93590-4

NO. 72713-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ZAKARIA AWEIS DERE,

Petitioner/Appellant.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Zakaria A. Dere is the appellant/petitioner. He is serving a 150 month sentence at Stafford Creek Correctional Center.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed his conviction on direct appeal on July 25, 2016. Attached in Appendix 1. A Motion for Reconsideration was denied on August 11, 2016.

III. ISSUES PRESENTED FOR REVIEW

1. 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.

2. 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.

3. Article 1 § 7 of the Washington Constitution was violated by the admission of recorded jail calls since there was no proper consent.

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

IV. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

One January 14, 2014 the First Amended Information charged

petitioner Zakaria Aweis Dere, codefendants Bashir A. Mohamed, and Mohamed A. Ali with one count of Robbery in the First Degree. Clerk's Papers, pp. 1-2 (hereinafter "CP" followed by the page number). On September 3, 2014, the three codefendants began trial before the Honorable Tanya Thorp. Verbatim Report of Proceedings at p. 57. (Hereinafter "RP" followed by the page number. RPRP

After several motions and two Amended Informations, Dere's trial for Robbery in the First Degree with a firearm enhancement was severed from the other two codefendants, whose 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 to 90 months for the robbery offense. CP 381-89.

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 Dere allegedly drove away from the crime. The court reasoned that since a third person who was not testifying had provided the license plate number, Abdulkadir did not have any personal

knowledge of the plate number. RP 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. RP 618-621; CP 184-219; CP 318-20. The court denied Dere's suppression motion, and later ruled that five separate calls were admissible. RP 623, 657.

3. TRIAL TESTIMONY AND CONDUCT.

Nasir Abdulkadir, testified that on December 12 and 13, 2013, he was as a taxi driver for Eastside for Hire. RP 867. He was familiar with the three codefendants and he had seen Zakaria Dere (nickname "Zu") about four times before, but that he had not known his name. RP 864-67.

While he was driving in the area of 12th Avenue and Main Street in Seattle, codefendant Mohamed Ali flagged his cab down, got into the front passenger seat, and took Abdulkadir's iPhone. RP 871, 874-75. Soon after that, codefendant Bashir Mohamed opened the driver's door, pointed a black revolver at his face, and demanded money. RP 876, 880-81, 889. Nasir Abdulkadir testified that at some point, Zakaria Dere stood within an arm's length of Bashir. RP 881. Bashir hit him with the gun, and Dere stood behind Bashir and was holding what he thought was a boxcutter knife. RP 884. The person behind Bashir was not identifiable in any pictures from the cab camera. RP 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. RP 885-86. After a few moments, Abdulkadir ran away and called 911. RP 891.

In the recorded 911 call (made at 2:59 a.m.), played for the jury, 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. RP 893-902, 1072. He also reported they drove away on Main Street in a white Chevy. RP 898-99.

At trial, Abdulkadir testified that he saw Dere leave in a white Cadillac. RP 903, 917. He did not know the license plate number. RP 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. RP 910. To each of these questions, an objection was sustained. RP 910. Later, the court reiterated that there would be no testimony about the plate number. RP 922.

Ten days after the robbery, he told the police Dere's name only after he met with someone he thought was Dere's sister, and on the same day he later picked Dere out of a six-person montage. RP 435, 932, 935-36, 1304.

The night of the robbery, Abdulkadir did not mention that he knew Dere's family. RP 1006-08. Officer Medlock, who wrote the main incident report, thought they were "strangers" to Abdulkadir. RP 1266.

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 that plate number. RP 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. RP 1254; RP 1260. The court later admitted Exhibit 94, a certified copy of the registration of Dere's silver Cadillac, reflecting license plate number AKE8954. RP 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; RP 1335. Bashir Mohamed testified that he had known both codefendants for some time. RP 1336-38. Bashir Mohamed testified Dere drove a Cadillac, which he identified in the admitted picture (Exh. 99) with the plate number. RP 1339.

On December 13, 2013, Bashir possessed the black revolver which the police later recovered from the Chevy Caprice. RP 1347. After the pre-arranged signal with codefendant Ali, he went to the taxi, opened the driver's door, pulled his gun out and demanded money. RP 1352. He noticed Dere standing next to him holding a baton, and that Dere started to hit Abdulkadir with the baton. He was not sure if Dere asked for money, or if it was Ali

who spoke. RP 1405-06, 1354, 1356. Bashir admitted that only he and Ali had planned the robbery. RP 1385-86. Dere took nothing from the cab or driver, nor was Dere handed anything that was taken. RP 1411.

Over earlier objections, RP 621-57, 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). RP 1373. Bashir identified the speakers in the August 25, 2014 call played to the jury. RP 1376.

The prosecution played for the jury the five calls recorded on August 25, 2014, RP 1476-87; September 10, 2014, RP 1462-63; September 12, 2014, RP 1463-67; September 16, 2014, RP 1467-71; and September 25, 2014, RP 1471-76.

4. CLOSING ARGUMENTS.

In closing argument, the State relied heavily on the recorded jail calls to paint Dere as an accomplice. RP 1701-02. During his closing argument, the prosecutor played various excerpts of the recorded calls, and emphasized their importance in establishing guilt. RP 1725-32. 1734-35. In rebuttal the State argued that the jail calls were "incredibly damning for the defendant." RP 1770. Similarly, the prosecution concluded its rebuttal by asserting, ". . . and most damning of all, the jail calls." RP 1777.

The State also relied on the identification of the Cadillac in which Dere was arrested, incorrectly arguing that Abdulkadir identified the plate.

RP 1717. In rebuttal, the State again mentioned the Cadillac, arguing that it was an important piece of evidence. RP 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. RP 1738; 1755-59; 1764-66.

5. JURY QUESTIONS

Within 15 minutes of getting the case, the jury asked to hear the recorded jail calls. Minutes (Sub 89, p. 24 of 29.); CP 326. The five calls were played in open court the next morning. RP 1797-1810. Later, the jury requested to review the transcript and translation of the jail call recordings. RP 1811. This request was denied. CP366. The verdict took another day.

V. ARGUMENT

A. ADMISSION OF THE JAIL RECORDINGS VIOLATED ART. 1 § 7 AND THE FOURTH AMENDMENT.

This issue presents a significant question of Constitutional law under art. 1 §7 and the Fourth Amendment. In addition, it involves an issue of substantial public interest that should be determined by the Supreme Court. As our government increasingly spies on its own citizens without judicial oversight, Washington State has stood as a bulwark against governmental spying. Yet since this Court's decision in *State v. Modica*, 164 Wn.2d 83, 186 P.3 1062 (2008), state prosecutors and law enforcement have been

obtaining recordings of jail inmates' calls without any judicial review or much bother at all. As happened here, the prosecution simply supplied the jail a defendant's name and/or a phone number to plug into their computer retrieval program. RP 1534. This single click tool does not distinguish between inmates or the free speakers outside. This easy access does not concern jail security; but rather serves as a stealthy, fast, and efficient way to search for evidence, and as testified to at trial, it is usually the prosecutor's office that requests these recordings. RP 618-21; 1534. Currently, nothing prevents police or prosecutors from trolling through all recorded jail calls in order to seek evidence. The State's unfettered access to the conversations of free citizens is frightening because word recognition software programs could 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 the families of defendants who cannot afford bail.

Here, the State obtained and then introduced at trial five recorded jail calls against the speaker who was not in jail. These conversations were not discovered for or by jail security. This is the first case to test the interplay between the free speaker's rights and the State's ability to scrutinize these conversations for evidentiary purposes alone.

1. POSSESSION OF RECORDED CALLS BY THE JAIL FOR SECURITY PURPOSES SHOULD NOT EXCUSE LAW ENFORCEMENT FROM SEEKING COURT REVIEW.

The original purported reason for opening the door to recorded jail calls was "because of the need for jail security." *Modica, supra*, at p. 89. In the eight years since *Modica,* the security rationale has been totally eclipsed by the State's trolling of these calls for incriminating evidence. Across this State, prosecutors and law enforcement are scrutinizing all jail calls and frequently provide them on the eve of trial. Three of the recorded calls (9/10/14, 9/12/14 and 9/16/14) in Dere's case occurred during the joint trial of Dere and Mohammed Ali, before Dere was severed out for a separate trial.

Normally searches undertaken by law enforcement officials to discover evidence of criminal wrongdoing require judicial review. *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014)(held even where police had properly seized a cell phone, they still needed a warrant to search its contents.) Here this was not a discovery by jail officials perusing the calls for security purposes, but a search for evidence unrelated to security. This is an important distinction because there must be some balancing of privacy interests v. law enforcement exigencies. As *Riley v. California, supra*, at 2488, observed:

> The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." Maryland v. King, 569 U. S. ___, ___, 133 S. Ct. 1958, 1979, 186 L. Ed. 2d 1, 30 (2013). To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.*

Here, there was no balancing between the initial justifiable seizure of the jail calls and their later scrutiny for evidence of non-security related crimes.

In fact the wide open availability of these calls is analogous to prohibited exploratory searches during the plain view exception to the warrant requirement. That is, "the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Bell*, 108 Wn.2d 193, 197-198, 737 P.2d 254 (1987) (discovery of marijuana grow not an extended search—the firefighters had "immediate knowledge" to form "a reasonable belief that evidence is present.")

Here, the State had no "reasonable belief that evidence was

present," but was just fishing for evidence. The jail officers have a right to monitor calls without a warrant for security purposes. But then after that exercise is done, the volume of recorded calls is turned over to another agency to explore those calls one by one "until something incriminating at last emerges." *Coolidge v. New Hampshire*, *supra.*

In *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) the police were lawfully present in the defendant's apartment in response to a shooting, and while there, saw potentially stolen electronic equipment. Then an officer moved a turntable to read and record serial numbers that established it was stolen. The Supreme Court held the minimal movement of the equipment was a search beyond plain view and, without probable cause, the evidence must be suppressed. The doctrine applied there is that a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation." *Arizona v. Hicks, supra* , 107 S. Ct. at 1152.

The analogy to plain view holds. The exigency is jail security. Thus any search of those calls must be 'strictly circumscribed' by security needs. Searches that go beyond the

'exigencies' violate the doctrine of *Arizona v. Hicks.* The search of these recorded jail calls went way beyond security. Searches of conversations should not be treated differently than moving a turntable to read the serial number. If anything, this search is more invasive—examining the words and inner thoughts of the speakers for incriminating statements. The State argued below that "the actual content of the calls recorded does not define the constitutional protection provided." (Respondent's Brief at p. 28) That misses the point. Rather, it is the State's unchecked scrutiny of these conversations that is analogous to moving the turntable to see the serial number.

The State's exploratory search for incriminating evidence in the jail conversations is also comparable to the invasive search invalidated in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014)("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.")

Although the Court of Appeals rejected Dere's constitutional claims, (Slip Op. at p. 5-7) this Court has not analyzed such claims as

Modica was decided only under chapter 9.73 RCW. *Id.* at p. 86.

2. CONSTITUTIONAL CONSENT REQUIRES MORE THAN ACCEPTING A PHONE CALL.

Under the strict requirements of article 1 § 7 consent normally requires more than punching the number "1" to accept a telephone call. After all, it is certainly possible that Dere was in his own home, when these calls were received. When someone is in the privacy of their residence, warnings under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) are required to validate a consent search of the home. And even if not in the home, the trial court should have applied a totality of the circumstances test to determine if the consent was valid. *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013)(laying out some factors to consider.) The basis of the 'consent' to the recording and monitoring of the jail calls was originally for security needs. That narrow goal undermines the voluntariness of any consent when the consenter is not fully informed how limitless his or her 'consent' turns out to be.

This Court has consistently required that consent be "both meaningful and informed." *State v. Cates*, 183 Wn.2d 531, 548-549,

354 P.3d 832 (2015)(dissent), citing *State v. Schultz*, 170 Wn.2d 746, 750, 754, 248 P.3d 484 (2011)(mere acquiescence to an officer's entry is not consent.) Except for the presumption that Dere heard the automated recording here, this was not a "meaningful and informed" consent. Curiously, the automated recording in evidence warns in part: "This call is from a correctional facility and **is subject to** monitoring and recording." (emphasis added.) RP 1546-47; 1798; 1806. The phrase "subject to" implies that it might happen but does not necessarily mean it will happen. *See, Websters's Third New International Dictionary* 2275 (1976). It is not crystal clear.

This very Court was concerned about such ambiguous, automated warnings: "Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy." *State v. Modica, supra,* at p. 89. After all, anyone who has called an insurance company, major corporation, bank, or any tech support person invariably hears an automated recording such as 'this call may be recorded for quality assurance.' People tune out such recordings and proceed with the call because they have no choice. Ruling that acceptance of such calls is a "meaningful and informed," voluntary consent to the use of these calls for all

purposes severely undercuts Washington's well developed constitutional law of consent. What is more, it discriminates against pre-trial detainees who cannot afford bail. Everything they and the calls' recipients may say on the phone has been 'seized' for evidentiary purposes under the current practice. This is not true for defendants who can make bail.

This Court never ruled that *Modica's* mothers' words were a potential source of incriminating evidence against her. To be sure, by pressing number "1," the recipient of a jail call is not voluntarily and knowingly consenting to a wholesale search of their end of the conversation for information incriminating them in matters irrelevant to jail security. The search and seizure in this case clearly goes beyond the scope of any consent created by pressing "1."

B. THE DEFENDANT WAS DENIED AN OPPORTUNITY TO CONFRONT AND CROSS EXAMINE A CRITICAL EYEWITNESS.

This issue presents a significant question of Constitutional law under both art 1 §22 and the Sixth Amendment as the prosecution was able to thread a connecting fact—the license plate number—throughout the trial without the defendant having a chance to confront or cross examine the supplier of that fact.

Ironically, the State conceded there would be no testimony

from the eyewitness who had allegedly identified the plate number of the Cadillac that Dere climbed into after his alleged involvement in the robbery. RP 428-434, 611. Similarly, the trial court correctly ruled that there would be no testimony about the plate number. RP 611. Despite the court's ruling, the prosecutor asked a series of questions of Abdulkadir designed to circumvent the court's ruling, which were disallowed by the court. RP 910. This heightened the effect later when this forbidden fruit was cleverly admitted through Officer Medlock who first testified that Abdulkadir described a white or silver Cadillac. RP 1260. And immediately after that description, Medlock testified that Abdulkadir gave him a license number. RP 1260. Although Medlock was not asked for the precise number, it was blatantly obvious that Abdulkadir gave him the correct number. In objecting to this testimony, the defense explained to the trial court: "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." RP 1254. The trial court ruled that the evidence was admissible because law enforcement relied on it as part of its investigation. RP 1253.

The full plate number was marched in front of the jury in other forms of testimony throughout trial. RP 1103-04; 1110; 1300; 1317-19. Yet there was no other testimony explaining how the police got the license number—other than the misleading inference that the victim supplied it. In closing the prosecutor used this to bolster the strangely tardy identification of Dere by Abdulkadir by emphasizing the plate identification, misstating that he had provided the plate number. Tr 1717, 1769. The plate number became a fact for the jury even though no eyewitness testified he or she saw it

In the Slip Opinion (at p. 8), the Court of Appeals refused to consider the constitutional violation here. In discrediting the evidentiary issue, The Court of Appeals (at p. 7) erroneously stated: "The officer in this case had personal knowledge that the police obtained the plate number from the victim." For starters, the officer could have had no personal knowledge since he was not a witness to what the license plate read that night. At best, he had second hand, or hearsay information, about the plate number. In fact even though the victim may have told him the plate number, the victim admitted he had no personal knowledge either. So this was third hand information not personal information. Secondly, the reason the trial

court admitted the evidence had nothing to do with the officer's 'personal knowledge' but ruled it went to the officer's reliance on it as "part of its investigation." RP 1253.

This 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. It was something he relied on for his investigation. Yet no eyewitness testified in *Aaron* about the blue jeans jacket. Due to this improper hearsay, the Court in *Aaron* reversed the conviction.

Even though the Court of Appeals declined to deal with the constitutional issue, the case we relied on, *Aaron*, raised the confrontation issue since it ruled: "Nonetheless, the confrontation issue arises by reason of the improper admission of testimony about the blue jeans jacket after Buchanan had left the stand without being questioned by either party about her statement to the police dispatcher." *State v. Aaron*, 57 Wn. App. at 282. The purpose of the hearsay rule is to prevent violations of the right to confront and cross

examine the witness who reports the given fact. Tegland, *Washington Practice Series* Vol. 5B Evidence Law and Practice § 801.2 (5th ed. 2007)(reasons for the hearsay rule are: "the out-of-court declarant was not under oath when making the statement in question, the declarant's demeanor cannot be observed, the declarant it is not subject to cross-examination, and the witness who is recounting the declarant's statement in court may not recount the statement accurately.") This is at the heart of the right to confront and cross examine witnesses under the 6th Amendment and article 1 § 22, as was argued in the trial court. RP 439; CP 76. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012)(introduction of certification records implicates right to confrontation.) Due to the prosecution's emphasis of the "unconfronted" license plate number, this Constitutional violation requires reversal.

VI. CONCLUSION

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. Here, as in many cases, the jail phone calls have devolved into a fertile source of incriminating evidence for prosecution and police. All they have to do is request any and all calls of a particular defendant to fish for evidence—not for security purposes but to improve their case—without ever bothering to make an *ex parte* application showing need or relevance. RP 1534. Furthermore, the "consent" to an automated recording falls far short of consents as developed by this Court under art. 1 § 7. The admission of those recordings along with the violation of Dere's constitutional right to confront and cross examine the witnesses against him should compel this Court to grant review.

DATED this 8th day of September, 2016.

Respectfully submitted,

s/
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Counsel for Zakaria Dere

ROBERT GOLDSMITH LAW OFFICE

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Court of Appeals
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BASHIR ABDIRASHID MOHAMED, MOHAMED ABDI ALI, Defendants, and ZAKARIA AWEIS DERE, and each of them, Appellant.	No. 72713-3-I DIVISION ONE PUBLISHED OPINION FILED: July 25, 2016

BECKER, J. — A telephone conversation between a jail inmate and a person outside the jail is not a private communication when the participants are advised that the call will be recorded and must confirm their understanding that they are being recorded. A recording of such a conversation is admissible against the noninmate participant as well as against the inmate.

Appellant Zakaria Dere appeals from a robbery conviction. Before the trial, Dere posted bail and was released from custody. Dere received several calls from Mohamed Ali, a codefendant who remained in jail. Their conversations were recorded by the jail's telephone system. The recordings provided evidence

of Dere's complicity in the robbery and were used by the State at trial. Dere assigns error to the denial of his motion to suppress the recordings.

Dere moved to suppress the recordings on the basis that they violated his privacy rights.

Dere first contends admission of the recordings violated the Washington privacy act, chapter 9.73 RCW. Recordings obtained in violation of the act are inadmissible for any purpose at trial. RCW 9.73.050. The act makes it unlawful to intercept or record private communications transmitted by telephone without first obtaining the consent of all participants in the communication. RCW 9.73.030(1); State v. Modica, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008). A communication is private when parties manifest a subjective intention that it be private and where that expectation is reasonable. State v. Christensen, 153 Wn.2d 186, 193, 102 P.3d 789 (2004).

Dere's conversations with Ali were not private communications. Dere and Ali did not have a reasonable expectation of privacy in their telephone conversations because they knew their calls were recorded and subject to monitoring. See Modica, 168 Wn.2d at 88-89.

In Modica, the defendant was arrested and jailed for punching his wife in the face. The defendant called his grandmother from jail to enlist her help in arranging for his wife to evade the prosecutors and not appear in court. Modica, 164 Wn.2d at 87. The jail recorded the calls between the defendant and his grandmother, and the State used the recordings to convict the defendant of witness tampering. The conviction was affirmed against an appeal asserting that

the recordings violated the privacy act. Modica, 164 Wn.2d at 86. Because the defendant and his grandmother both knew their calls were recorded and subject to monitoring, the court rejected the argument that the calls were private communications.

In Modica, signs posted near the jail telephones warned that the system recorded every outgoing call and tracked every number dialed. Modica, 164 Wn.2d at 86. An automated message repeated that warning to both those making and receiving the calls. The same was true in this case. Similar signs were posted and a similar warning was given by an automated message. Each time Dere received a call from Ali, the jail telephone system played an automated message stating as follows:

> Hello. This is a free call from [name of inmate], an inmate at King County Correctional Facility. This call is from a correctional facility and is subject to monitoring and recording. If this call is being placed to an attorney, it should not be accepted unless the attorney name and 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.

In Modica, the court noted that the presence of signs or automated recordings "do not, in themselves, defeat a reasonable expectation of privacy." Modica, 164 Wn.2d at 89. "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." Modica, 164 Wn.2d at 89. Dere argues that to the extent the Modica rationale depends on the "need for jail security," Modica, 164 Wn.2d at 89, his case is

distinguishable because nothing that he and Ali discussed in their recorded conversations had any connection to matters of jail security.

The argument that recordings are inadmissible when they are requested by the prosecutor for the purpose of investigation rather than because of safety concerns was rejected in State v. Haq, 166 Wn. App. 221, 259-60, 268 P.3d 997, review denied, 174 Wn.2d 1004 (2012). The jail records all inmate calls because jail authorities cannot know in advance which calls may contain information pertaining to plans of escape, tampering with witnesses, and other potential breaches of security. Thus, the need for jail security is a generalized rationale. Because an outsider's conversations with an inmate have the potential to affect the security of the jail, the State is not required to identify a security concern individualized to a specific inmate to remove a recorded jail phone call from the realm of private communications.

In Modica, the recordings were admitted against a defendant who was an inmate when he participated in the recorded call. Dere claims that Modica does not govern the admissibility of recordings the State seeks to use against a noninmate. The point of Modica, however, is that except for attorneys, anyone who uses the jail telephone system to carry on a telephone conversation with an inmate is subject to the inmate's diminished expectation of privacy. Just as Modica's grandmother did not have a reasonable expectation that her conversations with him would be private, Dere did not have a reasonable expectation that his conversations with Ali would be private. See Modica, 164 Wn.2d at 88.

Dere contends that he did not know his calls were recorded. This argument is foreclosed by findings of fact to which Dere has not assigned error. Dere had been an inmate himself and was aware of the recording policy. Dere and Ali heard the recorded message that each phone call was recorded and subject to monitoring at any time. The message was reinforced by the signs posted near the jail telephone. This evidence established Dere's knowledge that his telephone conversations with Ali would be recorded. Dere suggests that such recordings are analogous to a hidden microphone that intercepts attorney-client communications, but the comparison is inapt. The recordings were not surreptitious, and the conversations between Dere and Ali were not privileged.

Following Modica and Haq, we conclude Dere did not have a reasonable expectation of privacy in his telephone conversations with Ali. Because the calls were not private communications, the privacy act does not apply.

Dere also claims that the recording of his calls from Ali violated his constitutionally protected privacy rights. Article I, section 7 of the Washington Constitution generally protects the privacy of telephone conversations, but calls from a jail inmate are not private affairs deserving of article I, section 7 protection. State v. Archie, 148 Wn. App. 198, 204, 199 P.3d 1005, review denied, 166 Wn.2d 1016 (2009). A jail recording system serves an important institutional security interest and its operation typically demonstrates that at least one participant in a conversation has consented to the recording. Archie, 148 Wn. App. at 204. The inspection of other forms of communication with inmates, such as ingoing and outgoing mail and packages, is not an invasion of a privacy

interest protected by the Washington Constitution so long as the inmate is informed of the likelihood of inspection. Archie, 148 Wn. App. at 204. The security concerns are the same whether the inmate is a pretrial detainee or is being incarcerated after trial and they do not depend upon whether the communication is by mail or telephone. Archie, 148 Wn. App. at 204. The facts here are similar to those in Archie, and like in Archie, there was both notice and consent. The trial court found that both Ali and Dere "expressly consented to the recording" when they pressed the number that allowed the call to continue after they heard the automated message quoted above.

Likewise, a warrantless monitoring of conversations does not violate the Fourth Amendment to the United States Constitution when one party to the conversation gives consent. State v. Corliss, 123 Wn.2d 656, 663, 870 P.2d 317 (1994). The practice of automatically taping and randomly monitoring telephone calls of inmates in the interest of institutional security is not an unreasonable invasion of the privacy rights of pretrial detainees. United States v. Willoughby, 860 F.2d 15, 21 (2d Cir. 1988), cert. denied, 488 U.S. 1033 (1989). Willoughby rules out Dere's contention that under the Fourth Amendment his own privacy rights as a noninmate were entitled to greater protection than Ali's. "Contacts between inmates and noninmates may justify otherwise impermissible intrusions into the noninmates' privacy," given the strong interest in preserving institutional security. Willoughby, 860 F.2d at 21-22.

Dere compares the State's use of the recordings as a tool of investigation to the warrantless search of a cellphone in Riley v. California, ___ U.S. ___, 134

S. Ct. 2473, 189 L. Ed. 2d 430 (2014), and the warrantless eavesdropping described in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Those cases are inapposite. Consent is a well-recognized exception to the warrant requirement. See Katz, 389 U.S. at 358 n.22. Dere consented to having his conversation recorded.

Following Archie and Willoughby, we conclude there was no violation of Dere's constitutional privacy interests.

Dere also assigns error to evidentiary rulings. Over Dere's hearsay objection, an officer was allowed to testify that the victim of the robbery, a cab driver, provided the license plate number of the car seen driving away from the scene. The significance of the license plate was that the police later located the car at the address where it was registered and arrested Dere when he got into the car and started driving away.

The cab driver had not actually seen the license plate; he had obtained the number from another witness. Dere contends the officer's testimony was evidence of the type ruled inadmissible in State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990). Aaron is dissimilar. The error in Aaron was allowing an officer to repeat hearsay linking the defendant to a burglary. The admission of such evidence cannot be justified on the basis that it merely explained why the officer acted as he did. Aaron, 57 Wn. App at 279-80. The officer in this case had personal knowledge that the police obtained the plate number from the victim. We find no error.

Dere's reply brief addresses the license plate testimony as a violation of his constitutional right to confront the witness who actually did see the license plate on the night of the robbery but who did not testify. Because this argument was not made in the opening brief, we do not consider it. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 497, 254 P.3d 835 (2011).

Dere also contends the trial court admitted testimony that amounted to an improper opinion on his guilt. A third participant in the robbery, Bashir Mohamed, testified against Dere after reaching a plea agreement with the State. Mohamed testified that he hit the victim while Dere demanded money. When the prosecutor asked Mohamed whether the victim fled from the crime scene "as a direct result of what you and Mr. Dere were doing together," Mohamed answered in the affirmative.

According to Dere, the State's line of questioning was akin to asking Mohamed whether Dere intended to commit the robbery. Dere did not object on this basis below. But in any event, Mohamed's testimony did not manifestly amount to an express opinion that Dere was guilty or had criminal intent. It was based upon his own observations and helpful to an understanding of facts at issue. See ER 701. We reject the argument.

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

Schindler, J.

ROBERT GOLDSMITH LAW OFFICE

September 08, 2016 - 11:18 AM

Transmittal Letter

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Case Name: State v. Zakaria Dere
Court of Appeals Case Number: 72713-3

Party Respresented: Appellant Zakaria Dere
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