No. 93707-9

COA 328660-III

IN THE SUPREME COURT OF THE STATE OF

WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DANIEL BLIZZARD, Petitioner.

ANSWER TO PETITION FOR REVIEW

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At issue is the published court of appeals decision filed on September 1, 2016 in Division Three of the Court of Appeals.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly deny Blizzard's claims after the trial judge learned of a letter written by the county prosecutor?

2. Did the Court of Appeals correctly affirm the trial court's rulings on challenges made to the search warrants in this case?

3. Was the Court of Appeals correct in finding dismissal unwarranted where the seizure of documents in the jail neither benefitted the State nor prejudiced the defense?

4. Was the Court of Appeals correct in finding that the State presented sufficient evidence of authenticity to allow testimony regarding the contents of text messages?

D. STATEMENT OF THE CASE

On September 18, 2013, Daniel Blizzard was charged with attempted first degree murder and first degree assault. CP 14-5. The charges stemmed from a brutal attack on 78-year-old Vern Holbrook. CP 4-12. Mr. Holbrook later died as a result of the attack, and the State amended the charges to first degree murder on January 30, 2014. CP 38.

Three codefendants, Luis Gomes-Monges, Adriana Mendez, and Jill Lee Taylor, were also charged. CP 38.

Trial commenced on August 25, 2014. Ms. Mendez and Ms. Taylor testified for the State. During the trial, witnesses testified that Blizzard paid Gomes-Monges $10,000 to kill Mr. Holbrook. RP 2437-9, 2506-9, 2630-1. Blizzard was the beneficiary of a life insurance policy on the victim. RP 2417-8. The jury found Blizzard guilty of first degree murder. CP 2696. The jury also found that he was armed with a deadly weapon, CP 2697, and that the victim was particularly vulnerable and incapable of resistance. CP 2697, 2699. He was sentenced to 320 months, plus 72 months for the aggravator, and 24 months for the deadly weapon enhancement. CP 3073.

Blizzard appealed and the Court of Appeals affirmed his judgment and sentence.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals correctly denied Blizzard's claims after the trial judge learned of a letter written by the county prosecutor.

Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution. *State v. Lively*, 130 Wn.2d 1, 18, 921 P.2d 1035 (1996). The level of governmental misconduct needed to prove a violation

of due process must shock the conscience of the court and the universal sense of fairness. *Id.* at 19.

In this case, the elected prosecutor sent a letter to the presiding judge, Judge Elofson, stating that the sitting judge, Judge Reukauf, should recuse herself from the pending cases involving the Vern Holbrook matter. CP 833-6. Blizzard's case was pending at the time. The presiding judge shared the contents of the letter with the trial judge. RP 566. The trial court found that the letter was an ex parte communication with the trial judge and therefore, misconduct. RP 566. The manner of the communication, not the content, was the basis for the misconduct finding. However, the trial court denied a motion to dismiss, stating that "any prejudice that may still result from this conduct is premature to assess" and "isn't ripe yet" because jury selection had not begun. RP 570, RP 575.

On appeal, Blizzard claimed that there was an indicator of actual prejudice in that a ruling was made in favor of the State (regarding a suppression issue), and that this favorable ruling to the State resulted solely from prosecutorial misconduct. At the time the CrR 8.3 motion was argued, Blizzard did not claim any actual prejudice. Rather, his argument was that prejudice should be "presumed." RP 539.

After the trial court denied the CrR 8.3 motion and after the trial court ruled in favor of the State on the suppression motion, there was never any argument made that the court ruled in favor of the State solely because of the letter. There was no motion for recusal. It was only on appeal that Blizzard claimed actual prejudice that became apparent when the trial court ruled on the suppression motion.

For sake of argument, to the extent that there was any prejudice caused by the letter, it was remedied when the letter was made known to all parties in the case. Had the arguments contained in the letter been filed with the court as part of a formal motion for recusal, there would have been no issue of governmental misconduct. The court, however, considered the letter an ex parte communication with the trial judge because it was sent to the presiding Superior Court judge without being sent to defense counsel. RP 566. The court quickly disclosed the letter to all of the defense attorneys and the trial prosecutors and set a deadline for any motions for recusal to be filed. RP 501, CP 831-6. Blizzard's attorney chose not to file a motion for recusal and made a thorough record that he believed that they could have a fair trial before Judge Reukauf. RP 493. As such, assuming there was any prejudice caused by an ex parte communication, it was cured by the trial judge when she disclosed it to all the parties.

Furthermore, the prosecutor's actions were not subject to constitutional or structural error analysis. First of all, it is arguable whether a structural error analysis even applies in the context of prosecutorial misconduct. *See State v. Warren*, 65 Wn.2d 17, 195 P.3d 940 (2008). Even assuming, for sake of argument, that structural error analysis applies to this case, which involves a claim of government misconduct, Blizzard has not shown a structural error.

Structural errors encompass only the most egregious constitutional violations. The conduct alleged in this case (an ex parte communication) does not rise to that level. The record shows no basis for concluding that the ex parte communication "seriously affected the fairness, integrity or public reputation of judicial proceedings." Here, the communication was made known to all the parties. RP 501, CP 831-6. Upon learning of the letter or at any point thereafter, Blizzard did not seek recusal of the trial judge. RP 496. There was simply no "miscarriage of justice" warranting reversal. It cannot be said that the conduct rendered the trial fundamentally unfair.

The trial judge sent the letter to the trial prosecutor and defense attorney in this case, and then filed the letter with the clerk. CP 831-836. Thereafter, the State quickly filed a notice of abandonment of the motion for recusal of judge. CP 909-10. The lead prosecutor on the case stated in

the notice, "The Deputy Prosecuting Attorney, Alvin Guzman, believes a fair trial can be had before Judge Reukauf in the above captioned case." CP 910. The State, without a doubt, abandoned its motion for recusal of the trial judge. Nonetheless, the trial judge went on to make an independent decision that she was not going to voluntarily recuse and made a thorough record as to her decision. RP 569.

Blizzard did not object to her decision. A litigant who proceeds to trial "knowing of a reason for potential disqualification of the judge waives the objection and cannot challenge the court's qualifications on appeal." *State v. Perala*, 132 Wn. App. 98, 113, 130 P.3d 853 (2006). Furthermore, Blizzard made no motion for recusal. In fact, he specifically argued to the contrary. He stated, "So it is my opinion that there is no need -- there is no evidence. There is no supporting documents. There's nothing to suggest that this court should recuse itself." RP 493. Because he agreed that there was no basis for recusal, Blizzard waived any objection and was precluded from later challenging the court's qualifications on appeal.

Even without an objection, there was no independent basis for the trial judge to recuse herself. Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be

reasonably questioned. *State v. Perala*, 132 Wn. App. 98, 110-11, 130 P.3d 853 (2006). Recusal lies within the discretion of the trial judge, and his or her decision will not be disturbed without a clear showing of an abuse of that discretion. *Id.* at 111. The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Id.*

"'Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.'" *Id.* at 113. In order to establish that the trial court's involvement in the matter violated the appearance of fairness, the claimant must provide some evidence of the judge's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172 (1992). The critical concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. *Perala*, 132 Wn. App. at 113. The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

Here, Blizzard provided no evidence of the judge's actual or potential bias as required by *Post*. Furthermore, there was no independent

basis for the trial judge to recuse herself. The trial judge was very clear that she felt that she could be fair and impartial on the case:

> I have absolutely no question in my mind that I can continue to be fair and impartial in this case. I have absolutely no question in my mind that I have been fair and impartial on this case.

RP 496. After making that declaration in open court, she followed up by reviewing the Code of Judicial Conduct and consulting with the Ethics Advisory Committee through the Administrative Office of the Courts. RP 497, 499. The trial judge then explained that if a motion for recusal is being made that it needs to be done so in writing. RP 501. However, no motions were filed by anyone, including Blizzard. Accordingly, the court concluded that the issue had been taken off of the table. RP 518.

Blizzard claims that the court's opinion narrows the holding of *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975). The holding in that case was that the doctrine of separation of powers does not create exclusive spheres of competence in each branch and was never intended to. 85 Wn.2d at 750-1. In *Zylstra* the court found that by allowing court employees to bargain on wages, no branch threatened the independence or integrity of any other branch. *Id.* Further, no branch invaded the prerogatives of any other branch. *Id.* The Blizzard opinion did nothing to

change or narrow that holding. The record was clear that that trial judge's independence was not threatened by the prosecutor's letter.

2. The Court of Appeals correctly affirmed the trial court's rulings on challenges made to the search warrants in this case.

Under RCW 10.96.060, only a Superior Court judge may issue a warrant to recipients outside of the State of Washington. In this case, Detective Perrault obtained phone records by way of an exigent circumstances form and then warrants signed by a District Court judge. CP 3274-6. When he realized that he needed a Superior Court judge to sign the warrants, he redid the affidavits and warrants. CP 3276. At trial, Blizzard made a motion to suppress the warrants, claiming that the phone records obtained were pursuant to invalid warrants. The court found that the independent source doctrine applies and denied the motion to suppress. CP 3279.

The independent source doctrine is a "well-established exception to the exclusionary rule." *State v. Miles*, 159 Wn. App. 282, 291, 244 P.3d 1030 (2011). Under that exception, "an unlawful search does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information and (2) the State's decision to seek the warrant is not motivated by the previous unlawful search and seizure." *Miles*, 159 Wn. App. at 285.

Blizzard argues that the independent source doctrine does not apply because the lawful seizure pursuant to a Superior Court warrant was not independent from the earlier District Court warrant. Appellant's Brief at 41. He points to information that was added to the affidavits presented in Superior Court, specifically, the name of the specific carrier possessing the cell phone records and text messages for Blizzard's phone. Appellant's Brief at 40.[1] However, as the Court of Appeals pointed out, this new information was leaned through a series of phone calls to cell phone company representatives. It was not obtained by reviewing search warrant returns or obtained by exploiting the existence of the invalidly issued warrants.

Blizzard also claimed that the Superior Court warrants were deficient in that they omitted some language required by RCW 10.96.020. In this case, notice of a 20-day deadline to respond was omitted from the warrants. CP 3277. The trial court concluded that this did not invalidate the warrants because the provision was for the benefit of the out-of-state company holding the records in that it provided for more time to respond. RP 639-40, CP 3280. The court further held that there was no evidence

[1] That part of the Superior Court affidavit stated, "However, a representative from Level 3 later told me that the number had been sold to GOGII, Inc." This was information learned after the warrants has been issued by District Court. CP 3276.

that the companies needed more time, and that they simply provided the same records that they had provided previously. RP 640, CP 3280.

This is consistent with caselaw on how to interpret search warrants. "The crucial test of a search warrant is its basis in probable cause, not its hypertechnical adherence to a particular form." *See State v. Kuberka*, 35 Wn. App. 909, 911-12, 671 P.2d 260 (1983). Courts test and interpret a search warrant "in a commonsense, practical manner, rather than in a hypertechnical sense." *State v. Perone*, 119 Wash. 2d 538, 549. 834 P.2d 611 (1992). The requirement to provide a timeframe to the recipient is a benefit to the party seeking the warrant – in this case, the State. The purpose is so that the company responds within 20 days, and does not delay compliance. This rule is similarly, ministerial in nature. Furthermore, there has been no showing that omission of this language from the warrant caused any prejudice to Blizzard. As such, the trial court correctly denied his motion to suppress on this ground.

3. The Court of Appeals did not err in finding dismissal unwarranted where the seizure of documents in the jail neither benefitted the State nor prejudiced the defense.

On March 27, 2014, the defense also filed a CrR 8.3(b) motion to dismiss, claiming that jail staff intercepted and viewed attorney-client mail. CP 197. The State filed a response in opposition to the motion, and supporting declarations from jail personnel, as well as the lead detective

and prosecutor. CP 338-404. A hearing was held and numerous jail officers testified, as well as the lead detective. RP 924-1090. The testimony at the hearing showed that a discovery packet was confiscated from Blizzard's cell when corrections officers were searching for a "shank" or homemade knife in Blizzard's unit. RP 929. Discovery packets were not allowed in jail cells due to safety concerns. RP 1089. The packets are allowed to be kept in a particular spot on the officer's desk. RP 999.

The court denied the defense motion to dismiss and ordered that the discovery materials go back to the defense attorney. RP 1207, CP 1085. The court reasoned that there was a legitimate safety reason for searching Blizzard's jail cell (to locate a weapon), and that no information was gained from the search. CP 1202-4. The court further found that the State was not given an unfair advantage, and that there was no implication that Blizzard's confidence in his attorney was destroyed. RP 1205-6.

Blizzard claims on appeal that attorney client communications were intercepted. Appellant's Brief at 46. However, this was not a case involving attorney-client communications or attorney-client mail. It was a packet of discovery with some notes on it that had been made by Blizzard. Appellant's Brief at 47. The court noted that there were eight or nine

pages of discovery that had notes on them and that they were not extensive. RP 1205.

Blizzard also claims that there was a close examination of his discovery. Appellant's Brief at 52. This was also not the case. The court found the testimony of Lieutenant Keagle to be credible. RP 1203. She testified that she did not read the discovery or the notes. RP 1203. The court noted that she was the only person who could have had the opportunity to do so. RP 1203. Furthermore, following the search, nothing was provided to the prosecutor's office or to the detectives on Blizzard's case. RP 1011-2, 1085, 1203.

Blizzard claims that the court should have found prejudice. However, the court went through all the factors from *State v. Fuentes*, 179 Wn.2d 808, 820, 318 P.3d 257 (2014). RP 1181-1208. A trial court's decision to dismiss an action based on *State v. Cory* and under CrR 8.3(b) is reviewed for abuse of the court's discretion. *State v. Starrish*, 86 Wn.2d 200, 209, 544 P.2d 1 (1975). Blizzard has not persuasively explained how the trial court in this case abused its discretion. This was not a case of eavesdropping or a purposeful intrusion into the attorney-client relationship. Furthermore, there was no prejudice to Blizzard as no one read his notes or conveyed anything to the Sheriff's office or prosecutors.

As such, this case is factually dissimilar from the ones cited by Blizzard, *State v. Granacki*, 90 Wn.App. 598, 959 P.2d 667 (1998), and *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). *Granacki* involved a detective reading defense counsel's notes during a trial recess. 90 Wn.App. at 598. *Cory* involved the State eavesdropping via microphone on conversations between prisoners in the jail and their attorneys. 62 Wn.2d at 372. Here, the only thing shown at the hearing was that a corrections officer seized a discovery packet out of safety concerns and that it happened to have notes on it written by Blizzard. No one read the notes or relayed the notes to anyone. As such, the trial court did not abuse its discretion in denying Blizzard's motion to dismiss.

4. The Court of Appeals was correct in finding that the State presented sufficient evidence of authenticity to allow testimony regarding the contents of text messages.

The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

On appeal, Blizzard claimed that the court allowed testimony as to text messages for which a foundation was not laid. He never stated which

text messages lacked foundation. Jill Taylor, testified as to what Blizzard's phone number was (509-654-0283) and that AT&T was his cell phone company. RP 2457, 2462. She testified that she called Blizzard several times a day and texted him 20 times a day or more. RP 2457-8. She said that it was always to the same phone number. RP 2458. She looked at Exhibit 83, the extraction report, and testified that it contained conversations between Blizzard and her. RP 2459. She talked about specific text messages exchanged on January 13, 2013. RP 2465. This was more than enough to lay a foundation for the text messages.

Furthermore, Adriana Mendez testified that she also talked to Blizzard daily. RP 2780. She said that she texted Blizzard and that he used an app called "GOGII" for texting. RP 2574, 2779. While she was not able to remember his phone number, she was able to identify the conversation number and the messages. RP 2665.

Blizzard claims that he opinion below conflicts with *State v. Young*, 192 Wn. App. 850, 369 P.3d 205 (2016). In *Young*, the court found that the trial did not abuse its discretion in admitting text messages. As noted in *Young*, the trial court "considers only the evidence offered by the proponent and disregards any contrary evidence offered by the opponent in determining whether evidence has been authenticated." 192 Wn. App. at 857. In *Young*, a witness's personal knowledge in connection

with the subject matter of the texts was sufficient evidence for a reasonable trier of fact to find that the texts came from Young. RP 858. As such, the texts were properly authenticated. *Id.*

In Blizzard's petition, he claims that testimony was allowed as to the content of text messages despite exhibit 86 being found inadmissible. Petition at 19-20. Exhibit 86 consists of call detail records for Ms. Mendez's phone number, 910-6581. It shows the date and times of calls. RP 2983. And it may show the date and time a text message or email was sent but only if the "dialed digits column" is blank or lists an e-mail. RP 3000.

But the content of the text messages were contained in Exhibit 83. RP 2459. Ms. Mendez relied on Exhibit 83 when she testified that it contained conversations between Blizzard and her. *Id.* That exhibit was admitted with the provision that it not go to the jury room. RP 1969, 1983, 1985. The fact that Exhibit 86 was not admitted is of no consequence to the testimony regarding text messages because Exhibit 83 was admitted. The prosecutor moved to admit Exhibit 86 solely for the purpose of further corroborating what was contained in Exhibit 72. RP 3001.

In sum, there is nothing to support the argument that allowing Ms. Mendez to testify about test messages between her and Blizzard was a

manifest abuse of discretion. The State called numerous witnesses to establish a solid foundation for the testimony that was admitted pertaining to text messages. The report containing the messages, exhibit 83 was properly admitted. Given the thorough record in this case, it cannot be said that the trial court's exercise of its discretion was manifestly unreasonable or based upon untenable grounds or reasons.

F. CONCLUSION

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, his petition for review should be denied.

Respectfully submitted this 15th day of December, 2016,

__s/TAMARA A. HANLON_____
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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on December 15, 2016, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to Mr. Peter Mazzone and Mr. Peter Connick at peterm@mazzonelaw.com and peterconnick@gmail.com.

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

DATED this 15th day of December, 2016 at Yakima, Washington.

__s/Tamara A. Hanlon_____
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