulkes* and *Stone* should be distinguished or disapproved.[8]

3. Lack of factual basis (Issue D-3). The warrant fails for lack of probable cause because the factual basis of the informant's claims (including the time and circumstances statements about the unit were allegedly heard) is not stated in the warrant affidavit.

Under Article I, Section 7, a warrant affidavit:

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[8] See previous footnote.

> must contain some of the underlying circumstances that led the informant to believe that evidence could be found at the specified location. [citation and footnote omitted]. In particular, the affidavit must set forth the underlying circumstances specifically enough that the magistrate can independently judge the validity of both the affiant's and informant's conclusions.

State v. Lyons, 174 Wash.2d 354, 359, 275 P.3d 314 (2012). The magistrate must know the *date* of the informant's observations to determine whether they are stale. *Lyons*, 174 Wash.2d at 360-362.

The warrant affidavit does not meet these standards. (1) First, the affidavit does not set forth *how* the informant heard the statements about the storage locker. 2CP 90. (2) Second, the affidavit does not set forth *when* the informant heard the statements about the storage locker. *Ibid.* (3) Third, the affidavit does not set forth *why* the informant was "confident" the stolen property had been moved to the Monroe storage locker. *Ibid.*

The panel's decision on the warrant, pages *7-9, conflicts with *Lyons* and the cases and principles cited therein. Review should be granted pursuant to RAP 13.4(b)(1) and (3).

J. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED: WARRANTLESS INTERCEPTION OF MARITAL PHONE CALLS FROM JAIL.

The defense timely moved to suppress evidence of the marital phone calls from Mr. Blair to his wife. 2CP 50-59. The motion was denied. CP 206-207. The panel affirmed the denial. *State v. Blair*, *9-11, Appendix pages A-9 to A-11.

The word "jail" is not a talisman in whose presence the privacy act, the marital communications statute, and Article I Section 7 fade away and disappear.[9] This appeal gives the Court the opportunity to decide if marital phone calls by a pretrial detainee to his wife are private or "otherwise privileged" from eavesdropping or recording, absent a court order or a warrant. *See State v. Modica*, 164 Wash.2d 83, 88-89, 186 P.3d 1062 (2008). Review should be granted under RAP 13.4(b)(3) and (4).

1. Violation of privacy act and marital communications statute (Issue E-1). The warrantless

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[9] We paraphrase *Coolidge v. New Hampshire,* 403 U.S. 443, 461–62, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), *quoted in State v. Parker*, 139 Wash.2d 486, 506, 987 P.2d 73 (1999).

monitoring and recording of marital privileged telephone calls between Mr. Blair (while a pretrial detainee in jail) and his wife violate the privacy act, RCW 9.73.030, and the marital communications statute, RCW 5.60.060.

Washington's privacy act generally prohibits the interception and or recording of any "[p]rivate communication transmitted by telephone. . .between two or more individuals. . ." without their consent. RCW 9.73.030(1)(a). Here, there was no "consent". *See Modica, supra.* The interception of the marital calls violated the privacy act, "one of the most restrictive surveillance laws ever promulgated." *State v. Hinton*, 179 Wash.2d 862, 319 P.3d 9, 14 (2014).

RCW 5.60.060(1) protects the privacy of communications between spouses. The interception and recording of the marital telephone communications between the Blairs under the circumstances here abridged the marital privilege statute.

2. Telephone call between spouses a private affair (Issue E-2). A telephone conversation between spouses (one of whom is a pre-trial detainee in jail) is a "private affair" under Article I, Section 7 of the Washington constitution.

The authorities establishing that telephone calls receive strong privacy protection in Washington are legion. *See*

Hinton, supra, 319 P.3d at 13-15. Telephone calls between spouses are a "private affair" under Article I Section 7.

3. A "Big Brother" sign and recorded message do not trump the statutes or the constitution. A jail sign and taped message that the spousal call will be recorded (i.e., that "Big Brother is listening to you"[10]) do not trump the privacy act, the marital communications statute, or Article I, Section 7.

A client's presence in jail does not destroy the privacy of attorney-client communications over the telephone. Neither does jail status destroy the privacy of marital communications over the telephone. The presence of "Big Brother" signs or automated recordings in the jail does not defeat privacy. *See State v. Modica, supra*, 164 Wash.2d at 88-89.

Notification does not equal consent. If notification were equivalent to consent to intercept and record private conversations, violating an individual's rights would be "avoided" by simply announcing one intended to do so. Similarly, there is no "consent" when a party has no ability to refuse. The jail phone system is the only option a pre-trial

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[10] *See* George Orwell, *1984*.

detainee has to call his attorney, his wife, or his minister. There is no consent because the detainee (in jail because he does not have bail money) lacks the ability to avoid the police interception.

This Court should hold that the marital calls here were private and "otherwise privileged", *Modica, supra*, subject only to police interception if sanctioned by a court order or warrant. *State v. Archie*, 148 Wash. App. 198 (2009) is to the contrary. It should be distinguished or disapproved.

K. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED: THE SIXTH AMENDMENT REQUIRES THAT A JURY SHOULD DECIDE IF AN OFFENSE IS "GOING UNPUNISHED".

We contend that under the Sixth and Fourteenth Amendments to the United States Constitution, a jury should determine whether current offenses are "going unpunished" due to a high offender score based on current offenses. See RCW 9.94A.537. We contend that whether an offense is "going unpunished" is a factual finding requiring a jury trial on the issue. Our position is based upon *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakeley v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Jones v. United States*, 526 U.S. 227, 119

S.Ct. 1215, 143 L.Ed.2d 311 (1999); and *State v. Hughes*, 154 Wash.2d 118, 137-40, 110 P.3d 192 (2005).[11]

Unfortunately, our position was rejected by this Court in *State v. Alvarado*, 164 Wash.2d 556, 192 P.3d 345 (2008). We urge the Court to reconsider. A jury could decide that an offense is not "going unpunished" given the lengthy terms already imposed in Washington's sentencing grid.

L. CONCLUSION.

For the reasons stated, this Court should grant review, reverse the appellate panel, reverse the judgment, and remand to the Superior Court for further proceedings.

DATED this the 6th day of May, 2014.

Respectfully submitted,
MUENSTER & KOENIG
By: S/John R. Muenster
JOHN R. MUENSTER
Attorney at Law, WSBA No. 6237
Of Attorneys for Appellant Keith Thomas Blair

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[11] Hughes was abrogated on other grounds regarding harmless error by *Washington v. Recuenco,* 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on or about the 7th day of May, 2014, a true and correct copy of the foregoing document was served via email and first class mail on opposing counsel.

S/John R. Muenster
John R. Muenster

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Decision of the Court of Appeals A-1

Order Denying Motion for Reconsideration.....B-1

Not Reported in P.3d, 2014 WL 953492 (Wash.App. Div. 1)
(Cite as: 2014 WL 953492 (Wash.App. Div. 1))

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Kelsey Marie JOHNSON, Defendant,
and
Keith Thomas **Blair**, Appellant.

No. 68971–1–I.
March 10, 2014.

Appeal from King County Superior Court; Honorable Mariane Spearman, J.
Eric J. Nielsen, Eric Broman, Casey Grannis, Nielsen, Broman & Koch, PLLC, Nielsen, Broman & Koch PLLC, Attorney at Law, Seattle, WA, for Appellant.

Keith Thomas Blair, Aberdeen, WA, Appearing Pro Se.

Mafe Rajul, Attorney at Law, James Morrissey Whisman, Jennifer Paige Joseph, Prosecuting Atty King County, King County Prosecutor's Office, Seattle, WA, for Respondent.

UNPUBLISHED OPINION

GROSSE, J.

***1** When, as here, the State's witness made a single vague reference to another investigation in violation of the court's order in limine to exclude evidence of other crimes, and the defendant fails to show that there was a substantial likelihood that this testimony affected the verdict in light of ample other evidence of guilt, the trial court did not abuse its discretion by denying a motion for a mistrial. Accordingly, we affirm.

FACTS

The State charged Keith Blair with several counts of residential burglary involving multiple victims, one count of attempted residential burglary, two counts of theft of a firearm, and one count of taking a motor vehicle. The charges arose out of a series of burglaries that occurred in Seattle and surrounding areas in King County between July and October of 2010.

On July 25, 2010, the home of Joseph Saldin was burglarized and his car, a silver Porsche, was stolen. Also stolen were a safe, jewelry, shotgun, cigars, and watches. A neighbor saw someone with a limp walk up a hill in the neighborhood and then drive down the hill in the silver Porsche a short time later. The Porsche was later found crashed and abandoned.

On August 6, 2010, the home of Pamela LaCount was burglarized. A safe containing $30,000 was stolen, along with jewelry, an Xbox system, a laptop computer, walkie talkies, a Rolex watch, and a shotgun. On August 31, 2010, the home of Patrick Paveglio was burglarized. Tools and a lawn mower were stolen.

On September 14, 2010, the home of Tammy Bodmer was burglarized. A bike was stolen, along with five laptop computers, jewelry, watches, silver coins, and an external hard drive. On September 15, 2010, the home of Jeffrey Chrisope was burglarized. Keys, horse-themed jewelry, motorcycle riding gear, a large television, global positioning system units, an Xbox system, computer hardware and software, and a red car was stolen. Chrisope found his wife's red car several days later, not far from the house. On that same day, the home of Tony Marti was burglarized. Marti's bedroom windows were broken and a kitchen window was removed.

On September 18, 2010, the home of Angela Parvanta was burglarized. Jewelry boxes, jewelry, watches, three computers, and four martial arts swords were stolen. Parvanta found a ladder propped up against the house leading to a balcony. On September 23, 2010, the home of Robinson Walden was burglarized. Jewelry, watches, a laptop computer, headphones, and speakers were stolen.

On September 26, 2010, there was an attempted burglary at the home of Elizabeth Dolliver and Philip Thompson. Dolliver came home and found a man with a light gray jacket and a backpack descending a ladder that was propped up against her house. When she confronted him, he fled. Thompson chased him on foot. A neighbor, Travis Testerman, saw a man walking briskly near the Dolliver residence with a backpack. He saw the man cut through a neighbor's yard, emerge without the backpack, and get picked up by someone driving a black sedan. Testerman, who was an off duty Seattle police officer, followed the car and gave the 911 operator a partial license plate number. Testerman then went back and found the discarded backpack, which was later found to contain a gray jacket, gloves, and small crowbar. Testerman identified Blair from a photomontage.

***2** On September 27, 2010, the home of Gary Rollins and Patrick Murray was burglarized. Items stolen included a pistol, a laptop computer, dehydrated camping food, a suitcase, a backpack, a coin collection, watches, and jewelry. Rollins found his ladder leaning up against his bedroom window and the screen had been cut out. A neighbor saw a suspicious person on the side of the home around midnight, talking on a cellular phone, and limping toward the street with a backpack. A black four door car drove up

and the man said, "Turn off the lights." The lights then turned off and the man loaded a backpack and suitcase into the car.

King County Detectives Matthew Volpe and Cary Coblantz investigated the burglaries. Voipe sought to recover some gold that was stolen in the burglaries by contacting Ryan Youngberg, a person who advertised on Craigslist as a buyer of gold. Youngberg set up a meeting with Voipe and Kelsey Johnson, who was Blair's girlfriend.

On September 28, 2010, Voipe met with Johnson, who arrived in a black Kia. Voipe identified himself as a detective and asked to speak with her. After Johnson provided information to Voipe about the burglaries, Voipe seized the Kia and obtained a search warrant to look for stolen property inside the car. The license plate number on the car closely resembled the partial one which was reported from the car seen at the Dolliver burglary. The car had been rented by Aaron Knapp, a friend of Blair.

On October 4, 2010, Voipe searched the car and found various items stolen during the burglaries of the homes of Rollins, Parvanta, and Chrisope. He also found paperwork from the Employment Security Department with Blair's name on it, a receipt from a clothing store with Blair's name on it, and a receipt for a Travelodge motel room rented to Aaron Knapp.

On October 11, 2010, the home of James and Mary Lee was burglarized. Passports, credit cards, social security cards, and other documents were taken from a safe. Cameras, laptop computers, jewelry, and a data projector were also stolen. Lee found an open can of Dr. Pepper soda on a dresser and a tool that did not belong to her family on the floor next to the safe. DNA (deoxyribonucleic acid) recovered from the soda can matched Blair's DNA profile.

On October 21, 2010, based on information he received from a Snohomish County detective, Volpe went to an Everett motel where he hoped to contact Johnson and Blair. Johnson and Blair arrived at the motel in a Mercedes that belonged to Johnson. Volpe obtained a search warrant for the Mercedes and searched the car. He found coins, dehydrated food, jewelry, and other items stolen in the burglaries. He also found a receipt for payment on a storage unit in Lynnwood. Volpe arrested Blair and Johnson.

On November 2 or 3, 2010, Volpe investigated the Lynnwood storage unit but found it mostly empty except for a boat motor, a black bag, and some speakers. Volpe was then contacted by Johnson, who offered to disclose what she knew about the burglaries. Johnson told him she had been to the Lynnwood storage unit with Blair and had seen much of the stolen property in that unit. She also told him that the property had been

moved to a different storage unit in Monroe, which had been rented by Blair's wife Rachel Dunham. Volpe's investigation corroborated this information. On November 5, Volpe obtained a search warrant for the Monroe unit and after searching its contents, found a large quantity of stolen property.

***3** Johnson continued to contact Volpe and provide information about the burglaries. She also showed Volpe and Coblantz the houses that Blair burglarized and gave them specific information about the crimes that corroborated the victims' reports. Johnson agreed to testify against Blair and plead guilty to two counts of second degree possession of stolen property in exchange for the State's dismissal of the counts of first degree trafficking in stolen property and first degree possession of stolen property with which she was originally charged.

The State proceeded to trial on Blair's case on several counts of residential burglary, two counts of theft of a firearm, and one count of taking a motor vehicle. An additional count of money laundering was severed and prosecuted in a separate trial. The trial court ruled in limine to exclude evidence relating to other criminal activity for which Blair was being investigated or charged. Blair also moved to suppress evidence of calls he made from the jail to his wife about the stolen property. In these calls, he asked her where the property was being kept and to sell it. The trial court denied the motion.

At trial, Youngberg testified that he bought gold from Blair "[b]efore this whole thing happened when [he] was called into questioning," and that he was first contacted about Blair by the Bellevue Police Department. Blair moved for a mistrial, arguing that this testimony violated the motion in limine. The trial court denied the motion.

Johnson testified that she met Blair in August 2010. Blair was driving a silver Porsche, which she heard was stolen and was later crashed by his friend and abandoned. Johnson testified that Blair had an injured foot and sometimes walked with a limp. She said he had paid off her traffic tickets and paid to help her regain possession of her car. As a result and because she liked him, she felt "obligated" to help Blair by driving him to and from the houses he burglarized. She then testified about each of the burglaries with which Blair was charged.

The jury acquitted Blair of one count of theft of a firearm and found him guilty of the lesser included offense of first degree criminal trespass on one of the counts of residential burglary. The jury found him guilty as charged on the remaining counts. The trial court imposed an exceptional sentence of 186 months based on the "free crimes" aggravator. Blair appeals.

ANALYSIS

1. *Motion for Mistrial*

Blair moved in limine to exclude evidence of other crimes that had been prosecuted in a different King County case or that were pending in Snohomish County. The State responded that it was not seeking to admit any ER 404(b) evidence but did note that it would be calling Youngberg, who was also a witness in the prior King County case. As the prosecutor explained:

> The only thing that—as I'm hearing counsel talk about—is one of the witnesses the State does intend to call is Ryan Youngberg, who is somebody that posted on Craigslist—excuse me, he bought some gold from Kelsey Johnson. And the only reason—

***4** Defense counsel then interrupted and stated, "They can introduce that. That's not part of this other case." The prosecutor continued, stating:

> I know that he was also a witness in that case. And so there might be some crossover in that sense, but 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.

The trial court granted the motion.

At trial, Youngberg testified that he bought gold and advertised on Craiglist. He testified that he "ran into a situation" that made him realize he needed to be checking identifications (IDs) and writing receipts when dealing with sellers. When the prosecutor asked what that situation was, he responded, "It was when the Keith Blair incident happened. I don't know the exact date." The prosecutor then asked when he learned he needed to take these precautions and engaged in the following exchange occured:

> A. Oh, from the time that I brought in—was brought in for questioning, I learned from there on I needed to be taking IDs and writing receipts.
>
> Q. Did you buy gold from Keith Blair then?
>
> A. Before, yes. Before this whole thing happened when I was called in for questioning, yes, I did.

Youngberg then identified Blair in court and the prosecutor continued:

> Q. So when you talk about that you were questioned, is that when you came in contact with Detective Volpe from the King County Sheriff's Office?
>
> A. It was the Bellevue Police Department was the first time that I was contacted.
>
> Q. All right. I want to focus on Detective Volpe—

A. On who?

Q. Detective Volpe.

Defense counsel then called for a sidebar.

Blair moved for a mistrial, arguing that Youngberg's testimony violated the court's ruling in limine. Blair asserted that when Youngberg testified about an investigation by the Bellevue Police Department involving buying gold from Blair, he was referring to the other King County case that was already tried and subject to the court's ruling in limine. Youngberg testified at that trial, which was a trafficking charge involving Blair's illegal sale of gold to Youngberg. The trial court denied the mistrial motion, stating:

> 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 the jurors are going to be fooled for one minute thinking it was a legitimate business deal, the defendant selling gold to Mr. Youngberg.
>
> ***5** 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.

Blair contends that a mistrial was warranted because the violation of the motion in limine amounted to prosecutorial misconduct and was also a serious trial irregularity. We disagree. A trial court will a grant a mistrial " 'only when the defendant has been so prejudiced that nothing short of a new trial

can insure that the defendant will be tried fairly.' " [FN1] Because the trial judge is in the best position to determine the impact of a potentially prejudicial remark, we review a trial court's decision to grant or deny a mistrial for an abuse of discretion.[FN2]

FN1. *State v. Rodriguez,* 146 Wash.2d 260, 270, 45 P.3d 541 (2002) (quoting *State v. Kwan Fai Mak,* 105 Wash.2d 692, 701, 718 P.2d 407 (1986)).

FN2. *State v. Escalona,* 49 Wash.App. 251, 254–55, 742 P.2d 190 (1987).

To prevail on a claim of prosecutorial misconduct, the defendant must show " 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.' " [FN3] Prosecutorial misconduct is prejudicial when there is a substantial likelihood that the misconduct affected the jury's verdict.[FN4] The State does not appear to contend that the prosecutor's conduct was proper, as the briefing focuses only on the prejudice prong of the analysis. Indeed, as the trial court concluded, by eliciting testimony that referred to charges that were within the scope of the court's order in limine, the prosecutor's conduct was improper. But viewed in context of the entire record, Blair fails to show that this testimony was so prejudicial that there was a substantial likelihood it affected the jury's verdict.

FN3. *State v. Thorgerson,* 172 Wash.2d 438, 442–43, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting *State v. Maqers,* 164 Wash.2d 174, 191, 189 P.3d 126 (2008)).

FN4. *Thorgerson,* 172 Wash.2d at 442–43, 258 P.3d 43.

First, while a reasonable inference from this testimony is that Blair was involved in selling stolen gold, the testimony itself was vague and did not specifically refer to the other charges. Youngberg's reference to the Bellevue Police Department was preceded by his reference to "the Keith Blair incident," which everyone understood was the charged conduct in this case. Thus, the jurors could have reasonably inferred that he was talking about the current charges. Additionally, as the State points out, the charged crimes occurred in several different municipalities throughout King County, including Seattle, Shoreline, Lake Forest Park, Medina, Kirkland, Bothell, and Kenmore, and the detectives testified about contracts the King County Sheriff's Office had with some of the municipalities to provide law enforcement services. Thus, as the trial court concluded, the jury could have reasonably inferred that there were connections between the different law enforcement agencies and that the investigation by the Bellevue Police Department

was part of the current case.

***6** Additionally, unlike the cases cited by Blair where the admission of prior bad acts may have led jurors to convict based on propensity given the lack of other credible evidence,[FN5] here, it is unlikely that this single vague reference to a Bellevue investigation would affect the verdict, given the additional ample evidence of guilt. The State's case was based on eyewitness testimony. Johnson gave details that were corroborated by the victims and other witnesses, witnesses identified Blair and the vehicles he used, and victims identified stolen property that was found in those vehicles. Stolen property was also found in the motel room Blair occupied and in the storage unit his wife rented; Blair's DNA was found at one scene, and Blair called his wife from jail about the stolen property. Blair fails to establish that the prosecutor's conduct was so prejudicial to warrant reversal.

FN5. *See Escalona,* 49 Wash.App. at 254–55, 742 P.2d 190.

Nor can he establish that Youngberg's testimony amounts to a serious trial irregularity requiring a mistrial. "An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial." [FN6] To determine whether a trial irregularity deprived a defendant of a fair trial, a reviewing court considers the following factors: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow." [FN7] We review claims of prejudice "against the backdrop of all the evidence." [FN8]

FN6. *State v. Condon,* 72 Wash.App. 638, 647, 865 P.2d 521 (1993).

FN7. *Escalona,* 49 Wash.App. at 254, 742 P.2d 190.

FN8. *Escalona,* 49 Wash.App. at 254, 742 P.2d 190.

While a violation of an order in limine is considered a serious trial irregularity, not all violations of orders in limine have been held to be so serious as to deprive the defendant of a fair trial.[FN9] In *Condon,* the State's witness twice testified that the defendant had been in jail despite an order in limine excluding such evidence, but the court held that while the remarks had the potential for prejudice, they were not so serious to warrant a mistrial.[FN10] The court noted that the reference to being in jail was ambiguous and did not necessarily indicate a propensity to commit the crime charged, nor did it necessarily mean that the defendant had been convicted of a crime.[FN11] The court also noted that the curative instruction alleviated any

resulting prejudice, and that unlike in *Escalona,* it was not a "close case," as the evidence against Condon was strong.[FN12]

FN9. *See State v. Thompson,* 90 Wash.App. 41, 46–47, 950 P.2d 977 (1998) (remark "was sufficiently serious because it violated a motion in limine," but "not so egregious as to deny ... a fair trial"); *Condon,* 72 Wash.App. at 649–50, 865 P.2d 521.

FN10. 72 Wash.App. 638, 648–50, 865 P.2d 521 (1994).

FN11. *Condon,* 72 Wash.App. at 649, 865 P.2d 521.

FN12. *Condon,* 72 Wash.App. at 650, n. 2, 865 P.2d 521.

Viewed in context and against the backdrop of all the evidence, Youngberg's remark was likewise not so serious as to deprive Blair of a fair trial. While no curative instruction was given (although it was offered), as discussed above, the remark was sufficiently vague about which incident he was describing. At most, the jury could infer he was involved in selling stolen gold, but this was not the crime with which he was charged in this case. Thus, as in *Condon,* the improper remark was ambiguous enough that it did not necessarily suggest a propensity to commit the crime charged. Additionally, as discussed above, this was not a "close case," as in *Escalona,* given the additional amount of credible evidence of guilt.

*7 Blair's reliance on *State v. Trickier*[FN13] is misplaced. That case did not involve a motion for a mistrial or a violation of an order in limine to exclude prejudicial evidence. Rather, this was a reversal of the trial court's ruling admitting evidence of other pieces of stolen property in the defendant's possession when the defendant was only charged with possession of a stolen credit card. Unable to discern whether the trial court balanced the probative value against its prejudicial impact, the court held that the evidence was more prejudicial than probative because it allowed the jury to consider evidence of the defendant's possession of "a plethora of other allegedly stolen items" as the State's proof that he must have also known the credit card was stolen and was therefore impermissible propensity evidence. [FN14] But unlike in *Trickler,* where the trial court failed to consider the obvious prejudicial impact of evidence that the defendant possessed several stolen items for which he was not charged, here, the trial court considered the prejudicial effect of an isolated vague reference to Blair's involvement in other possible criminal activity that was not the same crime with which he was charged in the current case. As discussed above, the trial court did not abuse its discretion in determining that it was not so prejudicial as to deprive Blair of a fair trial.

FN13. 106 Wash.App. 727, 25 P.3d 445 (2001).

FN14. *Trickier,* 106 Wash.App. at 734, 25 P.3d 445.

2. *Validity of Search Warrant*

Blair challenges the validity of the search warrant for the Monroe storage unit, contending that the affidavit in support of the search warrant did not establish "timely probable cause" to search the unit. Blair asserts that the information that contraband would be found in the place to be searched was stale because his wife rented the Monroe unit on September 13, 2010, but the warrant for it was not presented and executed until November 5, 2010. We disagree.

Probable cause for a search warrant must be timely.[FN15] "The facts set forth in the affidavit must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued." [FN16] A reviewing court evaluates an affidavit "in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant." [FN17] Our courts have recognized that "some time passes between the officer's or informant's observations of criminal activity and the presentation of the affidavit to the magistrate," but "[t]he 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." [FN18]

FN15. *State v. Lyons,* 174 Wash.2d 354, 357, 275 P.3d 314 (2012).

FN16. *Lyons,* 174 Wash.2d at 360, 275 P.3d 314.

FN17. *State v. Jackson,* 150 Wash.2d 251, 265, 76 P.3d 217 (2003).

FN18. *Lyons,* 174 Wash.2d at 360–61, 275 P.3d 314.

Factors to consider in assessing staleness include "the time between the known criminal activity and the nature and scope of the suspected activity." [FN19] Two separate statements of time have been found to be important in determining staleness: "(1) when the affiant received the tip and (2) when the informant observed the criminal activity." [FN20] A magistrate cannot determine whether observations recited in the affidavit are stale unless the magistrate knows the date of those observations.[FN21] But "[a]n affidavit lacking the timing of the necessary observations might still be sufficient if the magistrate can infer recency from other facts and circumstances in the affidavit." [FN22]

FN19. *Lyons,* 174 Wash.2d at 361, 275 P.3d 314.

FN20. *Lyons,* 174 Wash.2d at 361, 275 P.3d 314.

FN21. *Lyons,* 174 Wash.2d at 361, 275 P.3d 314.

FN22. *Lyons,* 174 Wash.2d at 361–62, 275 P.3d 314.

***8** Here, the affidavit for the search warrant for the Monroe storage unit states in relevant part:

> On 11/3/10 at 2020 hrs Det. Grose and I went to the King County Jail and arranged to have Johnson brought to an interview room ... 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. Johnson was confident that all the property stolen in the burglaries was moved from the Lynnwood unit to the unit 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. Johnson agreed to show me the storage unit in Lynnwood.
>
> ....
>
> We all looked into the unit from the top and confirmed it was just as I saw it the previous day. Johnson confirmed that the storage unit was mostly cleaned out.
>
> ....
>
> On 11/5/10 Det. Coblantz and I checked the 5 storage facilities in Monroe WA. The only one that we found that had a storage unit in the name of Rachel Dunham was at Calico Discount Mini Storage, 17101 147 ST SE, County of Snohomish, Monroe, Washington. We spoke with employee Renee Gese and she provided the rental agreement stating that on 9/13/10 Rachel Dunham rented unit 18. Dunham provided her driver's license, address and Social Security Number in order to rent the unit. Gese gave us the access code and told us where Dunham's storage unit was. Det.

> Coblantz and I located the storage unit and confirmed it is still locked and secure. Det. Coblantz is currently at the unit maintaining the integrity of the scene until I can apply for a warrant.

Blair contends that the information in the affidavit was stale because several weeks passed from the time his wife rented the Monroe storage unit on September 13, 2010, and the date of the warrant, November 5, 2010. But this is not the correct time frame for determining staleness. As discussed above, the relevant times are (1) when the affiant received the tip and (2) when the informant observed the criminal activity.[FN23] Thus, the correct time frame would be from when Johnson received and provided the information to the detectives to when the search warrant was obtained.

> FN23. *Lyons,* 174 Wash.2d at 361, 275 P.3d 314.

***9** The affidavit states that Johnson provided this information to detectives on November 3, just two days before the search warrant was obtained. It also states that she told the detectives that the last time she saw the stolen property in the Lynnwood unit was after the Shoreline burglaries, stating that she saw "some valuable swords and the rest of the coins that were stolen in the Shoreline burglary." The affidavit refers to Shoreline burglaries that occurred on September 18, 2010 (victim Parvanta) and September 26, 2010 (victims Dolliver and Thompson). The affidavit also refers to another Shoreline burglary that occurred "the night before I seized the vehicle from Johnson," where "valuable coins" were stolen. September 28, 2010 is listed in the affidavit as the date Johnson's vehicle was seized.

That affidavit also states that Johnson told detectives that Blair told his wife to move the property after he was arrested. The affidavit states that Blair was arrested on October 21, 2010, and he and Johnson were booked into the King County jail "where they have remained." The affidavit also states that that the unit was last accessed on October 30 and that the detectives confirmed that the Lynnwood unit was mostly empty, on November 3, except for a few items.

The warrant was obtained November 5, 2010. Thus, it was served two days after the detectives received the information, and, at most, a week or two after Blair asked his wife to move the items to the Monroe unit; indeed the Lynnwood unit had been accessed just six days before the warrant was obtained and was not completely empty just one day before.[FN24] Thus, the court could reasonably infer that some of the stolen property had been moved less than a week before the warrant was sought and was likely to be found in the Monroe unit. Blair fails to show that this relatively short passage of time renders probable cause for the warrant stale. Additionally, the warrant was not

seeking a small number of items, but evidence of home burglaries committed over several months that were not likely to be consumed or destroyed.

> FN24. While Blair asserts that the arrest referred to was an earlier arrest in September, there was no specific reference to this arrest in the affidavit. Thus, a magistrate could have reasonably interpreted this to refer to the October 21 arrest. In any event, as set forth above, additional facts in the affidavit support the inference that items were still being moved to the Monroe storage unit as late as October 30, just a few days before the warrant was issued.

3. *Evidence of Calls from the Jail*

Blair next challenges the admission of evidence of calls he made from the jail to his wife about storing, moving, and selling the stolen property. He contends their admission was a violation of the privacy act, RCW 9.73.030(1), because the calls were protected by the marital privilege. We disagree.

The privacy act prohibits intercepting or recording a private communication transmitted by telephone unless all parties consent.[FN25] A communication is private when the parties have a subjective expectation that it is private, and that expectation is objectively reasonable.[FN26] Washington courts have repeatedly held that inmates have no objectively reasonable expectation of privacy in telephone calls from a local jail.[FN27] This is because inmates have reduced expectation of privacy, further diminished by warnings that telephone calls are recorded and may be monitored.[FN28]

> FN25. RCW 9.73.030(1).
>
> FN26. *State v. Christensen,* 153 Wash.2d 186, 193, 102 P.3d 789 (2004).
>
> FN27. *State v. Hall,* 168 Wash.2d 726, 729 n. 1, 230 P.3d 1048 (2010); *State v. Modica,* 164 Wash.2d 83, 88, 186 P.3d 1062 (2008).
>
> FN28. *Modica,* 164 Wash.2d at 88, 186 P.3d 1062.

***10** In *Modica,* our State Supreme Court held that a jail inmate had no reasonable expectation of privacy in telephone calls he made from the jail to his grandmother when both the defendant and his grandmother knew they were being recorded and that someone might listen to those calls.[FN29] The jail had a sign posted on the wall above where the calls were made warning that calls would be recorded and monitored, both parties had to listen to an automated recording of this warning, and the parties discussed the fact that their calls were being recorded.[FN30] The court concluded that given these facts, "[w]hatever expectation of privacy they had,

it was not reasonable." [FN31]

FN29. 164 Wash.2d at 88, 186 P.3d 1062.

FN30. *Modica,* 164 Wash.2d at 88, 186 P.3d 1062.

FN31. *Modica,* 164 Wash.2d at 88, 186 P.3d 1062.

But the court did caution that "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." [FN32] The court then recognized that intercepting or recording telephone calls violates the privacy act except under narrow circumstances and that the court will "generally presume that conversations between two parties are intended to be private." [FN33] But the court ultimately concluded that the defendant had no reasonable expectation of privacy "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." [FN34] The court also noted that "such facts may also be relevant to the issue of implied consent," but did not find it necessary to reach the issue of whether the parties impliedly consented to have their conversations recorded. [FN35]

FN32. *Modica,* 164 Wash.2d at 88, 186 P.3d 1062.

FN33. *Modica,* 164 Wash.2d at 89, 186 P.3d 1062.

FN34. *Modica,* 164 Wash.2d at 89, 186 P.3d 1062.

FN35. *Modica,* 164 Wash.2d at 89 n. 1, 90, 186 P.3d 1062.

Blair contends that because his calls to his wife were subject to the marital privilege, he did not lack a reasonable expectation of privacy under *Modica* because this was a call that was "otherwise privileged," and should therefore be presumed private. We disagree. As the State argues, Blair has failed to establish a marital privilege because engaging in conversation in the presence of others vitiates a privilege. The State cites case law holding that the marital privilege did not apply to letters from jail to wife from husband when the husband knew all outgoing mail was read by jail personnel.[FN36] Similarly, no privilege should apply to telephone calls made from jail between spouses who know the calls are being recorded, as was the case here.

FN36. *State v. Smyth,* 7 Wash.App. 50, 53, 499 P.2d 63 (1972).

As the State further contends, because Blair and his wife consented to the recording, they waived their spousal privilege and any violation of their privacy. The State cites *State v. Archie,* which held that tele-

phone calls from jail are not "private affairs" protected by article I, section 7 of the Washington State Constitution.[FN37] There, the court concluded that a jail inmate "expressly consented to recording when she pressed or dialed three to continue the call after the recorded warning" and therefore the recording did not violate article I, section 7.[FN38] Similarly here, Blair and his wife consented to the recordings by proceeding with the calls after being warned they would be recorded and monitored.

FN37. 148 Wash.App. 198, 204, 199 P.3d 1005 (2009).

FN38. *Archie,* 148 Wash.App. at 204, 199 P.3d 1005.

***11** Additionally, while *Modica* left open the issue of implied consent, the opinion did note that facts such as those in *Modica* "may also be relevant to the issue of implied consent." [FN39] The facts here are similar to those in *Modica:* Blair was in jail, there was a need for jail security, and as discussed above, the calls were not otherwise privileged. Blair fails to show that the trial court erred by admitting evidence of the jail calls.

FN39. 164 Wash.2d at 89 n. 1, 186 P.3d 1062.

Statement of Additional Grounds

Finally, Blair raises a number of issues in a pro se statement of additional grounds for relief, none of which have merit. He asserts claims of prosecutorial misconduct and an invalid search warrant that have already been addressed by appellate counsel and further contends that the trial judge committed misconduct by denying the mistrial and approving the search warrant. As discussed above, these claims lack merit. Blair also contends that the detective's access to personal information about the renter of the Monroe storage unit violated the right to privacy, that the search warrant affidavit contained false information, that the prosecutor committed misconduct by asking leading questions, that his attorney's failure to challenge the search warrant deprived him of effective assistance of counsel, and that the trial court improperly excused a juror for hardship without counsel present.

None of these claims have merit. Blair was not the renter of the Monroe storage unit whose alleged private information was given to police and therefore lacks standing to assert a privacy violation. He also fails to support his claim of false information in the affidavit and show that it was material and deliberately falsified. Additionally, he fails to show the alleged prosecutorial misconduct resulted in prejudice warranting reversal or that counsel's failure to raise every challenge to the search warrant at the trial level resulted in prejudice as such challenges may be raised for the first time on appeal. Finally, he fails to show how he was preju-

diced when the court allegedly improperly excused the juror for hardship.

We affirm.

WE CONCUR: LEACH, C.J., and VERELLEN, J.

Wash.App. Div. 1,2014.
State v. Johnson
Not Reported in P.3d, 2014 WL 953492 (Wash.App. Div. 1)

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

STATE OF WASHINGTON, Respondent, v. KELSEY MARIE JOHNSON, Defendant, and KEITH THOMAS BLAIR, Appellant.	)	No. 68971-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Keith Blair, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 8th day of April, 2014.

FOR THE COURT:

Judge

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