No. 47205-8-II
Clark County Superior Court No. 13-1-01035-6

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

STATE OF WASHINGTON,

Plaintiff-Appellee,
v.

JOHN GARRETT SMITH,

Defendant-Appellant.

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

The Honorable Robert Lewis, Judge

APPELLANT'S REPLY BRIEF

JOHN HENRY BROWNE
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I. REPLY ARGUMENT

A. THE RECORDING PLAYED TO THE JURY WAS A "PRIVATE CONVERSATION."

RCW 9.73.030(1) (b) provides that it is unlawful for any individual or the state of Washington to intercept or record any:

> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

The trial court held this portion of the statute did not mandate suppression of the recording on Smith's phone because the recording had to be accomplished by a third party. Conclusion of Law 8. The State appears to concede that under subsection (b), the recording need not be made by a "third party" in order to be unlawful. Instead, the Act prohibits not only "third party" recordings but also recordings made by one person to the conversation without the consent of the other party. See *State v. Kipp*, 179 Wash.2nd 718, 317 P.3rd 1029 (2014).

However, the State argues that what was recorded on Garrett's phone was not a "private conversation." In doing so, the State fails to

cite to the current judicial construction of the term "private conversation."

> The act does not define the word "private," but we have adopted the dictionary definition: "'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 in public.' " The question of whether a particular communication is private is generally a question of fact, but one that may be decided as a question of law if the facts are undisputed. In determining whether a communication is private, we consider the subjective intention of the parties and may also consider other factors that bear on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties. We will generally presume that conversations between two parties are intended to be private.

State v. Roden, 179 Wash.2d 89, 321 P.3d 1183, 1186 (2014) (internal citations omitted.)

The State has failed to overcome the presumption of privacy. The fact that the conversation between Garrett and his wife was inadvertently recorded does not make it any less private. The incident was recorded in the parties own home, on a private cell phone, it was short, and there were no third parties present. Certainly, it was something Garrett wanted to remain confidential or secret and did not want to have played in the "open or in public."

State v. Smith, 85 Wash. 2nd 840, 847-48, 540 P.2d 424, 428 (1975), has no application here. In that case the Court said:

> Gunfire, running, shouting, and Kyreacos' screams do not constitute 'conversation' within that term's ordinary connotation of oral exchange, discourse, or discussion. We do not attempt a definitive construction of the term 'private conversation' which would be applicable in all cases. We confine our holding to the bizarre facts of this case, and find that the tape does not fall within the statutory prohibition of RCW 9.73.030, and thus its admission is not prohibited by RCW 9.73.050.

In plain terms, the Court said that it's resolution was confined to the "bizarre facts" of that case. And after *Smith* was decided in 1975, the Court has set forth a definitive construction of the term "private conversation," most recently in *Roden*. That term includes the private conversation recorded in this case.

B. THE RECORDING PLAYED TO THE JURY WAS "INTERCEPTED" BY SMITH'S DAUGHTER AND THE POLICE.

The State argues that because the recording was completed, there was no interception when the detective listened to the recording.

The State's argument is identical to an argument rejected in *Roden*. There, the Washington Association of Prosecuting Attorneys argued there was no interception because once the text messages reached the phone, they were in electronic storage and fell outside the Act. But the Court noted that the police detective had to manipulate

the phone to access the text messages. Thus, it declined to find there was no interception because the messages were in electronic storage when they reached the phone - "a technicality that has no relevance under our state statute." *Id.* at 906.

Here Smith's daughter took possession of her father's phone without his knowledge or permission. The Detective and Smith's daughter manipulated Smith's phone to listen to a recording not intended for either of them. That conduct is precisely the kind of conduct prohibited by the Privacy Act. The recording should have been suppressed.

C. THE INTRODUCTION OF THE RECORDING WAS NOT HARMLESS

Absent Smith's statements on the recording, there is no evidence that Smith intended to kill his wife. The remaining evidence may well support some degree of assault. But it would not support the attempted murder conviction. This Court must reverse.

II.

CONCLUSION

This Court must reverse the conviction and remand to the Superior Court for further proceedings.

DATED this 30th day of November, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I caused a true and correct copy of the Opening Brief to Appellant to be served on the Plaintiff-Appellee via email and to the Defendant-Appellant via First Class United States Mail, postage prepaid, as follows:

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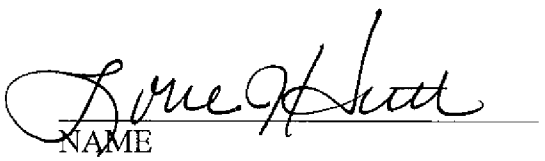

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