COA NO. 68971-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

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

The Honorable Mariane C. Spearman, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

In an effort to shield the prosecutor's misconduct in eliciting evidence in violation of the pre-trial order, the State maintains Youngberg "unexpectedly" divulged the excluded evidence. Brief of Respondent (BOR) at 18. The trial court did not see it that way, noting "it wasn't blurted out by the witness. It was actually asked by the prosecutor." 7RP 44-45, 47-48, 50-51, 65-66. For that matter, the trial prosecutor didn't see it that way, defending her elicitation of Youngberg's testimony on the ground that the jury needed to know how Youngberg met Blair. 7RP 41-43.

The State claims the error was harmless, giving lip service to the requisite standards for determining whether a new trial is warranted. In actuality, its harmless error argument looks like a sufficiency of evidence argument, where all the evidence and reasonable inferences are considered in the light most favorable to the State while conflicting evidence and inferences favorable to the defense are disregarded. BOR at 22-23. That is not the standard for determining whether prosecutorial misconduct or trial irregularity results in prejudice requiring a new trial.

A new trial is required when the prosecutor commits misconduct and there is a substantial likelihood the misconduct affected the jury's verdict. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). "If we are unable to say from the record before us whether the petitioner would or would not have been convicted but for the comment, then we may not deem it harmless." Charlton, 90 Wn.2d at 664.

Similarly, a denial of a mistrial motion will be overturned where is a substantial likelihood that the irregularity affected the verdict and thus deprived the defendant of a fair trial. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008); State v. Gamble, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). The opening brief applies these standards in addressing the prejudice in this case resulting from the error. See Brief of Appellant (BOA) at 25-32.

In addressing the irregularity claim, the State claims a trial court only abuses it discretion if no reasonable judge would have reached the same conclusion. BOR at 24. "Strict application of such a standard would mean that an appellate court would never reverse without a hearing to determine the general reasonableness of the judge." Coggle v. Snow, 56 Wn. App. 499, 506, 784 P.2d 554 (1990). The complete abuse of discretion standard is as follows: "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or

untenable reasons." Teter v. Deck, 174 Wn.2d 207, 215, 274 P.3d 336 (2012) (citing In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Littlefield, 133 Wn.2d at 47.

The trial court's decision not to grant a mistrial following the violation of its in pre-trial order is manifestly unreasonable in light of the facts and the applicable legal standard for trial irregularities. In deciding whether an irregularity deprived the accused of a fair trial, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

The error here was serious, the prejudicial evidence elicited in error was not cumulative, and no curative instruction was given to cure the prejudice. BOA at 30-31. Indeed, the State concedes testimony violating an order in limine is a "serious irregularity." BOR at 24 (citing State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998)). The State also concedes the evidence was not merely cumulative. BOR at 24.

That leaves the question of whether this serious, non-cumulative error was cured by an instruction. The trial court agreed an attempt to cure the error through instruction would do more harm than good, so it makes no sense for the State to argue that a mistrial was unwarranted because jurors would have been presumed to follow such instruction had it been given. 7RP 65-66; BOR at 26. It wasn't given because the damage was already done and the instruction would only have made it worse. The question is not whether an instruction could have cured the prejudice, but whether an instruction that was actually given cured the prejudice. Gamble, 168 Wn.2d at 177. The State's citations to cases where an instruction to disregard was actually given are therefore inapposite. Id. at 178-79; State v. Weber, 99 Wn.2d 158, 160-61, 166, 659 P.2d 1102 (1983).

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

The State relies heavily on the principle that evidence of repeated criminal activity over a period of time renders the passage of time less significant in assessing staleness. BOR at 29.

But that principle is predicated on the notion that the defendant was engaging in such activity during the period of time between when the contraband was observed in a given place and when the warrant was

requested or executed. Wayne R. LaFave, Search and Seizure § 3.7(a) 473-74 (5th ed. 2012); see, e.g., United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972) ("Here the affidavit in support of the warrant recites activities extending from some time in June to September 30, 1970, the latter date being approximately three weeks before the affidavit was filed."); United States v. Spry, 190 F.3d 829, 836 (7th Cir. 1999) (warrant issued in February 1998 not stale where affidavit recounted evidence seized from the defendant's home under a May 1997 warrant, together with reports that defendant continued to traffic in drugs following her 1997 arrest).

Probable cause to search "is concerned with facts relating to a presently existing condition." LaFave, Search and Seizure § 3.7 at 462. In other words, the passage of time is less significant because ongoing criminal activity allows for the inference of current activity taking place right up to the time of the issuance of the warrant. See United States v. Pless, 982 F.2d 1118, 1126 (7th Cir. 1992) ("Although one of the informants had given Officer Helms and Sgt. Barrett some of the information about three months before the preparation of the affidavit, the most critical aspects must fairly be read as referring to current activity.").

According to the affidavit, Blair and Johnson were arrested on October 21 and booked into the King County Jail, where they remained.

2CP 89. The warrant for the Monroe unit was not presented and executed until November 5 — a 15 day gap in time. 2CP 91, 94. Nothing in the affidavit shows Dunham herself burgled, so ongoing activity consisting of burglaries cannot be attributed to her.

This circumstance must be read in conjunction with others. The place to be search was a storage unit, not a residence. See United States v. Johnson, 437 F.3d 69, 72 (D.C. Cir. 2006) (greater lengths of time should be tolerated in assessing the staleness of information regarding a person's address, as opposed to their possession of contraband, because a person's address is often less fluid than a person's possession of incriminating evidence).

At the same time, the passage of time increases in importance when "portable and easily moved" items are involved. LaFave, Search and Seizure § 3.7 at 479 (citing United States v. Van Ert, 350 F. Supp. 1339, 1341 (D.C. Wis. 1972) ("A 55-day period as we have here between observations on which the search warrant for movable personal property and the application for the warrant, without being updated or without an explanation for the delay, automatically precludes a finding of probable cause."). The stolen property involved here was all portable and easily moved, and in fact had been moved out of the Lynnwood storage unit prior to its placement in the Monroe storage unit. 2CP 90-91.

The State relies on the statement in the affidavit indicating "a lot of property" filled the Lynnwood unit. BOR at 31. But before seeking a warrant for the Monroe unit, police were already aware that the Lynnwood was mostly empty. 2CP 90-91. The dispositive question is not *whether* a lot of movable property still existed, but *where* that property existed.

About seven weeks elapsed between when the Monroe unit was rented to store stolen property and the presentation of the warrant. The affidavit shows Dunham rented the Monroe unit on September 13 for the purpose of storing stolen property. 2CP 91. The affidavit recites that Blair "told Rachel Dunham to move the property after he got arrested." 2CP 90. Blair was arrested on October 21. 2CP 89. The warrant was executed on November 5. 2CP 91, 93. Given that Dunham started renting the Monroe unit on September 13, the inference is that Blair was telling Dunham to move the property *out* of the Monroe unit, not *into* it. BOA at 39. That fact undermines timely probable cause to believe evidence would be found in the Monroe storage unit.

The State attempts to counter this point by claiming "Johnson was likely speaking of Johnson and Blair's earlier arrest, which occurred in early September. See 6RP 104, 112." BOR at 32 n.4. The State claims this reading of the warrant supports its timeliness. Id. But notice the State's citation to the record. The State cites to the trial transcript, not the

affidavit in support of the search warrant. This runs afoul of the established rule that review is limited to the four corners of the supporting affidavit. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). It is improper for the State to go beyond the information contained in the affidavit in an effort to show the warrant was not stale. See State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988) ("When adjudging the validity of a search warrant, we consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested.").

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

The State argues Blair knew his jail calls were subject to monitoring and recording and he therefore had no reasonable expectation of privacy in those calls under the Privacy Act. BOR at 32-33. The Supreme Court in Modica, however, expressly repudiated the notion that a conversation ceases to be private simply because the participants know it will be recorded. State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008). The Court recognized "[s]igns or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy." Modica, 164 Wn.2d at 89.

Why then, did Modica lack a reasonable expectation in the privacy of his jail calls? The Court gave us the answer: "because Modica was in jail, because of the need for jail security, *and because Modica's calls were not to his lawyer or otherwise privileged*, we conclude he had no reasonable expectation of privacy." Id. (emphasis added). That is not dicta, as claimed by the State. That is the Court's holding.

The calls between Blair and his wife were privileged for the reasons set forth in the opening brief. BOA at 52-56. Blair therefore had a reasonable expectation of privacy in those calls and they should have been suppressed.

The State also argues Blair consented to the recording of his jail calls. BOR at 35-36. There can be no true consent when there is no choice but to consent. The Court in Modica, while not deciding the issue, acknowledged the argument that jailed inmates find themselves in an inherently coercive situation. Modica, 164 Wn.2d at 90 n.2. Inmates do not have the option of using an untapped telephone or not having their calls recorded, regardless of whether the inmate has been charged with a crime, is held on a petty or serious offense, is there for public safety reasons, or simply is too poor to afford minimal bail. Id.

Consent means "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person." Black's

Law Dictionary 323 (8th ed. 2004). Where intrusion into an otherwise private matter is involved, purported consent to the intrusion does not truly exist if coerced. To be valid, consent must be freely and voluntarily given where an intrusion into private affairs under article I, section 7 is at stake. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The communications between Blair and his wife likewise implicate a privacy interest, so it is appropriate to adopt the same standard.

To communicate with others, including spouses and other family members, use of the jail telephone is often the only practical means available to inmates, especially in light of limited jail visitation schedules. Inmates have no choice but to submit to the recorded call system. That is not voluntary consent. Counsel is aware of no case or statute in any context dealing with consent that equates involuntary consent with consent. Blair did not consent to the destruction of his privacy interest.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Blair requests reversal of the convictions.

DATED this 14 day of June 2013.

Respectfully Submitted,

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	)	
Appellant.	)	

DECLARATION OF SERVICE

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

THAT ON THE 6TH DAY OF JUNE 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH BLAIR
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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF JUNE 2013.

X Patrick Mayovsky