68971-1

68971-1

NO. 68971-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES

1. A trial court will 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. Keith Blair was charged with ten 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 for offenses against twelve different households between July and October 2010. Blair was separately prosecuted for similar offenses in both King and Snohomish Counties, evidence of which was to be excluded by a pretrial order in limine. During direct examination, one of the State's witnesses testified that he had purchased gold from Blair in the past and mentioned having spoken with officers from the Bellevue Police Department, which investigated one of the other cases. Given the sheer number of charges Blair was facing in this case, as well as properly admitted evidence that Blair and others had sold stolen goods, did the trial court act within its discretion in concluding that reference to the excluded evidence was not sufficiently prejudicial to warrant a mistrial?

2. To establish reversible prosecutorial misconduct, Blair must show both improper conduct and a substantial likelihood that the misconduct affected the jury's verdict. In addition to properly admitted evidence demonstrating that Blair had engaged in an extensive campaign of burglary and related offenses, the prosecutor elicited testimony from a witness who briefly referred to one additional instance of possible misconduct. Has Blair failed to demonstrate any reasonable likelihood that the misconduct affected the verdict?

3. A search warrant should be issued when the application establishes probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. Detective Volpe sought a search warrant for a storage unit rented to Blair's wife, Rachel Dunham. The affidavit provided information that Blair had committed a series of recent burglaries and had amassed a large quantity of stolen property, which had been kept in a Lynnwood storage unit. After his arrest, Blair told his wife to move the property, and she rented a storage unit in Monroe in September

2010. The Lynnwood unit was last accessed on October 30, 2010, and was not yet completely empty by November 2, 2010. Did the trial court correctly rule that the November 5, 2010 search warrant was based on timely probable cause to believe that evidence of the burglaries would be found in the Monroe storage unit?

4. Jail inmates have a reduced expectation of privacy, and they and the recipients of their phone calls are informed that their conversations will be recorded and may be monitored. After receiving such warnings, Blair and his wife elected to proceed with their phone calls. The Supreme Court has held that there is no Privacy Act violation in the same circumstances, and this Court has agreed. Has Blair failed to show that the recorded jail calls should have been suppressed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Blair was charged by amended information with numerous counts of residential burglary (Counts 5, 7, 9, 10, 11, 12, 13, 14, 16,

and 18), attempted residential burglary (Count 4), theft of a firearm (Counts 6 and 8), and taking a motor vehicle (Count 17). CP 1-8.[1]

The jury acquitted Blair of one count of theft of a firearm (Count 8), found him guilty of the lesser included offense of criminal trespass on Count 11, and found him guilty as charged on each of the remaining counts. CP 172-95.

The court imposed an exceptional sentence based on the "free crimes doctrine," directing that the 102-month sentence of confinement under Count 6 run consecutive to the other counts, resulting in a total sentence of 186 months in confinement. CP 192, 211-13.

2. SUBSTANTIVE FACTS.

Detectives Volpe and Coblantz of the King County Sheriff's Office investigated a series of residential burglaries in Seattle and its environs between July and October 2010. 2CP 1-8. In an effort

[1] Blair originally sought direct review in the Supreme Court under No. 86373-3. The appeal was transferred to the Court of Appeals under the new appeal number of 68971-1. The State adopts Appellant's convention for referencing the two sets of clerk's papers: "CP" for the clerk's papers designated under Supreme Court No. 86373-3; "2CP" for those designated under Court of Appeals No. 68971-1.

Counts 1-3 charged Blair's girlfriend, Kelsey Johnson, with crimes as a co-defendant, but she was not tried with Blair. CP 1-2. Count 15 was a money laundering charge, which was severed and prosecuted in a separate trial. CP 6. Blair is presently appealing the conviction in that case under Court of Appeals No. 67872-2.

to recover property stolen in one of the burglaries, Volpe contacted Ryan Youngberg, an individual who advertised on Craigslist that he bought gold. 5RP 24.[2] Youngberg set up a meeting between Volpe and Blair's girlfriend, Kelsey Johnson. 5RP 27. Johnson arrived at the meeting place in a black Kia, which had been rented by Blair's friend Aaron Knapp. 5RP 29; 6RP 120. Volpe identified himself as a detective and asked to talk with her. 5RP 31. Based on their conversation, Volpe seized the vehicle and obtained a search warrant to look for stolen property. Id. Volpe recovered various items stolen in three different burglaries, Employment Security Department paperwork and a receipt with Blair's name on it, and a receipt from a Travelodge motel room that Knapp had rented for Blair and Johnson. 5RP 38-40; 6RP 122.

Volpe received information from a Snohomish County detective that led him to wait for Blair and Johnson to arrive at an Everett motel. 6RP 10-11. They arrived in Johnson's Mercedes. 6RP 10-11, 121. A search warrant was obtained for the Mercedes and the motel room. 6RP 12. Volpe discovered various items of stolen property in these locations, plus a receipt for payment on a

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

storage unit in Lynnwood. 6RP 16. Volpe arrested Blair and Johnson. 6RP 21, 119.

With the storage facility manager's assistance, Volpe looked in the unit and found it mostly empty on November 2nd or 3rd. 6RP 19. He could see a boat motor, a black bag, and some speakers. 6RP 18-19.

Johnson contacted Volpe and offered to disclose what she knew about the burglaries. 5RP 20; 6RP 21-23, 49-50. Johnson told Volpe that she had seen much of the property stolen in the burglaries in the Lynnwood storage unit, and went there with Volpe. 6RP 23. Johnson also told Volpe that she knew the property had been moved to a different storage unit in Monroe, which had been rented by Blair's wife, Rachel Dunham. 6RP 87.

Volpe's investigation corroborated Johnson's information, and led to the discovery of a Monroe storage unit registered to Dunham. 6RP 24. Volpe obtained a warrant to search that unit, finding a large quantity of stolen property. 6RP 23-24, 26-49.

Following the search, Johnson contacted Volpe several more times. 6RP 49-52. Volpe and Coblantz took her out of jail and she pointed out houses that Blair had burglarized and gave specific information about the crimes. 6RP 52, 86. Johnson, who

was originally charged with two counts of possessing stolen property in the second degree and one count of trafficking in stolen property in the first degree, pleaded guilty to the two possession counts and agreed to testify against Blair. 6RP 174. In exchange, the State dismissed the trafficking charge. Id.

Johnson testified that she met Blair in August 2010. 6RP 99. Blair was driving a silver Porsche, which she heard was stolen and which his friend later crashed and abandoned. 6RP 100, 167-68. Blair had an injured foot and sometimes walked with a limp. 6RP 109. He paid off Johnson's traffic tickets and paid to help her regain possession of her car. 6RP 103. Because of that and because she liked him, Johnson "felt obligated" to help Blair by driving him to and from the houses he burglarized. 6RP 104.

Johnson testified about each of the burglaries with which Blair was charged.

Count 4. With respect to the attempted residential burglary of the Dolliver/Thompson residence in Shoreline, Johnson testified that she dropped Blair off in the black Kia and returned when Blair called her frantically because people had come home and interrupted the burglary. 6RP 137-39, 142. When she picked him up, they were followed by a black truck, which she evaded by

driving away recklessly. Id. Blair no longer had the backpack he had been wearing when she dropped him off. 6RP 141. He went back for the backpack the next day, but did not find it. 6RP 143.

Several witnesses corroborated Johnson's testimony about Count 4. Dolliver testified that she came home to find a man with a light gray jacket and a backpack descending a ladder that was propped up against her house. 8RP 35, 38. When she confronted the man, he fled. 8RP 36. Thompson chased after the man on foot, and later gave a description that matched Dolliver's observations. 8RP 39-40, 49.

Neighbor and off-duty Seattle Police Officer Travis Testerman testified that he saw a man resembling Blair walking briskly near the Dolliver residence with a backpack. 8RP 55, 57, 59. The man cut through a neighbor's yard, emerged without the backpack, got inside a black sedan, which had pulled up near him, and sped away. 8RP 59, 62.

Testerman and his wife followed the car in their black truck and gave the 911 operator a partial license plate number, which closely resembled the license plate of the rented black Kia that

Johnson was driving.[3] 8RP 62-64. He went back and found the discarded backpack, which was later found to contain a gray jacket, gloves, and a small crowbar. 8RP 97. Testerman and his wife both identified Blair from a photo montage. 8RP 69-70, 86. Testerman was 95% positive of his identification and further identified Blair in court. Id.

Another neighbor testified that she observed a black sedan drive up to the spot where the backpack had been recovered on the following day. 8RP 102-04. She saw the driver, whom she described in terms similar to the descriptions of Dolliver, Thompson and Testerman, look straight at the tree where the backpack had been discarded, and drive away. Id.

Counts 5 and 6. Johnson also testified about the LeCount burglary in Shoreline. Though Johnson did not go to the LeCount house, she testified that Blair told her he had stolen a safe that contained $60,000 and had used some of the money to buy a new Audi. 6RP 162, 165-66. Tanner and Pamela LeCount testified about the burglary as well, confirming that a safe containing $30,000 was among the items stolen. 6RP 147. Other items stolen

[3] Testerman gave the operator the partial plate "3-6-0-Z." 8RP 64. When Detective Volpe first met Johnson, she was in a black Kia with the license plate "630-ZVJ." 5RP 31.

included jewelry, cufflinks, an Xbox 360, a laptop, walkie talkies, a Rolex and a shotgun. 8RP 137-41, 144-48. Detective Volpe recovered some of these items in the Monroe storage unit. 6RP 44-46.

Counts 7 and 8. Johnson testified that she drove Blair to the Murray/Rollins home in Shoreline late at night in the black Kia. 6RP 131. When she returned to pick Blair up, he told her over the phone to turn off the headlights, which she did. 6RP 132. He then loaded suitcases and a backpack into the car. 6RP 133. Johnson testified that Blair took coins, guns and a laptop from the house. 6RP 134. Johnson sold some of the coins on Blair's behalf. Id.

Several witnesses corroborated Johnson's testimony about the Murray/Rollins burglary. Patrick Murray testified that some of the items stolen in the burglary were a pistol, a laptop, dehydrated camping food, a Swiss Army wristwatch, a gold pocket watch, a suitcase and a backpack. 7RP 163-66. Gary Rollins testified that his coin collection, Rolex and other watches, and other jewelry were stolen. 7RP 170-72. He also testified that he found his ladder leaning up against his bedroom window, the screen of which had been cut out. 7RP 174-75. Murray and Rollins' neighbor testified that he saw a suspicious person on the side of their home around

midnight, who was talking on a cell phone as he limped toward the street with a backpack. 7RP 147-53. As a black, four-door car drove up, the neighbor heard the man say, "Turn off the lights." 7RP 153-54. The car's lights turned off. Id. The man then loaded a backpack and suitcase into the car. 7RP 153-56. Volpe testified that he recovered some of Rollins' coins, two watches, and some of the dehydrated food in the black Kia. 5RP 35-36. He later recovered more of the dehydrated food and a collection of pennies in Johnson's Mercedes. 6RP 15.

Count 9. Johnson also testified about the burglary of Mary Lee's Medina home. Johnson drove Blair to the area in her Mercedes. 6RP 127-28. Blair called later and asked her to keep an eye out because he had found a safe and wanted time to open it with a crowbar. 6RP 128. The safe contained passports and birth certificates. Id. She later picked him up near the house. 6RP 129.

Lee corroborated Johnson's testimony. She testified that passports, credit and social security cards, and other important documents were taken from a safe. 7RP 79. Cameras, laptops, jewelry, and a data projector were also stolen. 7RP 80. Left behind were an open can of Dr. Pepper on a dresser, and a tool that did not belong to her family on the floor near the safe.

7RP 78-79. DNA recovered from the Dr. Pepper can matched Blair's DNA profile. 7RP 112, 115, 120, 127.

Volpe recovered the Lees' stolen data projector in the Monroe storage unit. 6RP 39. Photographic evidence collected by the Medina police confirmed that Johnson's Mercedes entered Medina twice that day. 7RP 140-42.

Count 10. Johnson testified about the burglary of the Chrisope home in Kirkland. She picked Blair up outside that house, where Blair had taken keys, horse-themed jewelry, motorcycle riding gear, a large TV and a red car. 6RP 153, 156. Blair moved the red car away from the house before Johnson picked him up. 6RP 155.

Chrisope corroborated Johnson's testimony. In addition to the items that Johnson mentioned, Chrisope testified that GPS units, an Xbox, and various computer hardware and software were stolen. 8RP 179-85. He found his wife's red Honda Civic several days later, not far from the house. 8RP 183-84.

Volpe testified that he recovered Chrisope's GPS system and some of his computer hardware in the Monroe storage unit. 6RP 44. He found Chrisope's external hard drive in the black Kia. 5RP 38.

Count 11. Johnson testified about the burglary of the Marti residence in Kirkland. She said that Blair called her from this house when he got stuck trying to enter through a window. 6RP 157. Marti corroborated the testimony, stating that his bedroom windows were broken and a kitchen window was removed, but aside from items that were disturbed within reach of the windows, it did not appear that anyone had been inside the house. 8RP 173.

Count 12. Johnson also testified about the burglary of the Paveglio home in Kenmore. She said that she drove Blair to the house, which had tarps covering the garage door entrance, in her truck. 6RP 160-61. She said Blair took tools and a lawn mower from the garage. Id. Paveglio corroborated Johnson's testimony, confirming that he had tarps over the garage door entrance and that a lawn mower and various tools had been taken. 8RP 175-77.

Count 13. Johnson did not remember much about the burglary of the Walden home in Shoreline, but testified that she had seen some "law enforcement items." 6RP 143. Walden testified that jewelry, watches, a laptop, headphones and speakers, and a sheriff's department patch were stolen. 8RP 166-77. Volpe recovered Walden's watches, speakers, and headphones in the Monroe storage unit. Id.

Count 14. Johnson also testified about the burglary of the Bodmer residence in Lake Forest Park. She called it "the bike house," because Blair took a bicycle with "thin wheels" from there. 6RP 149-52. Alicia and Tammy Bodmer testified that other items taken included five laptop computers (including a Dell Mini), jewelry, a watch, an heirloom rosary, silver coins, and an external hard drive. 8RP 151-54, 158-62. Tammy Bodmer confirmed Johnson's testimony that the stolen bike had thin wheels. 8RP 162. Volpe recovered Bodmer's watch and external hard drive from the Monroe storage unit. 8RP 160-61; 6RP 43. And in a recorded phone call, Blair referred to the "mini Dell" computer, and told his wife not to sell it. Ex. 139 at 2.

Counts 16 and 17. The burglary of the Saldin residence occurred in July 2010, shortly before Johnson met Blair. 8RP 189-94, 198-99; 6RP 99. Saldin testified that the following items were taken: a safe, shotgun, jewelry, cigars, a humidor replica of the White House, and watches. 8RP 189-94. A silver Porsche was also stolen. 8RP 195. Johnson testified that Blair was driving this Porsche when she met him. 6RP 100, 168.

Saldin's neighbor also testified about the burglary. She saw someone with a limp walk up a hill in the neighborhood and then

drive down the hill in Saldin's silver Porsche a short time later. 8RP 200-02.

Volpe recovered the humidor and cigars, two watches, and a key to the Porsche in the Monroe storage unit. 6RP 47-49. The Washington State Patrol found the Porsche crashed and abandoned. 8RP 208-09.

Count 18. Johnson testified about the burglary of the Parvanta/Minakami home in Shoreline. Though Johnson did not drive Blair to this house, she testified that Blair showed her the proceeds of the burglary, which included swords, watches (including a Rolex), lots of gold jewelry, and business cards for a Taekwando instructor. 6RP 147.

Parvanta and Minakami corroborated Johnson's testimony. Parvanta testified that they found a ladder propped up against the house leading to a balcony. 8RP 113. Jewelry boxes and jewelry, watches, three computers, and a Chanel bag had been taken. 8RP 110-11. Minakami testified that he teaches martial arts, and that four of his martial arts swords were taken. 8RP 128, 131. One of the watches that was stolen was a Cartier. 8RP 132.

Volpe recovered Parvanta's jewelry box, a jewelry bag, some jewelry, a watch, the Chanel bag, and two of Minakami's

swords from the Monroe storage unit. 6RP 40-43; 8RP 113-16, 132-33. He found Minakami's Cartier watch in the black Kia. 5RP 37; 6RP 39.

Other relevant facts are included in the argument sections to which they pertain.

C. ARGUMENT

1. THE COURT PROPERLY DENIED BLAIR A MISTRIAL.

Blair contends the court erred by denying his motion for a mistrial after the prosecutor elicited testimony in violation of a pretrial order in limine that he had bought gold from Blair and referred to being questioned about that by the Bellevue Police Department. Because this testimony was not prejudicial in the context of the overwhelming and properly admitted evidence in this case, this Court should reject the claim.

a. Relevant Facts.

The trial court granted Blair's pretrial motion 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. 2RP 17-18; 2CP 227-30. Though the prosecutor did not oppose the motion, she noted that she intended to call Ryan Youngberg, who had been a witness in the prior King County case, "so there might be some cross-over in that sense[.]" 2RP 17. Neither the court nor defense counsel inquired about the evidence that might cross over, but the prosecutor indicated that she did not seek to introduce evidence "about any specifics at all about any of the other burglaries." Id.

The State's case relied heavily on Johnson's testimony. Since Johnson was Blair's accomplice, the jury would be instructed to view Johnson's testimony with "great caution." CP 103. The prosecutor therefore sought to highlight any evidence that tended to corroborate Johnson's testimony. Accordingly, when Youngberg testified, the prosecutor attempted to elicit evidence that would confirm Johnson's testimony that Youngberg met Johnson through Blair, with whom he had done business in the past. Specifically, the prosecutor asked, "Did you buy gold from Keith Blair then?" 7RP 34. Youngberg replied, "Before, yes. Before this whole thing happened when I was called in for questioning, yes, I did." Id. Youngberg identified Blair in the courtroom. Id. The prosecutor then asked, "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?" 7RP 35. Youngberg unexpectedly replied, "It was the Bellevue Police Department was the first time that I was contacted." Id. As the prosecutor attempted to steer Youngberg back to his interaction with Volpe, Blair requested a sidebar and moved for a mistrial. 7RP 35-37.

Blair insisted that the prosecutor had intentionally flouted the court's order. 7RP 42, 45-46, 51, 53, 60, 62-63. The prosecutor emphatically denied that. Rather, she explained that the only reason she asked Youngberg about Blair was to corroborate Johnson's testimony about how she met Youngberg. 7RP 42-45, 48, 50, 52. The prosecutor indicated that she was operating within her understanding of the pretrial order by not asking about the details of the prior burglary or trafficking charges. 7RP 46. Blair refused a curative instruction. 7RP 60.

The trial court clarified that Blair was primarily concerned that Youngberg's testimony would lead the jury to infer that he was investigated by the Bellevue Police Department for separate criminal activity. 7RP 38-39. Although the court found that the prosecutor's exchange with Youngberg violated the pretrial ruling, and that a curative instruction might call attention to the matter, it

concluded that the irregularity was not unduly prejudicial. 7RP 66-67. Because other evidence would establish that Blair had others sell gold on his behalf, the court reasoned that it would not be "that much of a leap for the jurors to believe that the defendant was also involved in selling gold." 7RP 66. Additionally, the court doubted that the jury would realize that Youngberg's reference to Bellevue police involved an investigation separate from the many charges in the instant case. Id. Accordingly, the court denied the mistrial motion. 7RP 66-67.

b. Blair Cannot Establish Misconduct Requiring A Mistrial.

To prevail on a claim of prosecutorial misconduct, Blair has the burden to establish "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). To show prejudice, he must prove that "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." Id. Because Blair can make no such showing, his claim must fail.

First, the court reasonably concluded that the jury would infer that Youngberg's reference to having bought gold from Blair and his allusion to an investigation by the Bellevue Police Department occurred in connection with the charged crimes. The trial involved numerous burglaries in several municipalities, including Seattle, Shoreline, Lake Forest Park, Medina, Kirkland, Bothell and Kenmore. 2CP 2-7. Although Detectives Volpe and Coblantz are employed by the King County Sheriff's Office, Coblantz testified that he is "on contract with the City of Shoreline," and wears a uniform that says "Shoreline Police." 7RP 180. Coblantz described similar contracts between the KCSO and other municipalities. 7RP 180, 189-90, 192. Given the connections between law enforcement agencies in this area, the jury could reasonably infer that the investigation by the Bellevue Police Department was part of the current case.

Blair argues that Youngberg's testimony may have led jurors to convict him "on the basis that they believe the defendant deserves to be punished for a series of immoral actions," rather than on the ample evidence presented by the State. Brief of Appellant at 28 (citing State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough,

125 Wn.2d 847, 889 P.2d 487 (1995)). And he argues that the improper evidence allowed the jury to "follow its natural inclination and infer Blair acted in conformity with his character and therefore likely committed the criminal acts charged by the State." Brief of Appellant at 29. But the unique circumstances of this case render that possibility exceedingly unlikely.

It is true that evidence of other criminal acts may lead a jury to infer a criminal propensity, which in some cases might deprive a defendant of a fair trial. For instance, in State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), a witness improperly testified that Escalona "had a record and stabbed someone" despite an order in limine precluding the defendant's previous conviction for the stabbing. Id. at 254. Because Escalona's current charge was for an identical crime, the court held that the improper evidence was "inherently prejudicial" and "likely to impress itself upon the minds of the jurors." Id. at 256. A mistrial therefore should have been granted. Id. Similarly, in State v. Babcock, 145 Wn. App. 157, 185 P.3d 1213 (2008), the court held that Babcock was deprived of a fair trial on child molestation charges when the jury heard testimony that he had molested a second child. Id. at 165-66. The trial court abused its discretion by denying a mistrial

because the evidence of sexual abuse of a second victim was "by its nature and similarity to the remaining charges, highly prejudicial." Id. at 165.

This case is unlike Escalona and Babcock. First, it should be noted that Youngberg was not asked about, and did not testify to, any unlawful conduct by Blair. Even if the jury inferred that the gold Blair sold was stolen, the inference would go to possession or trafficking in stolen property, crimes not charged in this case. Second, in both Escalona and Babcock, it was significant that the State's evidence was not strong. In Escalona, the court found the irregularity especially serious "considering the paucity of credible evidence against [the defendant]." 49 Wn. App. at 255. And in Babcock, the court found the improper evidence particularly serious because, in the absence of physical or eye witness evidence, the verdict depended upon the credibility of the victim's testimony, which was at times inconsistent. 145 Wn. App. at 164.

Here, in contrast, the State had charged Blair with numerous counts of residential burglary, attempted residential burglary, theft of a firearm, and taking a motor vehicle for offenses against 12 different households. The State's evidence was solid. Johnson testified that she drove Blair to and from most of the burglaries and

gave details about the crimes that were corroborated by the victims. Eye witnesses identified Blair and the vehicles in which Johnson drove him. Victims described their stolen property and identified the items that had been recovered in Johnson's Mercedes, the rented Kia, the motel room that Blair and Johnson occupied, and the Monroe storage unit that Blair's wife rented to store the stolen goods. Ryan Youngberg confirmed that Johnson sold him gold under suspicious circumstances. Further, the method of entry into several of the burglarized homes was the same: a ladder to the upper story windows. Blair's DNA was even found in one victim's home. Given that the properly admitted evidence more than established Blair's prolific criminal endeavors, Blair can establish no reasonable likelihood that the improper evidence affected the jury's verdict.

c. Blair Cannot Establish A Serious Irregularity Requiring A Mistrial.

Blair alternatively argues that the trial court erred by refusing to grant a mistrial on the basis of a serious irregularity. But his inability to show a substantial likelihood that the improper evidence affected the jury's verdict defeats this claim as well.

A trial court will 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." State v. Rodriguez, 146 Wn.2d 250, 270, 45 P.3d 541 (2002). The trial judge is in the best position to determine the impact of a potentially prejudicial remark, so appellate courts will not overturn the trial court's decision to deny a mistrial absent abuse of discretion. Escalona, 42 Wn. App. at 254-55. "A reviewing court will find an abuse of discretion only when no reasonable judge would have reached the same conclusion." Rodriguez, 146 Wn.2d at 270 (citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

To determine whether a trial irregularity may have prejudiced the jury, a court should consider several factors, all "viewed against the backdrop of all the evidence": (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, which a jury is presumed to follow. Escalona, 49 Wn. App. at 254.

Youngberg's remarks were not cumulative. While testimony violating an order in limine often qualifies as a serious irregularity, see State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977 (1998),

the seriousness is mitigated here by the strength of the State's evidence.

In support of his argument that Youngberg's remarks necessitated a mistrial, Blair cites State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001), a case that has nothing to do with that question. To the extent that Trickler is relevant to the question of the prejudicial impact of evidence relating to prior criminal conduct, the case is easily distinguishable. There, the defendant was charged with possession of a stolen credit card, but "[m]ost of the evidence the State introduced at trial concerned items of personal property belonging to others." Id. at 733. Division Three held that, "[a]fter hearing the witnesses' testimony and seeing evidence of 16 pieces of stolen property," none of which involved the charged offense, "the jury was left to conclude that Mr. Trickler is a thief." Id. at 734.

In Blair's case, by contrast, the improper evidence was ambiguous as to whether any unlawful conduct even occurred. See State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993) (improper references to defendant having been in jail did not warrant mistrial despite having "the potential for prejudice" because references were ambiguous and did not indicate a propensity to

commit the same crimes charged). Further distinguishing Trickler, the improper evidence in this case was contained within two short remarks in a lengthy trial in which the State presented a great deal of substantial, relevant evidence.

Moreover, although Blair declined a curative instruction and the trial court believed that an instruction might only highlight the improper remark, the presumption is that the jury would have followed an instruction to disregard it. State v. Weber, 99 Wn.2d 159, 166, 659 P.2d 1102 (1983). See also State v. Gamble, 168 Wn.2d 161, 178-79, 225 P.3d 973 (2010) (evidence revealing defendant's prior criminal history in violation of an order in limine was a serious irregularity, but was cured by a prompt instruction to disregard).

Thus, while Youngberg's testimony constituted an irregularity, it was "so minute in the overall picture as to create only a hint of prejudice," and did not so taint the proceedings that Blair was denied a fair trial. See State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10 (1991) (no mistrial warranted in assault/murder trial when prosecutor elicited evidence about defendant's participation in methadone maintenance treatment in violation of pretrial order).

The trial court did not abuse its discretion in denying Blair's request for a mistrial.

2. THE COURT PROPERLY ADMITTED THE FRUITS OF A VALID SEARCH WARRANT.

Blair next contends that the warrant authorizing a search of the Monroe storage unit was based on stale information and that the fruits of that search should therefore have been suppressed. Because the affidavit contained information establishing timely probable cause, the court properly refused to suppress the evidence.

a. Standard Of Review.

Appellate courts will uphold the denial of a motion to suppress when substantial evidence supports the trial court's findings of fact, and the findings in turn support the court's conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. Id. at 249 (internal quotations omitted). Conclusions of law from an

order pertaining to the suppression of evidence are reviewed *de novo*. Id.

b. The Affidavit Furnished Probable Cause.

A search warrant should be issued when the application establishes probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). To support a valid search warrant, an affidavit must show a "nexus between criminal activity and the item to be seized and between that item and the place to be searched." Id. at 183. The affidavit must be evaluated "in a commonsense manner, rather than hyper-technically, and any doubts are resolved in favor of the warrant." State v. Lyons, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)).

Blair argues that the information in Detective Volpe's affidavit was stale because several weeks had elapsed between the date that Blair's wife rented the Monroe storage unit and the date of the warrant, and because stolen property is "inherently mobile." Brief of Appellant at 37-38. The argument should be rejected.

"Probable cause is not determined by merely counting the number of days between the time of the facts relied upon and the warrant's issuance." 2 W. LaFave, Search & Seizure § 3.7(a) (5th ed. 2011) (internal citations omitted). Other significant information bearing on the question of staleness includes the nature and character of the crime, the criminal, the thing to be seized, and the place to be searched. Id. (citing Andresen v. State, 24 Md. App. 128, 331 A.2d 78 (1975), aff'd sub nom. Andresen v. Maryland, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). Whether the warrant seeks evidence of a single offense or of repeated crimes is especially significant, and time lapses of several weeks have been upheld when the affidavit tended to establish repeated thefts, robberies, or receipt of stolen property. Id. (internal citations omitted). "Where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." Id. (quoting United States v. Johnson, 461 F.2d 285 (10th Cir. 1972)). See also Com. v. Burt, 473 N.E.2d 683, 692-93 (Mass. 1985) (warrant for stolen coins not stale where

"the affidavit described an ongoing operation observed on numerous occasions over a five-month period"). Further, in cases involving searches for particular items taken in a burglary, it is also "highly relevant" that there is "a very large amount of stolen property," that "the offender would run special risks if he were to attempt immediate disposition," that the stolen "objects would appreciate in value if retained for a longer period," or that "investigation of the most likely avenues of disposition, such as pawn shops, had not indicated that the articles had yet been disposed of." Id. (internal citations omitted).

With these factors in mind, the affidavit plainly establishes probable cause. The warrant sought evidence of not one, but a dozen home burglaries committed over several months. 2CP 87-90. Unlike drugs, the stolen property, including jewelry and watches, swords, coins, clothes, computer equipment, and guns, was "not likely to be consumed or destroyed." See Com. v. Fleurant, 311 N.E.2d 86, 90 (Mass. 1974) (fact that informant had seen a collection of machine guns at an unspecified time did not undermine warrant because a collection of weapons was unlikely to

be consumed or destroyed). The place to be searched was not a car or a motel room, but a secure storage facility, into which Johnson was certain the stolen property had been moved. Additionally, the warrant was not seeking a small number of items -- there was "a lot of property filling the [Lynnwood] unit" from which the property had been moved. 2CP 90. Though law enforcement had recovered some of the stolen jewelry from gold buyer Youngberg, with whom Blair and Johnson were known to work, there was much more property outstanding. Likewise, since the detectives knew of Johnson and Blair's connection to Youngberg, as well as the specific items stolen in the several burglaries, it would have been risky to attempt to dispose of the remaining property through Youngberg or similar avenues of disposition. Finally, even though Blair's wife had rented the Monroe storage unit in September to store the stolen goods, the detectives ascertained that the Lynnwood storage unit had last been accessed on October 30 and was not yet completely emptied by November 2. Thus, the court could reasonably infer that some of the stolen property had been moved less than a week before Volpe sought the warrant, and

was likely to be found in the Monroe unit.[4] (Indeed, the court relied on the information that the property had been moved to the Monroe unit to invalidate the search of Blair's home and suppress the evidence discovered there. 3RP 6-7.)

Because the affidavit furnished probable cause to believe that stolen property would be found in the Monroe storage unit at the time it was sought, the court properly denied the motion to suppress.

3. THE COURT PROPERLY ADMITTED RECORDED JAIL CALLS.

Blair next argues the court erred in admitting phone calls between himself and his wife, which he contends were recorded in violation of the Privacy Act, RCW 9.73.030(1). Because Blair and his wife had no reasonable expectation of privacy in calls from jail

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[4] Blair argues that Johnson's statement that Blair told his wife to move property after he got arrested, and the fact that she had rented the Monroe unit on September 13th, suggests that Blair meant that she should move the property *out* of the Monroe unit, not into it. Brief of Appellant at 39. But Johnson was likely speaking of Johnson and Blair's earlier arrest, which occurred in early September. See 6RP 104, 112. That would explain Dunham's September 13th rental of the Monroe unit, and would further support the timeliness of the warrant, since Johnson's observation of swords and coins in the Lynnwood unit on or after September 27 (the earliest time that both swords and coins could have been observed; see Brief of Appellant at 36-37) would indicate that Dunham had not moved swiftly to dispose of the stolen goods.

that they knew were recorded and subject to monitoring, the argument fails.

a. Relevant Facts.

Blair and his wife, Dunham, talked on the phone while Blair was in jail. At the beginning of each call, a recorded message announced the jail's policy to record and monitor calls. 2RP 45, 48, 55. The recording prompts the call recipient to "press 1" if she agrees to that policy. Id. at 55.

In these calls, Blair and Dunham refer to specific stolen items, including several computers (including the "Mini Dell"), a suitcase full of coins, and a Rolex watch. Ex. 139. They discuss where the items are being kept, and Blair urges Dunham to start selling them. Id.

Defense counsel moved to suppress the jail calls between Blair and his wife on the theory that they were recorded in violation of the Privacy Act, RCW 9.73.030(1). 2CP 50-59. The trial court denied the motion. CP 206-07. Blair challenges that ruling.

b. Blair Had No Reasonable Expectation Of Privacy.

The Privacy Act prohibits intercepting or recording a private communication transmitted by telephone unless all parties consent. RCW 9.73.030(1). A communication is private under the act when the parties have a subjective expectation that it is private, and that expectation is objectively reasonable. State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004).

Washington courts have repeatedly held that inmates have no objectively reasonable expectation of privacy in phone calls from a local jail. State v. Hall, 168 Wn.2d 726, 729 n.1, 230 P.3d 1048 (2010); State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008); State v. Hurtado, __ Wn. App. __, 294 P.3d 838 (February 19, 2013); State v. Haq, 166 Wn. App. 221, 260, 268 P.3d 997 (2012); State v. Archie, 148 Wn. App. 198, 204, 199 P.3d 1005 (2009). See also State v. Babcock, 168 Wn. App. 598, 607, 279 P.3d 890 (2012) (inmate had no objectively reasonable expectation of privacy in conversations occurring in the jail visitors' room, which had signs stating that the conversations could be monitored). This is so because inmates have a reduced expectation of privacy, which is further diminished by warnings that the phone calls are recorded

and may be monitored. Modica, 164 Wn.2d at 88; Haq, 166 Wn. App. at 260.

Further, Blair consented to the recording of his conversation with his wife. As this Court pointed out in its Modica opinion, the recording of private communications or conversations does not violate the privacy act when all the participants consent to such recording. RCW 9.73.030(1)(a) and (b). A party to a conversation is deemed to have consented when the person knows that the recording is taking place. State v. Modica, 136 Wn. App. 434, 449-50, 149 P.3d 446, 454-55 (2006); State v. Townsend, 147 Wn.2d 666, 675, 57 P.3d 255 (2002) (party deemed to have consented to the recording of e-mail messages because he knew such messages would be automatically recorded on the recipient's computer); In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997), rev. denied, 134 Wn.2d 1014 (1998) (party deemed to have consented to the recording of message when he left the message on an answering machine, the only function of which is to record messages). Although our Supreme Court found it unnecessary to reach the question of consent in its Modica opinion, 164 Wn.2d at 90, this Court has since held that a jail call recipient "expressly consented to recording when she pressed or dialed

three to continue the call after the recorded warning." Archie, 148 Wn. App. at 204.

Both Blair and Dunham heard the recorded message alerting them to the fact that the calls were being recorded, but nevertheless chose to converse. "Accordingly, they each consented to the recordings." Modica, 136 Wn. App. at 450. While the trial court did not admit the tapes on that theory, Blair and Dunham's consent to the recordings provides an additional basis to affirm. State v. Poston, 138 Wn. App. 898, 905, 158 P.3d 1286 (2007) (appellate court may affirm on any basis supported by the record).

Blair also contends that Modica and its progeny do not apply to his case. He first argues that the "mere possibility" that his calls would be monitored does not destroy his reasonable expectation of privacy. This argument ignores the notice Blair received that established a *certainty* that the conversations would be recorded. There cannot be any Privacy Act violation when a person knows that his or her conversation will be recorded and chooses to speak anyway. Farr, 87 Wn. App. at 184 (message left on answering machine); State v. Pejsa, 75 Wn. App. 139, 876 P.2d 963 (1994), rev. denied, 125 Wn.2d 1015 (1995) (police negotiator told

defendant that he was recording the conversation). Townsend, on which Blair relies, does not further his argument. There, the court found that no Privacy Act violation occurred because Townsend, who knew that his messages were being recorded on the receiving computer, had impliedly consented to the recording. 147 Wn.2d at 678-79. "[A] communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the message will be recorded." 147 Wn.2d at 675-76 (citing Farr, 87 Wn. App. at 184).

Additionally, where husband and wife consent to their conversations being recorded by the jail, they have waived their spousal privilege. Blair relies on dicta in Modica in his attempt to obtain a contrary result:

> However, we 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. ... Intercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private. Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. However, because Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy.

164 Wn.2d at 88-89.[5] Blair contends that the phrase "or otherwise privileged," should revive his spousal privilege. This argument should be rejected.

First, Blair cannot establish any spousal privilege in these conversations. The party asserting the existence of a privilege has the burden of proving it. Dietz v. Doe, 131 Wn.2d 835, 844, 935 P.2d 511 (1997) (burden of proving the existence of the privileged relationship and that information sought fell within the privilege rests with the party asserting it); State v. Glenn, 115 Wn. App. 540, 555, 62 P.3d 921 (2003) (party claiming clergy/penitent privilege has the burden to show it attached). Engaging in conversation in the presence of others, or where conversations may readily be overheard, vitiates privilege. See, e.g., State v. Falsetta, 43 Wash. 159, 86 P. 168 (1906) (privilege did not preclude bystander from testifying to communications overheard between attorney and client); Ramsey v. Mading, 36 Wn.2d 303, 312, 217 P.2d 1041 (1950) (communications between attorney and client were not

[5] This language is dicta because the communications at issue in Modica were between an inmate and his grandmother, and there was no suggestion that they were subject to any privilege. Further, the Modica court's conclusion that there was no reasonable expectation of privacy in the jail calls precedes the quoted language, and the court arrived at that conclusion without reference to the absence of privilege. Nor have any of the several Court of Appeals decisions that rely on and interpret Modica referred to the absence of privilege as a basis for finding no reasonable expectation of privacy in jail calls. See Haq, 166 Wn. App. at 260; Archie, 148 Wn. App. at 203-04.

privileged when they occurred in the presence of others); State v. Martin, 91 Wn. App. 621, 959 P.2d 152 (1998), aff'd, 137 Wn.2d 774, 975 P.2d 1020 (1999) (communications between penitent and clergy not privileged when made in presence of third person); State v. Smyth, 7 Wn. App. 50, 53, 499 P.2d 63 (1972) (marital privilege did not apply to letters from jail when husband knew all outgoing mail was read by jail personnel).

Second, since a testimonial privilege "may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists." Dike v. Dike, 75 Wn.2d 1, 11, 448 P.2d 490 (1968). The purpose of the spousal privilege is "to promote family harmony by promoting full and frank discussion." 5A Wash. Prac., Evidence Law and Practice § 501.30 (5th ed. 2012) (citing State v. Sanders, 66 Wn. App. 878, 833 P.2d 452 (1992)). Where the purpose of otherwise privileged communication is to frustrate effective prosecution, privilege does not apply. Sanders, 66 Wn. App. at 884.

Part of Blair's purpose in the communication at issue was to urge Dunham to sell/dispose of stolen property, an unlawful act that would frustrate effective prosecution. Accordingly, he cannot show that the spousal privilege applies. Cf. Whetstone v. Olson, 46 Wn. App. 308, 732 P.2d 159 (1986) ("attorney/client privilege does not extend to communications in which the client seeks advice to aid him in carrying out an illegal or fraudulent scheme").

Because the trial court correctly concluded that Blair had no reasonable expectation of privacy in his phone calls from jail, because he and his wife consented to the recording of those calls, and because the spousal privilege does not apply to those communications, Blair can establish no error in admitting the jail calls.

4. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

Finally, Blair asserts that the cumulative error doctrine requires reversal of all of his convictions. That doctrine teaches that an accumulation of errors may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006) (citing

State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). But the doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id. As discussed above, Blair has failed to prove that any of the alleged errors affected the outcome of his trial. Similarly, Blair has not indicated how these alleged errors combined to affect the outcome of his trial. As a result, his cumulative error claim fails.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Blair's convictions.

DATED this 5th day of April, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. BLAIR, Cause No. 68971-1 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of April, 2013

C Brame

Name
Done in Seattle, Washington