72713-3

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Court of Appeals
Division I
State of Washington

NO. 72713-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ZAKARIA AWEIS DERE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

As our government increasingly spies on its own citizens without judicial oversight, Washington State's Privacy Act has stood as a bulwark against governmental spying. However, since 2008, Washington state prosecutors and law enforcement have been able to obtain recordings of jail inmates' calls without any judicial review. Without any precedent or statutory authority, the State has exploited a perceived opening in the Privacy Act. Here, the State obtained and then introduced at trial five recorded jail calls against the speaker who was not in jail and where the conversation was not relevant to jail security. Under this interpretation of the law, law enforcement could easily use sophisticated software to gather evidence against any free speaker on a recorded jail call—without judicial review, as was done here. This is the first case to test the interplay between the free speaker's right to privacy and the State's ability to gather any such conversations without regard to jail security. The admission of the recorded jail calls along with other evidentiary errors require a new trial in this closely contested eyewitness identification case.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting recorded jail calls made by a codefendant to Zakaria Dere while Dere was out of custody.

2. The trial court erred in admitting hearsay statements regarding the license plate number of the vehicle defendant allegedly left the scene of the

crime in.

3. The trial court erred in admitting argumentative, conclusory testimony and prohibiting the defendant from admitting comparable testimony.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Washington State Privacy Act, RCW 9.73, *et seq.*, was violated by the admission of recorded jail calls.

2. The defendant's right to privacy under Article 1 § 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution was violated by admission of the recorded jail calls.

3. The defendant's right to be free of unreasonable searches under Article 1 § 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution was violated by the admission of recorded jail calls.

4. The defendant's federal and state constitutional right to confrontation of witnesses was violated by the admission of hearsay statements.

5. The defendant's right to a fair trial was violated by the admission of prejudicial hearsay.

6. The defendant's right to a jury trial was violated by the admission of the codefendant's opinion of his guilt.

D. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The January 14, 2014 First Amended Information charged appellant Zakaria Aweis Dere, codefendants Bashir A. Mohamed, and Mohamed A. Ali with one count of Robbery in the First Degree, and Bashir Mohamed and Zakaria Dere with Unlawful Possession of a Firearm in the First Degree. Clerk's Papers, pp. 1-2 (hereinafter "CP" followed by the page number).

On May 14, 2014, the State filed a Second Amended Information which added charges against Bashir Mohamed of Violation of the Uniform Controlled Substances Act (Count 4), Bribing a Witness (Count 5), and Tampering With a Witness (Count 6). CP 41-43. On June 6, 2014, the three codefendants' cases were joined for trial. CP 44.

On September 3, 2014, the three codefendants began trial before the Honorable Tanya Thorp. Transcript at p. 57. (Hereinafter "Tr" followed by the page number.) Previously, on July 15, 2014, Dere posted bail and remained out of custody until his verdict. Tr 57; 1561; 1830

The State agreed to Dere's Motion to Dismiss Count 3, Unlawful Possession of a Firearm in the First Degree. CP 78-81. On September 4, 2014, the State filed a third Amended Information, which omitted the dismissed Count 3. CP 259-61. After initially denying Dere's motion to sever his case, the court later granted the severance on September 16, 2014,

and his separate trial was delayed. Tr 598. For Mohamed Ali and Bashir Mohamed, the other two codefendants, trial continued through September 2014. During that trial, Bashir Mohamed pled guilty and later testified against his two codefendants. CP 321-23.

Dere was tried separately, and on October 31, 2014, a jury found Dere guilty of Robbery in the First Degree, and answered "yes" on the firearm special verdict, after two days of deliberation. CP 370-72. On November 14, 2014, the trial court sentenced Dere to 60 months on the firearm count, consecutive with 90 months for the robbery offense, totaling 150 months imprisonment. CP 381-89.

Dere timely filed his Notice of Appeal on November 14, 2014. CP 373. Dere is currently serving his sentence at the Clallam Bay Corrections Center in Clallam Bay, Washington.

2. PRETRIAL MOTIONS.

In addressing Dere's motions in limine on October 9, 2014, the trial court ruled that the alleged victim, Nasir Abdulkadir, could not testify about the license plate on the Cadillac which he claimed that Dere drove away from the crime. The court reasoned that because a third person provided the license plate number, Abdulkadir did not have any personal knowledge of the plate number. Tr 611.

On constitutional, statutory and evidentiary grounds, Dere moved to

exclude recorded jail calls made by codefendant Mohamed Ali, who was in jail, to Dere, who was not in jail at the time. Tr 618-621; CP 184-219; CP 318-20. The court denied Dere's suppression motion, and later ruled that five separate calls were admissible. Tr 623, 657.

3. TRIAL TESTIMONY AND CONDUCT.

The State's first witness, Nasir Abdulkadir, testified that on December 12 and 13, 2013, he was serving as a taxi driver for Eastside for Hire. Tr 867. Nasir Abdulkadir was familiar with the three codefendants. He claimed to have seen Mohamed Ali (nickname "Shamarke") with a gun. Nasir Abdulkadir also testified that he had once seen Bashir Mohamed. He also claimed to have seen Zakaria Dere (nickname "Zu") about four times before, but that he had not previously known his name. Tr 864-67.

Nasir Abdulkadir testified that while he was driving in the area of 12th Avenue and Main Street in Seattle, he saw defendant Mohamed Ali Bashir Mohamed, Zakaria Dere, Moe Will, and others he did not know, interacting with each other. Tr 869-70.

Nasir Abdulkadir testified that Ali flagged his cab down, got into the front passenger seat, was laughing and joking, and took Abdulkadir's iPhone to change the music he was playing. Tr 871, 874-75. Nasir Abdulkadir testified that within two minutes of Ali getting into the cab, codefendant Bashir Mohamed opened the driver's door, pointed a black revolver at his

face, and demanded money. Tr 876, 880-81, 889. Nasir Abdulkadir claimed that at some point, Zakaria Dere stood within an arm's length of Bashir. Tr 881. The prosecutor had Abdulkadir point out still photos of himself and the driver's side window, taken by a camera attached to the windshield near his rear view mirror. Tr 877-888. Bashir's right hand was in the picture. Tr 884. Abdulkadir testified that Bashir hit him with the gun, and that Dere stood behind Bashir and was holding what he thought was a boxcutter knife. Tr 884. The person behind Bashir was not identifiable in any pictures from the cab camera. Tr 1752, 1755.

Abdulkadir testified that after Bashir hit him, Dere cut him with the knife, and that Dere and Bashir repeatedly struck him on the head. Tr 885-86. He claimed that he tried to get them to stop hitting him by saying "don't you know me?" Tr 887. Nasir Abdulkadir stated that shortly thereafter, he jumped out of his cab and ran to the nearby Hookah bar. Tr 888. Abdulkadir testified that, as he was using his friend's phone to call 911, he saw a group of men searching inside his cab. Tr 891.

The recorded 911 call (made at 2:59 a.m.), played for the jury, reflected that Abdulkadir reported being robbed by three black males in their 20's, with three guns, who beat him with their guns and took his phone and GPS device. Tr 893-902, 1072. He also reported they drove away on Main Street in a white Chevy. Tr 898-99.

At trial, Abdulkadir testified that he also saw Dere leave in a white Cadillac. Tr 903, 917. Abdulkadir testified that he saw the police stop the white Chevy, and subsequently identified only Bashir Mohamed out of the four people in the car, and stated that the others individuals were not involved in the robbery. Tr 906-07. Abdulkadir testified that he told an officer at the scene that he would recognize the robbers if he saw them again. Tr 909. He did not tell the police the license plate number. Tr 909. The prosecutor then asked a series of five questions intimating that Abdulkadir had heard the license plate number from a friend of his – Amed Jama –who did not testify at trial. Tr 910. To each of these questions, an objection was sustained. Tr 910. Later, the court reiterated that there would be no testimony about the plate number. Tr 922.

Abdulkadir testified that on the Monday following the alleged Friday night robbery, he gave Facebook photos of Mohamed Ali ("Shamarke") to the police. Tr 912. He testified that he knew Ali's name the night of the robbery, but that he did not give it to the police because he wanted first to try to resolve it within the Somali community. Tr 915. He testified that he could not resolve the matter in speaking with Ali's mother during the intervening weekend. Tr 915-16.

Abdulkadir testified that he picked Dere out of a six-person montage. Tr 932. He told the police Dere's name only after he met with someone he

thought was Dere's sister. Tr 935-36.

On cross-examination, Abdulkadir admitted that before December 13, he knew Dere and his family from the Somali community, but that he did not identify him that night to the police. Tr 962.

Abdulkadir testified he gave Dere's name only after he talked to Dere's "sister," whom he had never met before and whose name he did not know. Tr 962. Dere's "sister" accused Abdulkadir of making false accusations. Tr 964. Abdulkadir testified he gave the police Dere's name on the following Monday, which was December 16. Tr 962. [Later, Detective Aakervik testified Abdulkadir did not provide Shamarke or Dere's names until December 23. Tr 1304.] In an interview with defense counsel in July 2014, Abdulkadir never mentioned this meeting with Dere's purported sister. Tr 968.

In his testimony, Abdulkadir described the black boxcutter that Dere hit him with, and detailed that it was similar to a boxcutter in a picture which was admitted for illustrative purposes as Exhibit 117. Tr 975. Abdulkadir then admitted that he first told police that the second person hit him with a gun, and did not mention a boxcutter until 10 days later. Tr 977, 1005.

Even though Abdulkadir knew Ali's name on the night of the robbery, Abdulkadir told the police that he did not know Ali; nor did Abdulkadir mention that he knew Dere's family. Tr 1006-08. Officer

Medlock, who wrote the main incident report, thought they were "strangers" to Abdulkadir . Tr 1266. Seattle Lt. Green testified that Abdulkadir said he had "seen them around but didn't know who they were." Tr 1244. Abdulkadir testified that he did not tell the police because he wanted to talk to their families first, even though he identified Bashir Mohamed before talking to his family. Tr 1007-08. At the proceedings in the month before Dere's trial, Abdulkadir testified that he did not give the police Ali's name because "it slipped off his mind." Tr 1008. Along with Ali's picture, Abdulkadir testified that he gave a picture of Moe Will to Detective Aakervik. Tr 1056-57. [Aakervik later testified that he only gave him two pictures of Mohamed Ali ("Shamarke".) Tr 1305.]

Officers Fitzgerald and Shepherd testified about the arrest of Bashir Mohamed, and the seizure of two guns and a GPS from the Chevy Caprice the night of the robbery on December 13, 2014. Tr 1092; 1132-33. Bashir Mohamed's fingerprint was found on the revolver, which was one of the guns found in the Chevy Caprice. Tr 1210.

Detective Kurt Litsjo testified that on December 26, 2013, he and another officer arrested Zakaria Dere in a silver Cadillac with plate number AKE8954. Detective Litjo had been looking for this Cadillac bearing the plate number. Tr 1103-04; 1110.

Despite consistently ruling that the license plate number would not

be admitted because the witness who provided the number did not testify, the court, over the defense's objection, permitted Officer Medlock to say that Abdulkadir gave him a license plate number. Tr 1254; Tr 1260. The court later admitted Exhibit 94, a certified copy of the registration of Dere's silver Cadillac, reflecting license plate number AKE8954. Tr 1300. A search of the Cadillac with plate number AKE8954 produced two identification documents in Dere's name. Tr 1317.

Testifying for the prosecution by agreement, Bashir Mohamed admitted that he pled guilty to the offenses of first degree robbery and illegal possession of a firearm in the first degree. CP 321-23; Tr 1335. Bashir Mohamed testified that he had known Mohamed Ali ("Shamarke"), since he was 5 or 6 years old, and Zakaria Dere ("Zu") since high school. Tr 1336-38. Bashir Mohamed testified that Dere drove a Cadillac which he identified in a picture admitted as Exhibit 99. Tr 1339.

Bashir Mohamed testified that on December 13, 2013, he was drinking Jack Daniels and taking methylone with Ali, and discussing the prospects of robbing someone. Tr 1340-42. Mohamed testified that he later approached a group of guys, including Dere, who were drinking cognac, and that Bashir gave Dere some methylone. Tr 1346-47. Bashir testified that the night of the robbery he possessed the black revolver which the police later recovered from the Chevy Caprice. Tr 1347. Bashir Mohamed testified that

at some point, he saw Ali in Nasir Abdulkadir's cab, and that, as pre-arranged, Ali signaled him over to the cab. Tr 1351. Bashir identified himself in one of the stills from the taxicab video. Tr 1352.

Bashir Mohamed testified that after the pre-arranged signal, he went to the taxi, opened the driver's door, pulled his gun out and demanded money. Tr 1352. He alleged that he saw Abdulkadir smile, noticed Dere standing next to him holding a baton, and that Dere started to hit Abdulkadir with the baton. Tr 1354. He testified that Dere asked for money. Tr 1356. Bashir Mohamed testified that Abdulkadir then exited the taxi and ran to the hookah bar. Tr 1360. Bashir Mohamed testified that Bashir eventually got into a white Chevy with other people not involved in the robbery, and stashed his gun under a seat. Tr 1364-66; 1368.

Later, in the jail Bashir heard Dere and Ali discussing paying off Abdulkadir, or making sure he did not come to court. Tr 1370-72. Subject to previous objections, the trial court allowed the prosecution to play for the jury a recorded jail phone call between codefendant Mohamed Ali (who was in jail) and Dere (who was not in jail). Tr 1373. Bashir identified the speakers in the August 25, 2014 call played to the jury. Tr 1376. Bashir identified Dere as the first male speaker on the September 10, 2014, recorded call. Tr 1375. As to the September 25, 2014 call, Bashir indicated that Dere asked Ali: "did that nigga come in?" Tr 1375-76. Bashir testified that after

the mention of "Remember Yesler Terrace," during the same recorded call, Dere said in Somali "we were there." Tr 1376-77.

At the end of Bashir's direct examination, the prosecutor asked, "And Mr. Abdulkadir had fled from the car as a direct result of what you and Mr. Dere were doing together; correct?" The witnessed answered "yes", after the trial court overruled the defense's objection that the question was "argumentative". Tr 1378.

On cross-examination, Bashir admitted that he spent a day or so with Ali before the robbery, only ran into Dere at the scene, and that only he and Ali had planned the robbery. Tr 1385-86. Bashir also admitted that he was not sure if Dere said anything, or if it was Ali who spoke. Tr 1405-06. Dere took nothing from the cab or from Abdulkadir. Nor was Dere handed anything that was taken. Tr 1411. In response to defense counsel's question, "Did you tell the prosecutor that Zakaria did not have intent to commit robbery?" the court sustained the State's objection, and struck the question from the record. Tr 1442.

During the trial, the State's witness, Ibrahim Abdi, a Somali interpreter, interpreted for the jury the recorded jail calls between Dere and Mohamed Ali. Tr 1458, et seq. The prosecution played a recorded September 10, 2014 call, even though there was not a clear translation of the following:

FIRST MALE: (Somali) 11 years. But he said -- he said he's going -- he's going to take the deal. He's going [INAUDIBLE] I was talking to his girl, whatever. She was -- she said nigga -- this nigga he's going to take the deal. The nigga he's going to try to say [INAUDIBLE] and he said he's -- when he testify, he's going to try to change to testify to some shit.

SECOND MALE: [INAUDIBLE].

FIRST MALE: [INAUDIBLE] a rat. There's no coming back [INAUDIBLE] go by that. You can't [INAUDIBLE]."

SECOND MALE: [INAUDIBLE].

FIRST MALE: So, nigga, you -- nigga, they gonna try to make [INAUDIBLE] point fingers after that. Once they do [INAUDIBLE] they don't need you to say [INAUDIBLE] you know what I'm saying?

SECOND MALE: Right. (Somali) Don't do it.
(Stop exhibit played in open court.)
Q. Okay. Before don't do it, what was said?
A. What did he say to him?
Q. Okay. I'm starting now at the 1:11 mark.
(Start exhibit played in open court.)

FIRST MALE: [INAUDIBLE].

SECOND MALE: [INAUDIBLE] right?

FIRST MALE: Yeah, but once you take that deal, there's no coming back.

SECOND MALE: (Somali).

FIRST MALE: (Somali).

SECOND MALE: (Somali).
Stop exhibit played in open court.)

Q. What was said there at the very end?

A. Momma -- momma (Somali) -- what did the mom said? The two mother -- moms are friends.

Tr 1462-63.

The record does not reflect whether the entire September 12, 2014, call played for the jury was translated into English. Tr 1463-67. The September 16, 2014, call was played for the jury in fits and starts. Tr 1467-71. A portion of the September 16, 2014 call provides:

MALE: (Somali) My nigga, I would you got to make him take a deal, bro --
(Stop exhibit played in open court.)

Q. Pausing at the 1:42 mark.

A. (Somali) He's swearing and -- and I already told you what to do. And you have to take the deal. Then he start using English." Tr 1470. Later, the next segment comes out this way on the record:

Q. Stopping at the 2:10 mark. Were you able to make that--

A. Yeah, (Somali) It means, you know, what -- I think he's going to take a deal. That's what he's trying to say. I think.

Tr 1471. The State also played the September 25, 2014, call in fits and starts. Tr 1471-76. The State played the August 25, 2014, call, despite the defense's objection that it went "beyond interpreting." Tr 1476-87.

On redirect, the prosecutor, without objection, had the interpreter read his prior translation as follows: "We just tell them that, you know -- you know, we are not in it and because they tell us after ten days, okay?" Tr 1491-92.

4. CLOSING ARGUMENTS.

In closing argument, the State relied heavily on the recorded jail calls to paint Dere as an accomplice. Tr 1701-02. During his closing argument, the prosecutor played various excerpts of the recorded calls, and emphasized their importance in establishing guilt. Tr 1725-32. 1734-35. Notably, the trial record of the September 10th jail call, Tr 1461-63, does not support the prosecutor's argument that "Dere said, I told him don't do it." Tr 1726. The trial record does not reflect that anyone said, "I told him." Nor does the record establish that the speaker who said "Don't do it," was the second male, not Dere (who was the first male speaker.) Tr 1461. Similarly, neither the trial record nor the replay of the September 16, 2014 call fully supports the prosecutor's argument that "you heard Mr. Dere say that because Bashir had been caught with everything, he should take it for the team." Tr 1727-28. The prosecutor also replayed a portion of the September 25, 2014, call, emphasizing how it shows Dere agreed he was involved in the robbery. Tr 1728-32.

In rebuttal the State argued that the jail calls were "incredibly

damning for the defendant." Tr 1770. Similarly, the prosecution concluded its rebuttal by asserting, "and most damning of all, the jail calls." Tr 1777.

The State also relied on the identification of the Cadillac in which Dere was arrested. The prosecutor argued:

> We also know from Bashir Mohamed the robbery, what Mr. Abdulkadir said, that he identified that Cadillac, the Cadillac with that license plate number. Mr. Mohamed identified that Cadillac and said that is the Cadillac that Zakaria Dere drove to get away. We know that Zakaria Dere was arrested in that Cadillac.

Tr 1717. In rebuttal, the State again mentioned the Cadillac, arguing that it was an important piece of evidence. Tr 1769.

The defense argued the State had not proven Dere was guilty of being an accomplice to the robbery and attacked the credibility of the eyewitnesses. Tr 1738; 1755-59; 1764-66.

5. JURY QUESTIONS

On October 29, 2014, the jury began deliberations at 3:30 p.m. Minutes (Sub 89, p. 24 of 29.) Within 15 minutes, the jury asked to hear the recorded jail calls. CP 326. The five calls were played in open court the next morning. Tr 1797-1810. At 11:55 that same day, the jury requested to review the transcript and translation of the jail call recordings. Tr 1811. The court responded: "Written transcript and written translation of the jail call recordings are not admitted exhibits." CP366. The verdict took another day.

D. ARGUMENT

I. THE ADMISSION OF THE RECORDED JAIL CALLS WAS REVERSIBLE ERROR.

1. THE RECORDED JAIL CALLS VIOLATED THE WASHINGTON STATE PRIVACY ACT.

RCW 9.73.030(1) prohibits the recording of private conversations on telephone calls without a court order or consent by both parties. "Washington's privacy act broadly protects individuals' privacy rights." *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). Conversations between two parties are presumed as being intended to be private. *Id.*, at 900.

Without a court order, the speakers' consent is the only way around the prohibitions of the Privacy Act. Indeed, RCW 9.73.030(3) defines consent as follows:

> Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

The conversations in this case were recorded without proper consent. First, neither "party" made an announcement; it was generated by the automated phone system. Tr 1533. Secondly, at the beginning of two of the five admitted calls (August 25, 2014, and September 16, 2014) that Dere received, the following recording was played:

> Hello. This is a free call from Mohamed Ali, an inmate at King County Correctional Facility. This call is from a correctional facility and is subject to monitoring and recording. If this call's being placed to an attorney, it should not be accepted unless the attorney name or number is on the do not record list. If an attorney name and number is not on the do not record list, this call will be recorded. If the attorney name and number is not on the do not record list, contact the jail immediately and have that attorney's name and number added to the attorney list. After the beep, press 1 to accept this policy or press 2 and hang up.

Tr 1546-47; 1798; 1806. The initial recording on the other three calls is not in the record. However, there was testimony that the above warning appears on every call made from the King County Jail. Tr 1546-47.

Significantly, the phrase "subject to monitoring and recording" is not equivalent to the express requirement in RCW 9.73.030(3) that consent be based on a warning that it "is about to be

recorded." In other words, the phrase "subject to" implies that it could happen but does not necessarily mean it is about to happen. *See Websters's Third New International Dictionary* 2275(1976) which defines "subject to" as "2b: Prone; disposed. . . 4. Likely to be conditioned, affected or modified in some indicated way. . ." Thus, it is merely a warning of a possibility, falling far short from meeting the express requirement of consent in the Privacy Act. In short, possibility, or even probability, of interception does not make a recording of a telephone call consensual under the stringent requirements of RCW 9.73, *et seq*. As the Washington State Supreme Court specified in *State v. Roden*, 179 Wn.2d 893, 901 (2014): "[t]he possibility that an unintended party can intercept a text message due to his or her possession of another's cell phone is not sufficient to destroy a reasonable expectation of privacy in such a message."

To protect the Privacy Act's goals, strict compliance with RCW 9.73 is required. As the Washington Supreme Court specified in *State v. Cunningham*, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980), recordings must strictly conform to the statute so as to "ensure that

waiver by consent authorized by RCW 9.73.030 is capable of proof by the recording itself." *See also Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 467, 139 P.3d 1078 (2006)(officers must strictly comply with the provisions of RCW 9.73.090(1)(c) when recording traffic stop conversations). Under this standard, three of the five calls should not have been admitted at all since there is nothing on the recording admitted in evidence which establishes consent.

The Privacy Act's exceptions are narrowly drawn. For example, to obtain a court order to record a private communication, it takes ". . . reasonable grounds to believe that national security is endangered, that a human life is in danger, that arson is about to be committed, or that a riot is about to be committed." RCW 9.73.040(1)(a). There are other exceptions, such as the recording of 911 calls and emergency response calls, RCW 9.73.090(1)(a) and video/audio recordings by police of arrested persons with detailed, proper warnings on the recording. RCW 9.73.090(1)(b). And even with one consenting party to the conversation (unlike federal law), there is a warrant-like provision authorizing recordings "if there is probable cause to believe that the nonconsenting party has

committed, is engaged in, or is about to commit a felony" or a serious drug offense. RCW 9.73.090(2) and (5).

There is a special statute, RCW 9.73.095, that permits and governs the recording of calls by prisoners in the state Department of Corrections (DOC). Significantly, the Legislature has not created a corresponding exception for county jails. Certainly, the Legislature did not include county jails within the statutory exception because most jail inmates have not been convicted and are presumed innocent. In the end, the statutory scheme of chapter 9.73 evinces a clear intent to protect privacy with narrowly drawn exceptions and strict procedures when privacy is allowed to be breached.

Given the statute's history and structure, strict compliance with the consent language of RCW 9.73.030 is required. Here, the "consent" obtained via the recorded warnings does not pass muster. All five calls were obtained in violation of the Privacy Act, and are thus inadmissible for any purpose at trial under RCW 9.73.050. Indeed, RCW 9.73.050 provides:

Any information obtained in violation of RCW 9.73.030 or

> pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

On this basis alone, a reversal is required.

2. ADMISSION OF RECORDED JAIL CALLS AGAINST A NON-INMATE VIOLATES THE WASHINGTON PRIVACY ACT.

No Washington case has held that a recorded jail phone call is admissible in trial against the speaker who was not an inmate. In *State v. Modica*, 164 Wn.2d 83, 89, 186 P.3d 1062 (2008), the Supreme Court held that jail recordings were admissible against the inmate-defendant. However, the primary basis for that decision is that "inmates have a reduced expectation of privacy." *Modica*, at p. 88. Moreover, the recording in *Modica* had a clear warning: "This call ***will be recorded*** and subject to monitoring at any time." At p. 86 (emphasis added).[1] The Court in *Modica* concluded that the inmate

[1] *See also State v. Archie*, 148 Wn. App. 198, 201, 199 P.3d 1005 (2009) ("This call ***will be recorded*** and subject to monitoring at any time.") (emphasis added).

"had no reasonable expectation of privacy" because (1) both Modica and his grandmother were recorded discussing the fact that their calls were being recorded; (2) Modica was in jail; and (3) there was a need for jail security. *Id.* at 89. Pointedly, the Court warned 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," and further specified that "[s]igns or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy." *Id.* at 89.

In every other case after *Modica*, the recorded conversations targeted the inmate-defendant, and not the free individual. *See,* e.*g.*, *State v. Haq,* 166 Wn. App. 221, 254, 268 P.3d 997 (2012) (strict scrutiny not required as prisoners in jail have no right to privacy.) In the case at bar, Zakaria Dere was not the inmate. He was a free man who, like all free citizens, was presumed innocent. Accordingly, strict scrutiny must apply.

When determining whether a communication is "private,"

courts consider several factors, including, but not limited to (1) the subject matter of the communication, (2) the location of the participants, (3) the potential presence of third parties, (4) the role of the interloper, (5) whether the parties "manifest a subjective intention that it be private," and (6) whether any subjective intention of privacy is reasonable. *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004). The fact that Dere spoke to the codefendant during trial about the case reflects his subjective intent that his conversation be private. Had Dere been given express, unequivocal notice that his conversation would in fact be recorded, he would have never discussed the alleged offense with the codefendant, and, likely, would have never spoken to the codefendant. Unlike the parties to the recorded call in *Modica*, Dere manifested no objective knowledge that his call was recorded, much less that it would be used against him at his own trial. Certainly, Dere had a reasonable expectation of privacy when discussing his own case. Dere's reasonable expectation of privacy is established by the circumstances of the telephone calls and his actions reflecting his subjective understanding that the call would be private, or at least not used

against him in a criminal trial. His reasonable expectation of privacy is also enshrined by statute. Not only does Washington's Privacy Act require express notice that the conversation *will* be recorded by a "party," the Act also distinguishes local jails from Washington State's DOC by making an exception to the strictures of the Act only for DOC facilities. Under these circumstances, the presumption of the expectation of privacy cannot be overcome in Dere's case.

The trial court's decision violates the letter and spirit of the Washington Privacy Act and sets a dangerous precedent reaching far beyond the bounds established by the Washington State appellate courts which have never authorized the dragnet approach to electronic surveillance or allowed law enforcement free reign to electronically record the conversations of our citizens without the checks and balances of judicial scrutiny. If law enforcement desired to use or record Dere's telephonic conversations, the State could have gone before a judge to seek a warrant. Instead, the State ran an "end around" the judiciary to violate Dere's statutory and constitutional privacy rights.

Courts would never tolerate the admission of recorded conversations gleaned from hidden microphones planted at the defense table of the codefendants. Because there was no express warning that the conversation will in fact be recorded and could be used against all speakers, the State, in Zakaria Dere's case, garnered incriminating evidence by using what is akin to a secret microphone. This was done without the oversight of the courts, unlike the strict procedures the Privacy Act requires for breaches of privacy.

3. THE ADMISSION OF RECORDED JAIL CALLS AGAINST A NON-INMATE VIOLATES THE CONSTITUTIONAL RIGHT TO PRIVACY.

Const. art. I, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Section 7 provides broader privacy protections than the Fourth Amendment. *State v. Acrey,* 148 Wn.2d 738, 746, 64 P.3d 594 (2003). Nonetheless, the United States Constitution also recognizes the right to privacy. *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2484, 189 L. Ed. 2d 430 (2014) (balances intrusion upon an individual's privacy with the promotion of legitimate governmental interests; holding that search of cell phone data required a warrant,

even though the phone was lawfully in police custody).

Art. I, § 7 of the Washington State Constitution "clearly recognizes an individual's right to privacy with no express limitations." *State v. Parker*, 139 Wn.2d 486, 493-494, 987 P.2d 73 (1999) (holding passengers in a lawfully detained vehicle cannot be searched.) The search and seizure of Dere's conversations is uncannily similar to a search of a passenger in a vehicle. Just as the passenger has privacy rights, so should the free speaker at the other end of the phone line.

The defense argued that the State was required to obtain a warrant in order to obtain and use the recording of Dere, who was a free citizen outside of jail at the time of the recordings. The trial court rejected the defense's argument and incorrectly presumed that *Modica* trumped art. I, § 7 and the Fourth Amendment. Tr 622-23, 657. The trial court confused the issue with how the State obtained the evidence with the nature of the evidence, in distinguishing *Riley v. California, supra*. Tr 623. The fact that nothing physical was seized from Dere is not the issue. After all, the first case developing the "expectation of privacy," *Katz v. United States*, 389 U.S. 347, 88

S. Ct. 507, 19 L. Ed. 2d 576 (1967), did not involve a seizure of a physical object, but the electronic eavesdropping of a phone conversation in a public telephone booth. The seizure of Dere's conversation and its use as evidence required a warrant, just as the United States Supreme Court ruled nearly fifty years ago.

The trial court erred in failing to apply "the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement." Indeed, "[t]hese exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement." *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Our State Constitution guarantees privacy, and does not analyze an invasion of privacy on reasonableness grounds. *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013) ("Article I, section 7 does not turn on reasonableness," but instead guarantees that no person shall be disturbed in his private affairs without authority of law).

Jail security is the prime reason for the exception to the

warrant requirement under the Washington Privacy Act. *Modica*, at p. 88. The exception clearly did not apply here not only because the call was used against a free speaker, but also because there is nothing in the recorded conversations with Dere having any connection to matters of jail security. The prosecutor obtained them to search for evidence, and as testified to at trial, it is usually the prosecutor's office that requests these recordings.[2] Tr 618-21; 1534. Thus, the prosecutor was able to collect calls made during the joined trial of Dere and Mohamed Ali (September 10, 12, and 16 calls), and then during Ali's severed trial (September 25 call), without any concern for the strictures of the Privacy Act or judicial oversight. Currently, nothing prevents police or prosecutors from trolling through all recorded jail calls in order to seek evidence without any connection to jail security required. The specter of the State's unfettered access to listen to and record the conversations of free citizens is all the more frightening because word recognition software programs could

[2] Ironically, the jail officer also mentioned that law enforcement or the defense could have obtained them just as simply. All he needs is a defendant's name or a phone number to plug into his computer retrieval program **at his desk**. This single click tool does not distinguish between inmates or the free speakers outside. It does not concern jail security; but rather serves as a stealthy, fast, and efficient threat to privacy rights.

provide the State with a powerful tool to troll through a massive number of electronically recorded conversations to fish for evidence of criminal conduct of free citizens. Allowing the State a "free pass" in the case at bar would grant law enforcement a tool akin to the National Security Administration's unconstitutional use of the PRISM program to troll through conversations of an untold number of free citizens.

The procedure and practice exercised by the State in the case at bar clearly violate art. I, § 7 and the Fourth Amendment. The State should not be allowed to skirt judicial oversight simply because one of the callers is in custody. Without a warrant or rationale, the prosecution should not be permitted to gather an inmate's calls and use them against the free speaker. This violated Dere's constitutional and statutory rights of privacy and freedom from unreasonable search and seizure. It also affects the rights of all citizens and strips the courts of their traditional powers of oversight.

II. ADMISSION OF THE IDENTIFICATION OF A LICENSE PLATE NUMBER ON THE CADILLAC IDENTIFIED ON THE NIGHT OF THE CRIME CONSTITUTED IMPROPER AND HIGHLY PREJUDICIAL HEARSAY EVIDENCE.

1. BECAUSE NO WITNESS TESTIFIED ABOUT A PLATE NUMBER THE NIGHT OF THE CRIME, ANY EVIDENCE ABOUT A PLATE NUMBER WAS BASED ON INADMISSIBLE HEARSAY.

The trial court correctly court ruled that there would be no testimony about a plate number of the Cadillac that Dere climbed into after his alleged involvement in the robbery, as that information came from a non-testifying witness. Tr 611. Despite the court's ruling, the prosecutor asked a series of questions of the alleged victim designed to circumvent the court's ruling. For example, the prosecution asked: "Q. This is a yes-or-no question. Do you recall whether anyone at the scene had mentioned anything about a license plate?" Tr 910. The court sustained five objections to these attempts before the prosecutor gave up at that point. Tr 910. But persistence paid off for the prosecution as the court relented and permitted Officer Medlock to testify that Abdulkadir gave him a license plate number. ("And did he give you the license plate number?" Tr 1260.) Ironically, the prosecution's question was misleading, if not false. In fact, Abdulkadir denied giving the officer the plate number. Tr 909. And if the police officer had it, it was not based on Abdulkadir's own personal knowledge. Tr 1252.

The court fell into the trap of finding that the evidence was admissible because law enforcement relied on it as part of its investigation. Tr 1253. And that is precisely what *State v. Aaron*, 57 Wn. App. 277, 787 P.2d 949 (1990), prohibits. In *Aaron*, a police officer was allowed to testify about the defendant's use of a blue jeans jacket even though his testimony was based on something he heard over a radio dispatch rather than personal knowledge. No eyewitness testified in *Aaron* about the blue jeans jacket. The State argued that it was relevant to the officer's state of mind, explaining why he acted as he did. In ruling this testimony was inadmissible, the Court observed: "However, the officer's state of mind in reacting to the information he learned from the dispatcher is not in issue and does not make "determination of the action more probable or less probable than it would be without the evidence." ER 401." *Aaron, supra,* at p. 280.

Similarly, the fact that the police relied on the license plate number in their investigation is of no consequence in the action here. In *Aaron* "the State introduced Officer Gough's testimony solely to suggest to the jury that the jacket containing the watch and jewelry

stolen from Schwedop belonged to Aaron." At p. 280. In Dere's case, the State insinuated Abdulkadir's supposed identification of the license plate number in a number of different ways. First, a detective testified that plate number AKE8954 was the specific vehicle he was looking for before arresting Dere. Tr 1103-04; 1110. Then he testified to the plate number of the car in which Dere was arrested. Tr 1104. This thread was connected to the lead detective's testimony that he was "aware of a reported description of a vehicle that allegedly fled the scene." Tr 1300. This testimony was promptly followed by introduction of the Cadillac's registration with the license plate. Tr 1300. A search of that Cadillac with the identified plate produced Dere's id's. Tr 1317-19. And most importantly, the prosecutor emphasized the plate identification in closing, misstating that Abdulkadir had provided the plate number. Tr 1717, 1769. The license plate thread bolstered Abdulkadir's oddly delayed identification of Dere as a perpetrator. Despite Abdulkadir 's claim that he knew Dere the night of the crime, he did not identify Dere until after he talked to his 'sister.' Tr 935-36; 1006-07; 1266.

2. THE LICENSE PLATE EVIDENCE WAS HIGHLY PREJUDICIAL.

"A claim of harmless error should be closely examined where it results from the deliberate effort of the prosecution to get improper evidence before the jury." *Aaron, supra,* at 282. Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983); *State v. Sweeney*, 45 Wn. App. 81, 86, 723 P.2d 551 (1986). Even though the actual plate number was not mentioned by Officer Medlock, it was patently obvious throughout the trail that it was the one that Abdulkadir 'gave' the police. The defendant's trial attorney saw this coming.[3] Given that the State hammered on this evidence during trial and mentioned it in both its closing arguments, there can be no doubt that the improper admission of the hearsay statements affected the trial's outcome and should be cause for reversal on its own.

[3] "So, even though it may not be said directly, I think indirectly that would be the obvious conclusion that the jury would reach that that was the number he gave." Tr 1254.

III. INCONSISTENT RULINGS ON CONCLUSORY OPINION EVIDENCE CAUSED PREJUDICIAL ERROR.

Over objection, the prosecutor's leading question was permitted of the testifying codefendant: "And Mr. Abdulkadir had fled from the car as a direct result of what you and Mr. Dere were doing together; correct?" Tr 1378. It was improper as a legal conclusion that tied Dere as an accomplice into the robbery scheme even though Dere took no property from the victim and was not involved in planning it with the co- defendants. Tr 1397; 1411.

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury]."' *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348 (1987)). In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the circumstances of the case, including the following factors: (1) "the type of witness involved," (2) "the specific nature of the testimony," (3) "the nature of the charges," (4) "the type of defense," and (5) "the other evidence before the trier of fact." *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Applying the five factors here: (1) the witness was a codefendant testifying for the State under a plea agreement, so any admission by him carried the credibility of a 'confession;' (2) the clever framing of the leading

question would lead the jury to believe that they were accomplices in the robbery; (3) although the defendants were charged as accomplices to a robbery, a lesser included offense of assault in the fourth degree was given to the jury (CP 355-58), which created the possibility of a finding that Dere was guilty of an assault but not an accomplice to the robbery; (4) the defense was both one of denial and that he was not an accomplice; and (5) the other evidence of his role as an accomplice was not overwhelming. The five factors tilt strongly in favor of excluding the codefendant's lay opinion.

Conversely, when Bashir was asked this question by defense counsel: "Did you tell the prosecutor that Zakaria did not have intent to commit robbery?" the court sustained an objection and struck the question from the record. Tr 1442. That was the correct ruling since it was a lay opinion of the defendant's intent. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (inappropriate opinions include expressions of personal belief, "as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses").

A witness should not be permitted to give an opinion on the guilt of the defendant as that violates the defendant's right to a jury trial and presumption of innocence, which includes the jury's independent determination of the facts. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759 (2001). By striking the

defense's question and admitting the codefendant's opinion to the prosecutor's question, the trial court sent a strong signal to the jury. This violated Dere's state and federal constitutional rights to a jury trial and the presumption of innocence, and severely prejudiced Dere's right to a fair trial.

E. CONCLUSION

As a matter of law and policy, the State should not be allowed to obtain and use calls against the non-inmate without a warrant, unless the State can establish that the conversation related to matters of jail security. Otherwise, the right to communication privacy—even if big brother is watching and thereby chilling it—is curtailed further. "Protecting the privacy of personal communications is essential for freedom of association and expression." *State v. Hinton*, 179 Wn.2d 862, 877, 319 P.3d 9 (2014)(holding text sender had right to privacy in text sent to another's phone to arrange a drug deal.)

For the reasons argue above, this case should be remanded for a new trial due to the violations of the Washington Privacy Act, art. I, § 7, and the Fourth Amendment, and the admission of hearsay and the injection of lay opinion of guilt.

DATED this 30th day of September, 2015.

Respectfully submitted,

_____s/_____
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