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Court of Appeals
Division I
State of Washington

73299-4

COA NO. 73299-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

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

The Honorable Susan J. Craighead, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's CrR 3.6 motion to suppress jail call evidence, in violation of RCW 9.73.030.

2. The court erred in entering the following CrR 3.6 conclusions of law:

a. "Pursuant to the decision in State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008), this Court concludes that the recording of the defendant's telephone conversations with his wife, Rachel Dunham, did not violate the Washington Privacy Act because the parties did not have a reasonable expectation of privacy." 2CP 144 (CL 2.a.i).¹

b. "Court finds that although no specific exception exists in RCW 5.60.060(1) for a so-called crime-fraud exception as it relates to a spouse, the Court concludes that spousal privilege does not apply to statements made between spouses in furtherance of a conspiracy." 2CP 145 (CL 2.a.viii).

c. "Therefore, the Court denies the defendant's motion and concludes that the statements of both the defendant and Dunham during

¹ Blair originally sought direct review in the Washington Supreme Court under No. 91395-1. The Supreme Court subsequently granted Blair's motion to transfer his appeal to the Court of Appeals, which resulted in the new appeal number of 73299-4-I. The clerk's papers are referenced as follows: "CP" for the clerk's papers designated under Supreme Court No. 91395-1; "2CP" for the clerk's papers designated under Court of Appeals No. 73299-4-I.

their taped telephone conversation on February 19, 2011, are admissible." 2CP 145 (CL 2.a.ix).

Issue Pertaining to Assignments of Error

Whether the court erred in failing to suppress the recorded jail calls between appellant and his wife under the Privacy Act because the calls were privileged and no crime exception to the marital privilege applies?

B. STATEMENT OF THE CASE

The State charged Keith Blair with conspiracy (count 2) and attempt to introduce contraband into the King County Jail (count 3). 1CP 1-2. The conspiracy charge alleged Blair and Christopher Yates agreed to commit the crime of possession with intent to deliver marijuana. 1CP 1-2.

Before trial, defense counsel moved to suppress evidence of jail calls between Blair and his wife, Rachel Dunham, under several legal theories, including that admission of the jail calls violated the Privacy Act. 2CP 1-14; 74-85; 1RP² 20-65; 2RP 6-21; 3RP 73-119. The court denied the motion and the case proceeded to trial. 2CP 141-45.

Evidence at trial showed Blair was incarcerated in the King County Jail in February 2011. 5RP 52-53. Detective Coblantz monitored a jail

² The verbatim report of proceedings is referenced as follows: 1RP - 8/31/11; 2RP - 9/1/11; 3RP - 9/6/11; 4RP - 9/8/11; 5RP - 9/12/11, 9/13/11, 9/14/11, 9/15/11 & 9/30/11) (filed under 67874-4-I); 6RP (1/28/15). On September 4, 2015, this Court granted Blair's motion to transfer the verbatim report of proceedings from 67874-4-I.

call between Blair and Rachel Dunham, which took place on February 19, 2011. 5RP 34, 52-54; Ex. 2, 8, 24. The call was recorded and admitted into evidence at trial. Ex. 2.

After mundane talk and partly unintelligible conversation, the following exchange took place:³

Blair: Somebody is getting released tomorrow.

Dunham: Yeah.

Blair: (unintelligible) I need you to come down here at 5:30 p.m. and get that quart . . . of

Dunham: Of?

Blair: Green.

Dunham: Green?

Blair: Yeah

Dunham: I'm sorry.

Blair: Okay. Can you do that?

Dunham: Yeah.

Blair: I'll give him (unintelligible) number to get a hold of you.

Dunham: He's gonna be released at 5:30?

Blair: Yeah, p.m.

Dunham: Why 5:30?

Blair: I don't know. That's when they release people. So I need you to be here okay?

Dunham: Okay. But . . . okay.

Blair: Okay. Thank you.

Ex. 2 (2:32-3:20).

³ A transcript of the call was admitted as an illustrative exhibit. Ex. 8; 5RP 56. As acknowledged at trial, the transcript is imperfect. *Id.* at 55, 5RP 293. The recording itself is imperfect, as it is difficult or impossible to hear what is being said at times. 5RP 55; Ex. 2. Undersigned counsel, in listening to the recording and setting forth relevant contents of the phone call in this brief, has made a good faith attempt at accuracy.

Detective Coblantz testified that "green" typically refers to marijuana in the context of controlled substances. 5RP 76. Later in the call, the following exchange occurs:

Blair: (unintelligible) phone call. I'm going to give dude your phone number right now, so make sure you're here at 5:30.

Dunham: What's his name.

Blair: I don't know. He'll call you.

Dunham: You don't know?

Blair: (unintelligible)

Dunham: Dude, it's a set up Keith. Serious. Hello? I can't hear you.

Blair: Hold on. (unintelligible) But uh (unintelligible)

Dunham: It's a set up.

Blair: No it's not.

Dunham: Yeah, it is.

Blair: It's not.

Dunham: You don't even know his name.

Blair: Alright, I'll find out right now. Just trust me okay?

Dunham: Okay.

Ex. 2 (9:20-10:27).

After some small talk, Blair says, "His name is Chris." Ex. 2 at 11:11. Dunham says "Huh?" and Blair says "Chris." Ex. 2 at 11:14.

After some more small talk, the following exchange occurs:

Blair: Um, shred that up and put it in a rubber.

Dunham: Huh?

Blair Shred that up and put it in a rubber.

Dunham: Shred what?

Blair: When you come here at 5:30. Tear it up, put it in a rubber.

Dunham: Tear what up?

Blair: What are you coming here for tomorrow?

Dunham: What do I tear up? I don't get it.

Blair: Forty.
Dunham: Yeah, I understand.
Blair: Okay. Got it?
Dunham: Kinda.
Blair: (unintelligible)
Dunham: Can you call me?
Blair: Can I call you?
Dunham: Yeah, like the morning.
Blair: (unintelligible) maybe.
Dunham: Before you go to work.
Blair: I'll try to, why?
Dunham: Just so I can be . . . I dunno.
Blair: You know like when we go to . . .
Dunham: Yeah.
Blair: Yeah.
Dunham: That's what you want?
Blair: Yeah. Okay?
Dunham: Okay. Does (unintelligible) monetary.
Blair: (unintelligible) yeah, 40 dollars worth.
Dunham: Yeah. What, what's my benefit?
Blair: Ummm, don't worry about it.
Dunham: Is he . . .
Blair: Don't worry about it —
Dunham: Do I —
Blair: — I'll tell you later.
Dunham: (unintelligible)
Blair: No.
Dunham: Just get it⁴ . . .
Blair: Just get it ready and give it to him, yeah. Okay?
Dunham: Okay.
Blair: Thank you.
Dunham: (unintelligible) Should I, um, not do this?
Blair: Say what?
Dunham: Really should not, shouldn't discuss things that . . .
Blair: Yeah, I know.
Dunham: So.
Blair: Well, I'm not doing shit.
Dunham: Yeah, but dude do you understand what you just did.

⁴ Or "Just give it . . ."

Blair: Yeah.
Dunham: For me.
Blair: No, don't worry about it.
Dunham: Okay.
Blair: (unintelligible) took a bus all the way out
(unintelligible) fucking Billings, man.
Dunham: Billings?
Blair: Yeah, Billings Montana.
Dunham: Oh really? Wow. That's a long ways.
Blair: Yeah.
Dunham: Older, younger?
Blair: Young, young white kid.
Dunham: (unintelligible).
Blair: (unintelligible) So if it happens it happens, if it don't
it don't (unintelligible).
Dunham: Yeah.
Blair: I don't know him though.
Dunham: What are you talking about . . .
Blair: Yeah.

Ex. 2 (11:35-14:57)

Detective Coblantz testified "40" usually refers to a dollar amount for something. 5RP 76. Coblantz said it was rare for narcotics to be packaged in condoms, but he had seen it in the past. 5RP 76.

Sergeant Hicks searched a jail database for all individuals with the first name of "Chris" who were to be released on February 20, 2011. 5RP 39. Christopher Yates was to be temporarily released from 10 a.m. to 6 p.m. on February 20. 5RP 24. Yates was the only "Chris" or "Christopher" to be released on that date. 5RP 39-40. Yates and Blair were housed on the same floor of the jail. 5RP 38.

Detective Coblantz and other officers set up surveillance outside the jail on February 20th, taking up their positions at 5:15 p.m. 5RP 79. Coblantz positioned himself at Fifth Avenue and Jefferson Street, the southwest corner of the jail. 5RP 80.

Nothing happened for roughly the first 45 minutes. 5RP 80. At about 5:55 p.m., an Acura pulled up and parked for about five minutes across from the intake doors to the jail. 5RP 81-82. Christopher Yates and a female then got out of the car. 5RP 81.

Yates stood there with the female, smoked a cigarette and looked around for a few minutes. 5RP 82. At just before 6 p.m., Yates and the female ran across the street up to the intake doors of the jail, at which point Coblantz lost sight of them. 5RP 82.

As that was happening, Dunham drove past Coblantz at the corner of the Fifth and Jefferson bus stop. 5RP 82-83. She stopped at the red light, then turned up the hill and parked next to the jail intake doors on Jefferson. 5RP 83.

As Dunham pulled up and parked, the female who had accompanied Yates walked past Dunham's car back, continued across the street, and entered on the passenger side of the Acura. 5RP 83-84. There was no contact between the female and Dunham. 5RP 83-84. The Acura drove off. 5RP 84.

Dunham stayed in her car for roughly 10-15 minutes, during which time she did not contact anyone. 5RP 84. Coblantz then impounded Dunham's car. 5RP 84-85. A cigarette package was found in the center console. 5RP 92-94. The package was glued shut. 5RP 95. A condom containing a baggie of marijuana was inside the cigarette package. 5RP 95-97, 101-02, 128. The marijuana weighed 2.5 grams. 5RP 128. Yates was strip searched, but no contraband was found on him. 5RP 84.

The "to convict" instruction for the conspiracy count (Instruction 14) required the State to prove the following:

(1) That on or about the [sic] February 20, 2011, the defendant agreed with one or more persons other than Rachel Dunham to engage in or cause the performance of conduct constituting the crime of Violation of the Uniform Controlled Substances Act - Possession With Intent to Deliver Marijuana;

(2) That the defendant made the agreement with the intent that such conduct be performed;

(3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and

(4) That the acts occurred in the State of Washington.

2CP 125.

During deliberations, the jury sent this question to the court: "With respect to Instruction 14, Paragraph (1), Does 'agreed' mean that Keith had an explicit and mutual agreement with some unknown person or can it mean that Keith believed he had an agreement (regardless of the unknown

person's belief or agreement)." 2CP 106. In response to the jury's question, the court instructed the jury as follows: "The State must prove, beyond a reasonable doubt, an actual agreement between the defendant and another person other than Rachel Dunham to engage in or cause the performance of conduct constituting the crime of violation of the Uniform Controlled Substances Act — Possession with Intent to Deliver Marijuana." 2CP 107.

The jury found Blair guilty of conspiracy under count 2 and acquitted him of attempted introduction of contraband under count 3. 2CP 103-05. The defense subsequently moved for arrest of judgment under CrR 7.4, contending the evidence was insufficient to support the conspiracy conviction because the State did not prove an actual agreement between Blair and Yates to commit the crime of possession with intent to deliver marijuana. 1CP 15, 19; 5RP 265-68, 280-82. The court ruled the evidence was insufficient and entered a written order granting the motion for arrest of judgment, vacating the conspiracy charge and dismissing it with prejudice. 1CP 25-26; 5RP 299-300.

The State appealed, arguing the evidence was sufficient to convict. See State v. Blair, 173 Wn. App. 1026, 2013 WL 791854, at *1 (2013). The Court of Appeals agreed and reversed the trial court's arrest of judgment. Id. On remand, the court sentenced Blair to two months

confinement on the conspiracy conviction. 1CP 62, 65; 6RP 19. Blair appeals from the judgment and sentence. 1CP 72-83.⁵

C. **ARGUMENT**

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

Defense counsel moved to suppress jail calls made between Blair and his wife on the theory that they were recorded in violation of the Privacy Act. 2CP 4-5; 76-79. The trial court denied the motion on the ground that a crime-fraud exception to the marital privilege applied, and so there was no reasonable expectation of privacy in the jail calls under the Privacy Act. 2CP 144-45. The trial court erred in denying the motion because no crime-fraud exception to the marital privilege exists and considering all the circumstances, including the fact that the calls were between a husband and wife, the communications were private.

a. **The trial court's ruling admitting the jail call into evidence turned on its conclusion that a crime-fraud exception to the marital privilege existed in Washington.**

The gist of defense counsel's CrR 3.6 motion to suppress evidence of the jail calls between Blair and his wife under the Privacy Act was that

⁵ As mentioned, Blair originally sought direct review in the Washington Supreme Court under No. 91395-1. The Supreme Court subsequently granted Blair's request to transfer his appeal to the Court of Appeals, which resulted in the new appeal number of 73299-4-I.

Blair had an expectation of privacy and their communications were subject to the marital privilege. 2CP 4-5; 76-79. The State disagreed. 2CP 34-38, 86-96. The court heard argument on the motion. 1RP 20-65; 2RP 6-21; 3RP 73-119. The court took testimony on the issue. 3RP 4-71. The facts, as set forth in the trial court's written findings, are undisputed. 2CP 142-44.

The King County Jail has the ability to record all outgoing telephone calls made by inmates housed in the facility. 2CP 142 (FF 1.c.). A pre-recorded message warns each inmate and recipient of an inmate's call that all telephone calls using the system are recorded. 2CP 142 (FF 1.d.). Each inmate and recipient must accept this condition on the use of the jail telephone system by pressing a number on the telephone to accept the terms of the system. 2CP 142 (FF 1.f., g.). Blair and Dunham were married at the time they used the jail telephone system in February 2011. 2CP 143 (FF 1.s.). Detective Coblantz listened to their jail call on February 19, 2011. 2CP 143 (FF 1.x.).

The trial court, in ruling that Blair had no reasonable expectation of privacy under the Privacy Act, did not do so on the basis that the call was recorded by the jail and he was so warned. That was not the dispositive factor. In State v. Modica, the Supreme Court cautioned "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." State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008). The trial court grasped Modica's warning on this point. 3RP 121.

In addressing a recorded jail call in the context of the Privacy Act, the Supreme Court held "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 (emphasis added). The court understood the significance of Modica's reference to privileged communications. 3RP 121. That is why it looked to whether an exception to the marital privilege existed in this case.⁶ 3RP 122. The court concluded the Privacy Act did not prohibit admission of the jail call because the communication between Blair and his wife fell within a purported crime-fraud exception to the marital privilege. 3RP 122-25; 2CP 144-45.

b. The jail calls between husband and wife were private communications protected by the Privacy Act.

The Privacy Act makes it "unlawful . . . to intercept, or record any . . . [p]rivate communications transmitted by telephone . . . between

⁶ The trial court raised the question of whether a crime-fraud exception to the spousal privilege existed sua sponte and directed the attorneys to research it. 2RP 2-6.

two or more individuals . . . without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1)(a).

The Privacy Act protects "private" conversations. State v. Clark, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). "Private" means "belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or public." Modica, 164 Wn.2d at 87-88 (quoting Clark, 129 Wn.2d at 225) (internal quotation marks omitted).

A communication is private when parties manifest a subjective intention that it be private and that expectation is reasonable. Modica, 164 Wn.2d at 88. Relevant factors include the subject matter and duration of the call, the location of the participants, and the potential presence of third parties. Clark, 129 Wn.2d at 225-27; Modica, 164 Wn.2d at 88.

The presence or absence of any single factor is not conclusive because the privacy analysis turns on the facts and circumstances of each case. Clark, 129 Wn.2d at 224, 227. "Whether a conversation is private is a question of fact but may be decided as a question of law where, as here, the facts are not meaningfully in dispute." Modica, 164 Wn.2d at 87.

Weighing in favor of privacy here is that Blair's conversations with his wife were not "inconsequential, nonincriminating telephone

conversation[s] with a stranger," which the Court has held "lacked the expectation of privacy necessary to trigger the privacy act." State v. Faford, 128 Wn.2d 476, 484-85, 910 P.2d 447 (1996). Blair communicated with his wife, not a stranger. The communications were both consequential and incriminating. The subject matter of the conversations, which involved Blair telling his wife how to assist him in bringing marijuana into the jail, manifests an expectation of privacy. The subject matter of the conversations weighs in Blair's favor because the conversations covered a serious matter not normally intended to be public. See State v. Babcock, 168 Wn. App. 598, 606, 279 P.3d 890 (2012) (defendant's conversation about hiring a hit man "covered a serious matter not normally intended to be public" and thus weighed in favor of reasonable expectation of privacy).

Blair and his wife knew the call was subject to recording by the jail. 2CP 143 (FF 1.t.). Yet "[t]he mere possibility that interception of the communication is technologically feasible does not render public a communication that is otherwise private." State v. Townsend, 147 Wn.2d 666, 674, 57 P.3d 255 (2002); see also Faford, 128 Wn.2d at 486 ("We will not permit the mere introduction of new communications technology to defeat the traditional expectation of privacy in telephone conversations.").

And although the inmate and the recipient are warned that the call will be recorded, there is no warning that the call will actually be listened to. The possibility of someone actually listening to the call exists, but there is no certainty that someone will actually do so. In the context of new communications technology, the Supreme Court has "continually held that the mere possibility of intrusion will not strip citizens of their privacy rights" under the Privacy Act. State v. Roden, 179 Wn.2d 893, 900-01, 321 P.3d 1183 (2014).

The Court in Modica held intercepted jail calls between an inmate and his grandmother were admissible because, on the facts of that case, there was no reasonable expectation of privacy in the calls. Modica, 164 Wn.2d at 88-89. First, inmates have a reduced expectation of privacy. Id. at 88. Second, both Modica and his grandmother knew they were being recorded and that someone might listen to those recordings. Id. at 88.

However, the Court cautioned "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." Id. at 88 (citing Faford for the proposition that "privacy act protects cordless telephone calls even if the participants know they can be intercepted"). The Court stressed that "[i]ntercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that

conversations between two parties are intended to be private. Signs or automated recordings that calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. However, because Modica was in jail, because of the need for jail security, *and because Modica's calls were not to his lawyer or otherwise privileged*, we conclude he had no reasonable expectation of privacy." Id. at 89 (emphasis added).

The Supreme Court obviously meant something when it declared Modica had no reasonable expectation of privacy in his calls because they were not to his lawyer or "otherwise privileged." Id. Automated warnings that jail calls may be recorded or monitored do not, in themselves, defeat a reasonable expectation of privacy. Id. The fact that Modica was in jail and there was a need for jail security was not enough to defeat a reasonable expectation of privacy. Id. The final piece that defeated privacy was the lack of privilege associated with the call. Id.

In light of Modica, it is untenable to conclude a recorded message notifying the parties that the call is being recorded destroys the spousal privilege. The State argued that the conversation must be successfully kept confidential for the privilege to exist and so only actually successful confidential communications are accorded the privilege in the jail call context. 2CP 90-93. But that could not be what the Court in Modica

meant in referencing privilege as an analytically significant factor in determining a reasonable expectation for privacy in the jail call.

Modica starts from the premise that the jail call is recorded. There could never be an actually successful confidential communication between attorney and client, husband and wife, or clergy and penitent during a call that is recorded by the jail. A communication privilege, if measured by that standard in the Privacy Act context, would never be found. There would be no reason for the Court in Modica to caution that there was no reasonable expectation of privacy in the intercepted jail call because, despite the fact that the call was monitored or recorded, Modica's call was not to his lawyer or "otherwise privileged." Id. at 89. When the Court referred to a recorded communication that was "otherwise privileged," it meant a communication that was presumptively covered by a recognized privilege.

The communication privileges stand on the same footing in this regard. The clergy-penitent privilege protects only successful confidences. State v. Martin, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999) (citing State v. Barnhart, 73 Wn.2d 936, 940, 442 P.2d 959 (1968) (addressing spousal privilege); State v. Thorne, 43 Wn.2d 47, 56, 260 P.2d 331 (1953) (same)). The presence of a third person during an attorney-client conversation likewise destroys the element of confidentiality and thus the privilege.

Dietz v. Doe, 131 Wn.2d 835, 850, 935 P.2d 611 (1997); Ramsey v. Mading, 36 Wn.2d 303, 311-12, 217 P.2d 1041 (1950). The marital privilege is no different. Thorne, 43 Wn.2d at 56 (spousal privilege applies to successful confidences); Barbee v. Luong Firm, P.L.L.C., 126 Wn. App. 148, 156, 107 P.3d 762 (2005) (spousal privilege applies to all actually successful confidential communications made between spouses while they are husband and wife: "In this respect, it is analogous to other privileges surrounding confidential communications, such as attorney-client, priest-penitent, and physician-patient.").

All three privileges are capable of being vitiated by eavesdroppers. In this sense, the spousal, attorney-client and clergy/penitent privileges are measured by the same standard. But as explained, when Modica references privileged communications in the jail call context, it did not mean communications that went unrecorded. It meant communications that are generally accorded the status of enjoying a privilege.

The question, then, is whether a relationship between callers that is presumptively accorded a communication privilege as a general matter weighs in favor of finding an intercepted call to be a private communication. "Marital communications are presumptively confidential." Breimon v. General Motors Corp., 8 Wn. App. 747, 750, 509 P.2d 398 (1973). The spousal privilege is intended to encourage "that

free interchange of confidences that is necessary for mutual understanding and trust" and is based on the premise that "the greatest benefits will flow from the relationship only if the spouse who confides in the other can do so without the fear that at some later time what has been said will rise up to haunt the speaker." Barbee, 126 Wn. App. at 155-56 (quoting Thorne, 43 Wn.2d at 55).

The rationale for the privilege presumes spouses are *aware* that the privilege exists; i.e. they are able to speak to one another "*without the fear* that at some later time what has been said will rise up to haunt the speaker." Id. (emphasis added). At the same time, ordinary husbands and wives untrained in legal niceties will be unaware of when the privilege will not be honored in a court of law.

The general awareness of the privilege, combined with general lack of awareness regarding when the privilege will not be honored, informs the question of whether a jail call subject to monitoring is nevertheless subject to a reasonable expectation of privacy when the call is between spouses. The existence of a privilege attaching to a given relationship between the callers, whether it be the spousal privilege or any other, is what the Court in Modica found significant in conducting its privacy calculus, aside from whether the communication at issue was successfully kept confidential. Modica, 164 Wn.2d at 89. The fact that

Blair communicated with his wife weighs in favor of a reasonable expectation of privacy in the jail call at issue here.

The trial court did not conclude otherwise. It understood that the existence of the marital privilege weighs in favor of excluding the jail call.

- c. **There is no crime-fraud exception to the marital privilege in Washington, so the trial court's ruling that the jail call was admissible under the Privacy Act must be reversed.**

The trial court, however, purported to carve out an exception to the marital privilege, concluding "although no specific exception exists in RCW 5.60.060(1) for a so-called crime-fraud exception as it relates to a spouse, the Court concludes that spousal privilege does not apply to statements made between spouses in furtherance of a conspiracy." 2CP 145 (CL 2.a.viii.).

Review of a trial court's interpretation of a statutory privilege is de novo. Norton v. U.S. Bank Nat. Ass'n, 179 Wn. App. 450, 454, 324 P.3d 693, review denied, 180 Wn.2d 1023, 328 P.3d 903 (2014). The trial court noted that privileges have their roots in common law. 2CP 145 (CL 2.a.vi.). But there is no common law history of recognizing a crime-fraud exception to the marital privilege in Washington. No Washington case was cited below for the proposition, and undersigned counsel is unable to find one.

The marital privilege statute derives from the common law. And the statute contains no crime-fraud exception. The legislature's intent is unmistakable under the *expressio unius est exclusio alterius* rule of statutory construction. "Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies." Wash. State Republican Party v. Wash. State Public Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). In such circumstances, "the silence of the Legislature is telling" and must be given effect. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (quoting Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)).

Thus, when a statute contains an express exception to the statute's general rule, that exception is treated as the only exception available. First-Citizens Bank & Trust Co. v. Cornerstone Homes & Dev., LLC, 178 Wn. App. 207, 216-17, 314 P.3d 420 (2013) (express statutory exception to the anti-deficiency judgment statute is the only exception); State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (statute's exception of some weapons listed in firearm enhancement statute shows legislative intent that crimes involving *other* weapons not on the list are *not* to be excepted).

The marital privilege statute sets forth the circumstances where the privilege will *not* apply: "a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW[.]" RCW 5.60.060(1).

The statute does not specify the privilege does not apply when the spouses talk about doing a crime together. The trial judge violated the marital privilege statute in creating a crime-fraud exception where none exists. By recognizing several express exceptions to the marital privilege, the legislature expressed its intent not to include any others, including a crime-fraud exception to the marital privilege. "Whether or not a statute creates a testimonial privilege is a determination of law, and a trial court has no discretion to find a privilege where none exists." Drewett v. Rainier School, 60 Wn. App. 728, 731, 806 P.2d 1260, review denied, 117 Wn.2d 1003, 815 P.2d 266 (1991). If a trial court lacks discretion to find

a privilege where none exists, then so too must it lack discretion to find an exception to a privilege where none exists.

Privileges such as the marital privilege "are recognized when *certain classes of relationships, or certain classes of communications within those relationships*, are deemed to be so important to society that they must be protected, even at the expense of the fact-finding process in criminal investigations and prosecutions." T.S. v. Boy Scouts of America, 157 Wn.2d 416, 429, 138 P.3d 1053 (2006) (quoting State v. Maxon, 110 Wn.2d 564, 567, 756 P.2d 1297 (1988)). The legislature, and the common law from which the marital privilege statute derives, deem the marital relationship and the communications that take place during the course of that relationship to be worthy of protection. Under Washington authority, the protection for marital communications does not vanish when the spouses talk about committing a crime.

The trial court admitted the jail call on the basis that the marital privilege ceased to exist due to of a crime-fraud exception, and therefore there was no reasonable expectation of privacy in the jails calls under the Privacy Act. 2CP 144-45 (CL.2.a.i., viii, ix). As shown, the court's resolution of the issue is flawed. There is no crime-fraud exception to the marital privilege in Washington and Blair retained a reasonable expectation of privacy in the jail call with his wife. The trial court erred in

concluding "spousal privilege does not apply to statements made between spouses in furtherance of a conspiracy" and "the parties did not have a reasonable expectation of privacy." 2CP (CL.2.a.i., viii).

d. Admission of the jail call prejudiced the outcome.

Any information obtained in violation of the Privacy Act is inadmissible. RCW 9.73.050. The failure to suppress evidence obtained in violation of the Privacy Act is prejudicial where there is a reasonable probability that the erroneous admission of the evidence materially affected the outcome of the trial. State v. Porter, 98 Wn. App. 631, 638, 990 P.2d 460, review denied, 140 Wn.2d 1024, 10 P.3d 405 (1999).

There is a reasonable probability the outcome of the trial was affected here. The jail call formed the heart of the State's prosecution. Without the jail call, there would be insufficient evidence to convict because the State would be unable to prove an actual agreement to commit the crime between Blair and Yates. Absent the jail call, the most the State could do is point to Dunham arriving outside the jail while possessing marijuana. The jail call was needed to show Blair agreed with Yates to possess that marijuana with intent to deliver. The jury never should have been allowed to consider that evidence. The conspiracy conviction should be set aside.

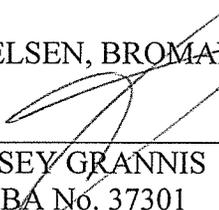
D. CONCLUSION

Blair requests reversal of the conviction.

DATED this 5th day of September 2015.

Respectfully Submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73299-4-I
)	
KEITH BLAIR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 9TH DAY OF SEPTEMBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH BLAIR
DOC NO. 345896
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF SEPTEMBER 2015.

x *Patrick Mayovsky*