

NO. 41701-4-II

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

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STATE OF WASHINGTON, Respondent

v.

RODDY KENT KARTCHNER, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00329-7

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN EACH OF MR. KARTCHNER'S CONVICTIONS.
- II. KARTCHNER WAIVED HIS CLAIM OF ERROR AS TO THE DENIAL OF HIS MOTION TO SEVER WHEN HE FAILED TO RENEW IT PRIOR TO THE CLOSE OF THE EVIDENCE.
- III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.
- IV. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED THE ADMISSION OF TWO RECORDINGS OF TELEPHONE CALLS MADE FROM KARTCHNER TO HIS WIFE FROM THE JAIL WHICH WERE NOT PRIVILEGED AND TO WHICH RCW 5.60.060 (1) DID NOT APPLY.
- V. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE ONLY COUNTS WHICH CONSTITUTED SAME CRIMINAL CONDUCT WERE THE MONEY LAUNDERING COUNTS.

B. STATEMENT OF THE CASE

Roddy Kartchner opened a bank account at Bank of America in Hazel Dell on February 9, 2011. RP 337-41. Kartchner walked back into the Bank of America in Hazel Dell on February 11, 2009 holding a forged check for \$470,000 drawn on the account of Fantzer, Inc., a small software company in Connecticut owned and operated by Aaron LaBerge. RP 341-44, 698-701, exhibit 37. Someone who had accessed Fantzer's account knew that a CD held by the company would mature that day and transferred the money from the CD to his checking account. RP 699-700.

In fact, Mr. LaBerge found out a few days before this incident that the password for his company account had been changed without his knowledge or permission. RP 704. Much to his dismay, Bank of America was dismissive of his concerns and merely reset his password, suggesting that he likely had typed in the password incorrectly. RP 706-07. On February 11, 2009 Bank of America called Mr. LaBerge and asked him if he had changed the phone number associated with his account and he said “no,” he hadn’t. RP 698. At that point he was instructed to immediately go to his local Bank of America branch, which he did. RP 698. When he arrived at the bank he was asked if he had authorized \$400,000 in wire transfers and he said he hadn’t. RP 698.

Meanwhile, a few hours earlier back in Hazel Dell, Washington, Roddy Kartchner deposited the \$470,000 check into his newly opened account at Bank of America. RP 344. It was then negotiated for a cashier’s check in the same amount so that Kartchner could have immediate access to the money. RP 345, 348. Erin Sweatt of Bank of America handled the transaction. RP 341-48. Ms. Sweatt went through a series of routine checks before engaging in the transaction, such as confirming that there were adequate funds in the Fantzer account, that the signature on the check matched the Fantzer signature card (this is a subjective determination—RP 400), and that the check number is relatively in

sequence to other checks that had been clearing the account. RP 345-46. After performing these checks, Ms. Sweatt felt comfortable proceeding with the transaction. RP 346-47.

Over the course of the afternoon Kartchner initiated several transactions with the \$470,000 he had just acquired. RP 347. He withdrew \$12,000 in cash and he purchased two cashier's checks in the amount of \$20,000 each. RP 348-50, 53. One cashier's check was made out to CCCI (the defendant's construction company) and the other was made out to Forecast and Associates, which is Tom Goodwin's company. RP 750. Tom Goodwin is Kartchner's "partner" in these matters. RP 749, 51. The final transaction Kartchner attempted was two wire transfers for \$200,000 each. RP 354. One wire was supposed to go to the "Shanghai Fortune Machinery Company" in China and the second was supposed to go to "Trade Day, Inc." in Taiwan. RP 357. These companies were fictitious companies. RP 825-826. Mr. Kartchner left the bank after ordering the transfers but mentioned he might return later for more transactions. RP 358. Kartchner claimed that the money was to be used to build an apartment complex in Gresham, Oregon. RP 359. After the wire forms were completed but before the money actually left Bank of America, Ms. Sweatt received a call from another Bank of America employee informing her that the original \$470,000 check had been fraudulent. RP 359. Ms.

Sweatt immediately canceled the wire transfers. RP 360. Mr. Kartchner returned the next day seeking to negotiate one of the two \$20,000 cashier's checks he left with the day before (the cashier's check made out to his company, CCC1). RP 360-61, 737, 750, 814. He was asked to wait in the lobby and Ms. Sweatt called 911. RP 361. Mr. Kartchner was arrested. RP 362. Bank of America lost \$12,000 that day as a result of Kartchner's fraud. RP 364, 388.

Detective McClafferty of the Clark County Sheriff's Office responded to the bank and contacted Kartchner. RP 738. When McClafferty asked to speak to the defendant he became confrontational, saying "Why? Is it the large amount of money? Do I need to bring my attorney or have my attorney deposit it next time I have a large amount of money?" RP 740. Later, McClafferty interviewed Kartchner back at the police station. RP 741. When Detective McClafferty asked Kartchner what he planned to use the \$470,000 for he said it was for "some type of orbital product" rather than an apartment building in Gresham. RP 744. He said it was a loan. RP 744. When asked to describe the "orbital product" he seemed confused and couldn't describe it. RP 744. When asked if he had any documentation for this nearly half a million dollar loan the defendant said "no, that's still in progress." RP 745. The defendant agreed, however, that when one purchases a home using a loan, the loan would never fund

prior to the execution of the loan documents. RP 746. When asked how he got \$470,000 without any loan documentation he paused for five to ten seconds and said "Tom [Goodwin] was in charge of getting the financing." RP 746-47.

When McClafferty asked the defendant whether any of the money was still in his account, he claimed that around \$418,000 was still there. RP 750. Because Detective McClafferty knew this was untrue, he confronted Kartchner with the original copies of the wire transfers and asked him to explain them. RP 752. Whereas the defendant had been relaxed up to that point, when confronted with the wire transfers he became "very, very pale in color" and "very nervous and stumbled over his words." RP 753. He said "I was just following instructions from Tom and Mr. Moore." RP 753. Kartchner explained that Mr. Moore is the person who was providing the "loan" and that he lived in the United Kingdom. RP 754. When questioned about Tom Goodwin, the defendant was very evasive. RP 754-55.

In addition to the "orbital engine" project and the Pine Street Condominium project in Gresham, Kartchner also told Detective McClafferty that he had partnered with a woman named Lynn Sysel who was set to inherit \$49 million. RP 834-35. Kartchner claimed that Sysel was going to give him 45% of that money if he helped her get the

inheritance. RP 835. At the time the defendant attempted to steal \$470,000 the Pine Street Condominium project was in foreclosure. RP 929.

On the same day that Kartchner presented the fraudulent \$470,000 check to Bank of America, a man named Andrew Schneider deposited a check in Kartchner's Bank of America account for \$80,000 drawn on the account of Dr. Neville Alleyne. RP 651, 661, 717, 880. Dr. Alleyne is an orthopedic surgeon who lives in La Jolla, California. RP 716. Schneider made this deposit from a Bank of America branch in Brooklyn, New York. RP 633, 661. Dr. Alleyne recalled that he received a phone call from Bank of America asking if had written a check for \$80,000. RP 717. He replied he hadn't and, amidst much laughter in the courtroom, told of how he called his wife while he was on the phone with Bank of America and said "Honey, did you—did you write a check for \$80,000 that you forgot to tell me about?" She replied that "no," she hadn't. RP 717. Dr. Alleyne had never met or heard of Roddy Kartchner. RP 719. Detective McClafferty questioned Kartcher repeatedly about the \$80,000 check and after a great deal of waffling and evasion he finally admitted that he knew how the \$80,000 came to be deposited in his account. RP 806-10.

On February 20, 2009 Kartchner made a phone call to his wife from the jail. RP 786-87. Prior to making a call from the jail (with the exception of attorney-client calls), all inmates are warned that their phone

conversation is being recorded and monitored. RP 784. On the call, Kartchner asked his wife "So, did you find a home for my cases?" His wife replied "No, and here's why. The more I thought about it and I needed to call you back. They took pictures in that room. We don't want to arouse suspicion. They've got a picture of everything that was in that room." RP 791. This call refers to briefcases that contained promissory notes that pertained to counts for which Kartchner was acquitted. RP 778, CP 307-311. The recordings were admitted into evidence but are largely inaudible on the transcript. Later that day Kartchner spoke to his wife on the phone again from the jail and learned that the police had confiscated his briefcases during a search warrant. RP 793. He became very angry with his wife and scolded her. RP 793-96. She apologized profusely. Id. The defendant also asked his wife, during this call, to remove some boxes from his home office. RP 792-96.

During a search of the defendant's computer detectives found a second check written on Fantzer, Inc. check for \$130,000. RP 953.

Kartchner was convicted after trial of: Count 9, attempted theft in the first degree from Aaron LaBerge; Count 10, first degree theft from Bank of America; Count 11, first degree identity theft of Aaron LaBerge on 2-11-09 (\$470,000 check); Count 12, forgery on 2-11-09 (\$470,000 check); Count 13, money laundering (first attempted wire transfer); Count

14. money laundering (second attempted wire transfer); Count 15, attempted first degree theft from Dr. Alleyne; Count 16, first degree identity theft of Dr. Alleyne; Count 17, attempted first degree theft on 2-12-09 from Bank of America (the \$20,000 cashier's check to CCU); Count 18, second degree identity theft from Aaron LaBerge (the \$130,000 check); Count 19, attempted tampering with physical evidence; and Count 20, attempted tampering with physical evidence. CP 311-23. This timely appeal followed. CP 363.

### C. ARGUMENT

#### I. THE EVIDENCE IS SUFFICIENT TO SUSTAIN EACH OF MR. KARTCHNER'S CONVICTIONS.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Sullivan*, 119 Wn.2d 190, 829 P.2d 706 (1992); *State v. Cochran*, 94 Wn.2d 716, 226 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from

the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Kartchner's claim of insufficiency rests entirely on the mens rea element of each offense. He claims that he did not act either intentionally or knowingly. He makes the same argument in this appeal that he made to the trial court below: That he was an unwitting dupe; that he was used and had no idea that his activities were part of a fraudulent scheme. He states in his brief: "[T]he evidence merely proves that the defendant acted as a gullible dupe of the real criminals who were manipulating him and Mr. Goodwin into believing that they had finally found their long sought-after financing for one of their projects." The problem with this argument is that it is an argument based on credibility and the jury rejected it. Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The evidence demonstrated that Kartchner acted as a co-conspirator in an elaborate financial fraud scheme. That his co-conspirators were unnamed does not negate his culpability or lead to an inference that he was a dupe. The jury heard that Kartchner holds a

Bachelor's degree and earned half the credits needed for a Master's degree in Business Administration. RP 1219. They heard that he had more than twenty years of experience in construction. With respect to the \$470,000 check drawn on Fantzer, Inc.'s account, the jury heard that the money had conveniently been available in Fantzer's account because a certificate of deposit had matured that day and been transferred into Fantzer's checking account. The jury heard that the account had been breached several days prior when someone changed the phone number on the account. The jury heard that the defendant obtained two cashier's checks in the amount of \$20,000 each, as well as \$12,000 cash from the \$470,000 and that he attempted to make two wire transfers totaling \$400,000 of the remaining money. This evidence leads to an inference that the defendant was making these transactions on behalf of others and that the cash and the two cashier's checks constituted payment for his services.

Regarding the \$80,000 nearly stolen from Dr. Alleyne, the jury heard that the money was transferred into Kartchner's account on the same day he negotiated the \$470,000. The jury saw an email from Andrew Schneider (an un-charged co-conspirator) to Kartchner in which Schneider identifies Dr. Alleyne and describes him as an "investor." RP 804. (See exhibits 25-28, email correspondence between the defendant and Mr. Schneider). A reasonable juror would conclude, in light of all the other

evidence, that this email was written in such a way to give Kartchner plausible deniability. Although the jury heard that it was Kartchner who brought the \$80,000 to the attention of law enforcement, he did so *after* he had been arrested for his activities on February 11, 2009. Kartchner makes much of the fact that neither he nor his wife attempted to access the \$80,000, but this argument ignores the fact that Kartchner has already been arrested for his activities relating to the \$470,000 check and was under suspicion by law enforcement. A person in Kartchner's position would avoid contact with the money in an attempt to avoid further criminal liability. A reasonable juror could further conclude that he was doing damage control at that point and attempting to portray himself in an innocent light. The jury concluded that it was unreasonable for Kartchner to have believed that investors would hand over hundreds of thousands of dollars in unsecured loans, with no paperwork to verify the investment, to develop an "orbital engine," sight unseen. The jury heard Kartchner's claim that he was an unwitting dupe and concluded he was not credible. This claim cannot be reviewed on appeal.

Regarding Mr. Kartchner's conviction for attempted tampering with physical evidence, he claims, without citation to authority, that the convictions cannot be sustained because he had the legal right and authority to tamper with physical evidence that was: 1) located in his

home; and 2) not contraband. Kartchner does not argue that the State failed to prove that had reason to believe that an official proceeding was pending or about to be instituted or that he destroyed, mutilated, concealed, removed, or altered physical evidence with the intent to impair its appearance, character, or availability in such pending or prospective official proceeding. He agrees the State proved these things. Rather, he appears to argue that where the evidence is located in a suspect's home, the State must prove an additional element of the crime, to wit: that the evidence was contraband.

The statute contains no such additional element, and the State, after a diligent search, could find no case which holds this is a non-statutory element of tampering with physical evidence. Kartchner's argument can be summarized by the following example: A defendant commits a rape and the crime produced substantial physical evidence (such as torn clothing and sheets with bodily fluid) that the defendant didn't bother to clean up. Police officers arrive at his door and pound on it, exclaiming "Police! We have a search warrant! Open the door!" The defendant, knowing that an official proceeding is about to be instituted as a result of the rape, grabs the torn clothing and the soiled sheets and throws them into a burning fireplace. Once they are sufficiently burned, he then opens the door. According to Kartchner's theory, no conviction for tampering with

physical evidence could be sustained because the torn clothing and the soiled sheets are not contraband.<sup>1</sup> This is a specious argument for which there is no authority. This Court should not consider assertions which are not supported by argument and citation to authority. *State v. Corbett*, 158 Wn.App. 576, 597, 242 P.3d 52 (2010) (“We do not review assigned errors where arguments for them are not adequately developed in the brief.”)

The evidence is sufficient to sustain Kartchner’s convictions.

II. KARTCHNER WAIVED HIS CLAIM OF ERROR AS TO THE DENIAL OF HIS MOTION TO SEVER WHEN HE FAILED TO RENEW IT PRIOR TO THE CLOSE OF THE EVIDENCE.

Kartchner complains that the trial court erred in denying his motion to sever, but he cannot raise this claim in this appeal because he waived the claim below. Although Kartchner couches this claim in the same constitutional language in which he couches each of his claims, namely that he was denied his constitutional right to a “fair trial,” the denial of a motion to sever is not constitutional error and is governed by court rule. CrR 4.4 provides, inter alia:

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<sup>1</sup> The State uses the term “contraband” in its colloquial sense to describe items which are illegal to possess, such as illicit drugs or child pornography. The actual definition of contraband is an item that is illegal to trade, import, export or smuggle.

(a) *Timeliness of motion -- Waiver.*

(1) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

Mr. Kartchner made a pre-trial motion to sever offenses but he did not renew the motion during trial. When a motion for severance of offenses is not renewed at the close of the evidence, it was waived. *State v. Ben-Neth*, 34 Wn.App. 600, 606, 663 P.2d 156 (1983); *State v. Hartnell*, 15 Wn.App. 410, 550 P.2d 63, *review denied*, 87 Wn.2d 1010 (1976); *State v. Henderson*, 48 Wn.App. 543, 740 P.2d 329, *review denied*, 109 Wn.2d 1008 (1987).

III. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

Defendant cites to two passages of the deputy prosecutor's closing argument and claims that they constitute misconduct. As an initial matter, Kartchner argues this issue as though an objection were made at trial to the prosecutor's argument. However, there was no objection to the argument. As Kartchner cites to the standard of review for prosecutorial misconduct that was objected to at trial (that the conduct was both

improper and prejudicial). his argument fails. In order to prevail on a claim of prosecutorial misconduct on appeal that was not objected to a trial, the defendant bears the burden of demonstrating that the remark was so flagrant and ill-intentioned that it causes enduring prejudice and could not have been remedied by a curative instruction. *State v. Boehming*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005); *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). “In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Here, Kartchner does not claim that the supposed misconduct was either flagrant or ill-intentioned, nor does he claim that it could not have been cured with a curative instruction. As he bears the burden of making this showing, his claim necessarily fails.

Moreover, the remarks by the prosecutor that Kartchner complains of were not improper. When viewed in context, the prosecutor was rebutting Kartchner’s defense that he was an unwitting dupe who acted without knowledge and intent. Kartchner put this theory in issue, not the State. The State was entitled to opine on the absurdity of his claim that he, having earned both a Bachelor’s Degree and half the credits need for a Master’s Degree in Business Administration, had no idea that his acts

were illegal, unreasonable or suspicious. The prosecutor's argument was proper. The prosecutor did not misstate the law, nor did he ask the jury to ignore the law. The jury was properly instructed on the elements of each crime, to include the applicable mens rea, and the jury is presumed to follow the court's instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 75 L. Ed. 2d 446, 103 S. Ct. 1205 (1983).

The prosecutor did not commit misconduct. Further, the defendant has ignored his burden to demonstrate that remarks were so flagrant and ill-intentioned that they could not have been obviated by a curative instruction. This Court should reject this assignment of error.

IV. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED THE ADMISSION OF TWO RECORDINGS OF TELEPHONE CALLS MADE FROM KARTCHNER TO HIS WIFE FROM THE JAIL WHICH WERE NOT PRIVILEGED AND TO WHICH RCW 5.60.060 (1) DID NOT APPLY.

The trial court did not err in admitting the recorded jail conversation between the defendant and his wife, Wendi Kartchner, in which he asked her to conceal and/or destroy evidence that he knew law enforcement officers were attempting to collect because the recording was not an examination of a spouse as contemplated by RCW 5.60.060 (1) and because the communication was not privileged. Prior to making a phone

call from the Clark County Jail an inmate is warned that the call will be recorded and is subject to monitoring. RP 784.

In the midst of the first day of trial defense counsel made a motion to exclude the recording of the telephone calls recorded by the jail between the defendant and his wife in which he asked her to get rid of brief cases containing files with the promissory notes he executed between himself and his friends from whom he borrowed money. This evidence pertained to counts for which he was ultimately acquitted (see CP 307-311).

Defense counsel did not disagree that the conversation was not private given that both the defendant and his wife were warned that their conversation was being eavesdropped upon and recorded (and would be used against the defendant). Rather, he argued that there was no waiver of the marital communications privilege because (1) his client was not specifically advised of the privilege and (2) his client did not execute a formal waiver of the privilege. Counsel cited no authority for the proposition that one must be advised, in a fashion similar the constitutional warnings in *Miranda* or *Ferrier*,<sup>2</sup> that the statutory privilege exists and that it can only be waived by a knowing, intelligent and voluntary waiver.

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

The trial court initially agreed with the State that the conversation was not privileged in the first place because it was conducted in the presence of a third party (the eavesdropper who was listening to it and recording it). The trial court deferred ruling, saying "I think we could reserve on the ruling on that to give both parties an opportunity." RP 420.

By the next day both the deputy prosecutor and the court had done research on the applicability of RCW 5.60.060 (1) to the case. Defense counsel had not. The State argued that RCW 5.60.060 (1) did not apply according to its plain terms because the statute only prohibits a party from *examining* a spouse about his or her communication with the other spouse. Because Wendi Kartchner would not be called as a witness by the State, she would not be "examined" about this communication unless the defendant chose to conduct such an examination. The State further argued, as it had the day before, that the communication was not confidential because it was made in the presence of an eavesdropper and the parties knew it. Having been provided no authority for counsel's motion to exclude the recording, the trial court ruled that the communication was not confidential because it was made in the presence of an eavesdropper and the married parties knew it.

By statute in Washington, a spouse of a party is incompetent to testify over the objection of the party spouse, subject to a number of restrictions and exceptions. RCW 5.60.060 provides in relevant part:

(1) A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband . . . .Id. This statutory privilege against spousal testimony evolved from an English common law rule that disqualified spouses from testifying against each other in a trial or hearing. *State v. Kephart*, 56 Wash. 561, 563, 106 Pac. 165 (1910); *State v. Diana*, 24 Wn. App. 908, 910, 604 P.2d 1312 (1979); *State v. Osborne*, 18 Wn. App. 318, 322, 569 P.2d 1176 (1977), *review denied*, 89 Wn.2d 1016 (1978). See, generally, 8 J. Wigmore, Evidence § 2227 (McNaughton rev. 1961).

The privilege is designed to encourage marital harmony by forbidding testimony that is objectionable to the witness's spouse. *State v. Thorne*, 43 Wn.2d 47, 260 P.2d 331 (1953); *State v. White*, 50 Wn. App. 858, 862, 751 P.2d 1202 (1988). The spouse testimonial privilege also reflects the "natural repugnance" of the direct or indirect incrimination of one spouse by the other, and protects the witness spouse from the trilemma of either: committing perjury, being in contempt of court, or jeopardizing the marriage. [Footnotes omitted.] Comment, The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications, 54 Wash. L. Rev. 65, 70 (1978). See, also, 8 J. Wigmore, §§ 2227-2228.

The testimonial privilege has been harshly criticized as lacking modern justification. Professor Wigmore termed it "the merest anachronism in legal theory and an indefensible obstruction to truth in practice." 8 J. Wigmore, *Evidence* § 2228 at 221 (McNaughton rev. 1961). Professor McCormick claims that the privilege "is an archaic survival of a mystical religious dogma and of a way of thinking about marital relationships that is today outmoded." E. Cleary, *McCormick on Evidence* § 66 at 162-63 (3d ed. 1984). Still others call the privilege a "sentimental relic" that should long ago have been discarded. *Hawkins v. United States*, 358 U.S. 74, 81, 3 L. Ed. 2d 125, 79 S. Ct. 136, 140 (1958) (Stewart, J., concurring).

Washington courts have accordingly narrowly interpreted the marital testimonial privilege so as to exclude the least amount of competent evidence. See *State v. Kosanke*, 23 Wn.2d 211, 217-18, 160 P.2d 541 (1945); *State v. Wood*, 52 Wn. App. 159, 163, 758 P.2d 530 (1988); *State v. Bonaparte*, 34 Wn. App. 285, 289, 660 P.2d 334, review denied, 100 Wn.2d 1002 (1983). This restrictive interpretation is consistent with Washington's interpretation of other privileges that conflict with the essential and inherent judicial power to compel the production of evidence. See, e.g., *Pappas v. Holloway*, 114 Wn.2d 198, 787 P.2d 30 (1990) (attorney-client); *State v. Harris*, 51 Wn. App. 807, 812, 755 P.2d

825 (1988) (psychiatrist-patient); 5A K. Tegland, Wash. Prac., Evidence § 162(2), at 8 (3d ed. 1989).

Here, the trial court did not err in admitting the recording of the jail telephone calls because the communications on the calls were not privileged, and because RCW 5.60.060 (1) by its plain terms does not apply to this case.

a. *Communication not privileged.*

The communication made between Kartchner and his wife on the recorded jail telephone calls was not privileged. In order for a communication to be privileged it must be made solely between the married parties and it must not be overheard by a third party or revealed to a third party or else the privilege is destroyed. *State v. Wilder*, 12 Wn.App. 296, 529 P.2d 1109 (1974); *State v. Burden*, 120 Wn.2d 371, 841 P.2d 758 (1992) (overruling *State v. Clark*, 26 Wn.2d 160, 168, 173 P.2d 189 (1946)), which opined, in dicta, that a third party to whom a wife disclosed a marital communication should not be allowed to testify about the communication).

An eavesdropper, for example, may be called to testify about a communication he or she overheard between spouses. This is so even where the married parties intend that the communication be private and take substantial steps toward keeping it private. For example, if spouses

went into a public bathroom stall to have a private conversation, having checked all of the other stalls to make sure they were empty, an eavesdropper who hid his or her presence by standing on a nearby toilet would be allowed to testify to what he overheard the parties say. Here, the Kartchners had no illusions about the privacy of their conversation—they knew it wasn't. They knew they were being listened to and recorded.

In *State v. Fiddler*, 57 Wn.2d 815, 360 P.2d 155 (1961), the Supreme Court held where the defendant sent letters to his wife and his wife asked a third party to read it to her, there was not a successful confidential communication. The Court, quoting *State v. Slater*, 36 Wn.2d 357, 218 P.2d 329 (1950), said: "If the communication is heard by a third party, even if by eavesdropping, the third party may testify to it." *Fiddler* at 819; *Wolfe v. United States*, 291 U.S. 7, 78 L.Ed. 617, 54 S.Ct. 279 (1934). The Supreme Court affirmed the trial court's decision to admit the letters into evidence. *Fiddler* at 820.

In *State v. Grove*, 65 Wn.2d 525, 398 P.2d 170 (1965) the defendant, who was incarcerated on suspicion of murdering of his mother-in-law, wrote a letter to his wife from the jail attempting to exculpate himself. After completing the letter he placed it unsealed in the prison mail system because he knew that according to jail policy, the letter would be read by jail staff and possibly censored. *Grove* at 526. The prosecution

discovered the existence of the letter when the wife, after receiving it, showed the letter to a third party. *Id.* The defendant argued, inter alia, that the trial court violated RCW 5.60.060 (1) by admitting the letter into evidence at trial. *Grove* at 527. The Supreme Court, relying on *Fiddler*, supra, held that there was neither an intent between the parties to keep the communication confidential nor was there a successful confidential communication. The Court affirmed the trial court's decision to admit the letter. *Id.* The Court said: "Here, it is conceded that the appellant delivered the letter to a jail guard, unsealed, knowing that it would be censored under existing jail rules, and that the letter was stamped with a large 'C', indicating censorship." *Id.*

Defense counsel spoke of waiver at trial, but the concept of waiver is inapplicable to a conversation that was not privileged to begin with. The trial court did not err in admitting the recording of the jail telephone calls where the communications made between the Kartchners were not privileged. Mr. Kartchner had no expectation of privacy or confidentiality in a phone which he knew was being recorded and heard by one or more eavesdroppers.

b. *RCW 5.60.060 (1) does not apply*

RCW 5.60.060 (1) by its plain language does not apply to this case because Wendi Kartchner was not called to testify against her husband.

nor was she “examined” about a confidential communication. The admission of the recording was the functional equivalent of testimony by a third party about a conversation two spouses had in his or her presence. The Supreme Court has applied the testimonial privilege narrowly to exclude only in-court spousal testimony. RCW 5.60.060 (1) does not bar third-person testimony concerning extrajudicial statements of a spouse. *State v. Burden*, supra. The trial court did not violate RCW 5.60.060 (1) by admitting the recordings of the jail telephone calls because RCW 5.60.060 (1) does not apply to this situation.

The trial court properly admitted the jail telephone recordings and Kartchner’s claim of error fails.

V. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE ONLY COUNTS WHICH CONSTITUTED SAME CRIMINAL CONDUCT WERE THE MONEY LAUNDERING COUNTS.

RCW 9.94A.589 (1)(a) provides, in relevant part:

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . “Same criminal conduct,” as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

“In order for separate offenses to “encompass the same criminal conduct” under the statute, three elements must therefore be present: (1) same criminal intent, (2) same time and place, and (3) same victim. The absence of any one of these prongs prevents a finding of same criminal conduct.” *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Moreover, an appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838, 111 S. Ct. 110 (1990).

Kartchner claims that the trial court should have counted the offenses in counts 10, 11, 12, 17 and 18 as same criminal conduct because he had only one broad intent: to steal. He cites no relevant authority to support his argument. He cites *Porter*, supra, but *Porter* involved “back-to-back, uninterrupted” drug deliveries. *Porter* at 186. Similarly, *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998) involved delivery of heroin and conspiracy to deliver heroin. The Court of Appeals ruled that the differing mens rea elements between the two crimes did not compel a finding of separate criminal conduct, and that the crimes had the same objective intent. Last, he cites the wholly inapplicable *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004). In *Saunders*, the trial court found ineffective assistance of counsel where counsel failed to argue that the

rape and kidnapping in that case were same criminal conduct. The kidnapping and rape were conducted simultaneously, against the same victim and had the identical criminal purpose. *Saunders* at 825.

Here, there were four crimes involving victim Aaron LaBerge. On February 11, 2009, Kartchner committed attempted theft in the first degree, first degree identity theft, and forgery, and on February 12, 2009 Kartchner committed second degree identity theft against LaBerge. Under RCW 9.35.020(6) “Every person who, in the commission of identity theft, shall commit any other crime may be punished therefore as well as for the identity theft, and may be prosecuted for each crime separately.”

Kartchner does not make a specific argument about the actual facts of these crimes, he simply asserts that his broader objective of stealing compels a finding of same criminal conduct. However, they are not same criminal conduct. First, the attempted theft and the identity theft should be treated separately under RCW 9.35.020(6), *supra*. Second, the forgery and the identity theft in counts 11 and 12 cannot be considered same criminal conduct because although Aaron LaBerge was a victim in both counts, Bank of America was an additional victim in the forgery count. Two crimes cannot be the same criminal conduct if one involves two victims and the other involves only one. *State v. Davis*, 90 Wn. App. 776, 782, 954 P.2d 325 (1998). Mr. LaBerge was a victim of the forgery because

Kartchner successfully negotiated the \$470,000 check. Bank of America was also a victim of the forgery because Kartchner successfully stole \$12,000 from Bank of America as a result of the forgery. However, Mr. LaBerge was the only victim of the identity theft. RCW 9.35.005(5) defines a "victim" of identity theft as "a person whose means of identification or financial information has been used or transferred with the intent to commit, or to aid or abet, any unlawful activity." The trial court did not err in concluding that counts 10, 11, and 12 were not same criminal conduct. Likewise count 18, although committed against Aaron LaBerge, was not same criminal conduct because the jury found that it occurred on February 12, 2009. Last, count 17 cannot be considered the same criminal conduct as any other count because the victim was Bank of America and it occurred on February 12, 2009. Kartchner was properly sentenced.

D. CONCLUSION

Mr. Kartchner's conviction and sentence should be affirmed in all respects.

DATED this 21<sup>st</sup> day of February, 2012.

Respectfully submitted:

ANTHONY F. GOLIK  
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By:   
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# CLARK COUNTY PROSECUTOR

## February 16, 2012 - 2:45 PM

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