No. 32808-2

WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

LYNN L. JACKSON,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case asks the court to consider whether a violation of the Washington's privacy act (Privacy Act) at the direction and under the control of law enforcement also violates a defendant's right to privacy under article 1, §7.

On April 4, 2014, Lynn Lee Jackson was arrested by Asotin County Sheriff's Detective Jackie Nichols for attempted rape of a child in the second degree and assault with a deadly weapon. In the hours leading up to Mr. Jackson's arrest he had engaged in a lengthy telephone conversation with his ex-fiancée, Dena Mellick, regarding her daughter M.M.'s allegations of abuse. Ms. Mellick made the phone call at the direction of law enforcement. The call was recorded by law enforcement without Mr. Jackson's permission. Law enforcement directed the conversation by passing notes and coaching Ms. Mellick.

Although the primary allegations against Mr. Jackson concerned an incident that occurred on or about March 15, 2014, in Clarkston, Washington (March Incident), Detective Nichols had arranged to meet Ms. Mellick and M.M. in Lewiston, Idaho.[1] At trial, Detective Nichols acknowledged that if she had arranged for the call to have been made from Washington, she would have been required to first obtain a warrant.

[1]Idaho law allows law enforcement to record a conversation with one party's consent. See Idaho Code §18-6702(2)(d).

The State indicated it would seek to introduce Mr. Jackson's statements at trial, but no CrR 3.5 hearing was held. Following a one-day bench trial, the trial court found intent to rape M.M. based upon Detective Nichols' testimony regarding Mr. Jackson's statements to law enforcement immediately following his recorded phone call with Ms. Mellick.

Mr. Jackson's statements to Detective Nichols were the fruit of law enforcement's violation of his rights under the Privacy Act. Because the violation was by law enforcement, the statements were also the fruit of a violation of Mr. Jackson's article I, §7 rights. The trial court erred in admitting Mr. Jackson's statements and other evidence obtained as a result of the recorded telephone conversation.

This case also asks this court to determine whether a defendant is armed with a firearm for purposes of RCW 9.94A.533(8) where the defendant's only interaction with the firearm is to return it to its usual place and to ask the alleged victim to use the gun against the defendant.

During the March Incident, Mr. Jackson moved a holstered pistol from where M.M. had found it under his bed and placed it where it was normally kept near his pillow. After his struggle with M.M., Mr. Jackson became distraught and asked M.M. to shoot him. M.M. testified that Mr. Jackson never used the pistol to threaten or intimidate her. Based upon

M.M.'s testimony, the trial court found Mr. Jackson not guilty of second degree assault, specifically finding there was no nexus between the firearm and the assaultive conduct. Nevertheless, when ruling on the firearms enhancement, the trial court ruled that placing the firearm into the "field of play" was sufficient to prove Mr. Jackson was armed.

Mr. Jackson's sentencing enhancement should be stricken because the trial court's own findings prove the firearm was not there to be used. Mere proximity is insufficient to support a finding that Mr. Jackson was armed.

Mr. Jackson asks this court to hold that law enforcement violated Mr. Jackson's privacy rights under both the Privacy Act and article I, §7 when it recorded Ms. Mellick's conversation with Mr. Jackson. This court should therefore remand this matter for an evidentiary hearing to determine what evidence is fruit of the poisonous tree and what evidence is admissible, and for a new trial. Mr. Jackson also asks this court to hold that his interaction with his holstered pistol at the time of the March Incident was insufficient to support application of a firearms enhancement where the trial court specifically found no nexus between the firearm and the alleged assaultive conduct.

II. ASSIGNMENTS OF ERROR AND ISSUES FOR REVIEW

1. The trial court erred when it allowed the State to present incriminating statements elicited by an Asotin County Sheriff's detective immediately after intercepting a private conversation in violation of the Washington Privacy Act.

    a. Did the Asotin County Sheriff's detective, who eavesdropped on a recorded phone call M.M.'s mother made to Mr. Jackson from the Lewiston, Idaho Police Department, violate Washington's Privacy Act, RCW 9.73.010 – .260?

    b. Did the Asotin County Sheriff's detective violate Mr. Jackson's privacy rights under the Washington Constitution, article I, §7?

2. The trial court erred in failing to hold a CrR 3.5 hearing to determine the admissibility of Mr. Jackson's statements to law enforcement.

    a. Should the Asotin County Sheriff's detective have Mirandized Mr. Jackson prior to questioning him at his home immediately after intercepting the phone call?

3. The trial court erred when it found Mr. Jackson was "armed" with a firearm for purposes of RCW 9.94A.533(b).

    a. Did the trial court apply the correct legal standard when it found no nexus between the firearm and the assaultive behavior, but then ruled Mr. Jackson was armed because a firearm was present during the same conduct?

    b. Was there sufficient evidence to find Mr. Jackson intended to use the firearm against M.M. where M.M. testified Mr. Jackson did not use the firearm to intimidate or coerce her?

    c. Was there sufficient evidence to find Mr. Jackson intended to use the firearm where the firearm was already present at the scene and Mr. Jackson's only contact with the firearm

was to place it on the bed where he generally kept it and to give M.M. the firearm and ask her to shoot him?

III. STATEMENT OF THE CASE

On April 7, 2014, Lynn L. Jackson was charged by information with Count One: attempted rape of a child in the second degree, in violation of RCW 9A.44.076 and .28.020; and Count Two: assault in the second degree, in violation of RCW 9A.36.021(1)(c) (assault with a deadly weapon). (CR 012-13) On July 16, 2014, the State amended the information to add a firearms enhancement (RCW 9.94A.533(3)) to both counts and a sexual motivation enhancement (RCW 9.94A.533(8) and .835(1)) to Count Two. (CR 44-45) The charges against Mr. Jackson arose from an incident involving his long-time girlfriend's daughter, M.M., on or about March 15, 2014.

Following a one-day bench trial, Judge Scott D. Gallina found Mr. Jackson guilty of Count One, reduced Count Two to assault in the fourth degree, and found Mr. Jackson was armed with a firearm at the time of the attempted rape. (CR 106-10) On Count Two, Judge Gallina explained he could find no nexus between the weapon which was alleged to have been used and the assaultive behavior and so found Mr. Jackson guilty of the lesser included offense of fourth degree assault. (RP 260:8-12, 261:2-5) Judge Gallina relied heavily on Mr. Jackson's two statements

to Asotin County Sheriff's Detective Jackie Nichols to find Mr. Jackson intended to rape M.M. (RP 266:6-12) Judge Gallina then found sufficient evidence to impose the firearms enhancement based upon Mr. Jackson's act of placing his holstered handgun on the bed prior to struggling with M.M. (RP 269:11-17)

3.1. During the March 2014 incident, Mr. Jackson struggled with M.M. on his bed and then asked her to shoot him.

Mr. Jackson had known M.M. since he and Ms. Mellick began dating when M.M. was approximately seven years old. (RP 41:3-7; 73:17-18) In the spring of 2014, Mr. Jackson and Ms. Mellick became engaged to be married. (RP 40:23-24) M.M. was then 13-years-old. (RP 74:1-2)

That same spring, Mr. Jackson began teaching M.M. to drive. (RP 109:4-7)) On or about March 15, 2014, Mr. Jackson took M.M. driving on some country roads between the Mellick home in Pullman and Mr. Jackson's home in Clarkston, Washington. (RP 86:8-87:2) After they had finished driving, they stopped by Mr. Jackson's home, so that Mr. Jackson could get some aspirin. (RP 86:18-21, 188:2-10)

Mr. Jackson was in the middle of remodeling his home and only his bedroom was furnished. (RP 188:17-189:2) M.M. went into Mr. Jackson's bedroom to use his computer. (RP 87:21-23) Mr. Jackson, complaining of a headache, lay down crosswise on the bed. (RP 87:8-11)

Mr. Jackson asked M.M. to lie down with him, so she lay down on the bed next to Mr. Jackson while she played on her phone. (RP 87:11-13)

M.M. rolled off the bed and fell on the floor, where she noticed a gun under Mr. Jackson's bed. (RP 88:7-8) Mr. Jackson began keeping a gun on his bed after his home was broken into. (RP 191:11-22) He tossed the gun onto the bed where he usually kept it. (RP 224:20-24)

Mr. Jackson then pushed M.M. down on the bed. (RP 97:5) M.M. struggled with Mr. Jackson, but was unable to get up off the bed because Mr. Jackson restrained her. (RP 99:7-100:3) (RP 98:14-99:3)

Eventually, Mr. Jackson reached for the still holstered gun, gave it to M.M., and told her to shoot him. (RP 101:8-13) M.M. testified:

> Q: Okay. So he told you to shoot him?
> A: Yes.
> . . . .
> Q: Was that the first time that he had the gun, when he pushed it towards you?
> A: Well, he had taken out from under his bed and set it on the bed, and then I – he had got on top of me, I tried to get away, he threw me on the bed, and then he pushed the gun towards me and said, "I want you to shoot me."
> Q: Okay. So you remember that he had touched the gun earlier –
> A. Yes.
> -- in this exchange. Did he point it at you?
> A: No.
> Q: He didn't wave it front of you or anything like that?
> A: No.
> Q: He didn't threaten, "you better do what I tell you--"
> A: No.

Q: "—or," nothing like that? So when he handed you the gun was he pointing the barrel of it, where the bullets come out, was he pointing that at you?
A: He didn't hand it to me, he pushed it to me.
Q: Pushed it to you. So it wasn't facing you?
A: No.

(RP 111:10-17, 22-112:24)

After M.M. refused to shoot Mr. Jackson, she got up from the bed and left the room. (RP 113:1-24) M.M. did not tell Ms. Mellick about the incident until prompted to by Mr. Jackson.

3.2. Ms. Mellick learns of the March Incident after Mr. Jackson urges M.M. to get her mother to call off the wedding.

Mr. Jackson and Ms. Mellick planned to marry on April 1, 2014. (RP 43:7-11) That morning, they were in Las Vegas with M.M. (RP 194:5-11). Mr. Jackson told her "Time's running out and if ... I marry your mom, there's a good chance I'm going to rape you and you need to tell your mom that." (RP 194:19-195:6) Mr. Jackson explained that he wanted to stop the wedding because he did not want M.M. "to live in a house and be afraid of something happening with some creep." (RP 195:11-14) Later that day, M.M. told Ms. Mellick that Mr. Jackson told her to tell her mother that if they got married, Mr. Jackson was going to rape M.M. (RP 43:18-44:1)

Mr. Jackson left Las Vegas the following morning. (RP 47:15)

3.3. The Asotin County Sheriff's detective arranges to have M.M. interviewed in Idaho, where Ms. Mellick places a recorded call to Mr. Jackson at the request of law enforcement.

Two days later, Ms. Mellick contacted an attorney. (RP 48:5-16) The attorney contacted the Asotin County Sheriff's Department because the incidents Ms. Mellick disclosed to him occurred in Clarkston. (RP 127:22-128:4) Asotin County Sheriff's Detective Jackie Nichols arranged with M.M. and Ms. Mellick to meet her and Detective Jason Leavitt of the Lewiston Police Department at the Lewiston Police Department in Idaho on April 4, 2014. (CR 4, RP 48: 17-49:1, 66:18-19)

M.M. and Ms. Mellick were living in Pullman, Washington. (RP 49:16-17) Detective Nichols testified that she had contacted the Pullman Police Department because it was possible that some incidents had occurred in Pullman, but chose to conduct the interview with M.M. and Ms. Mellick in Lewiston because the Asotin County Sheriff's Department was "not sure at that point where all the incidents had occurred". (RP 128:10-14, 17-19) Asotin County victim advocate Sandy McIntyre also traveled to Lewiston to meet with M.M. and Ms. Mellick. (RP 67:20-68:1)

During the meeting Lewiston Police Department Detective Leavitt suggested that Ms. Mellick should call Mr. Jackson from the police station

in Idaho on her cell phone. (RP 50:1-3) Detective Leavitt wanted Mr. Jackson to confess while law enforcement recorded his private conversation with Ms. Mellick. (RP 50:3-5) Detective Nichols testified that in Washington, this technique could not be used without a warrant. (RP 133:7-11)

Detective Nichols was present when Detective Leavitt made this suggestion. (RP 69:1-5) Ms. Mellick testified that she understood Detective Leavitt and Detective Nichols both wanted Ms. Mellick to make the call. (RP 51:24-52:11, 69:7-10) M.M. testified both detectives asked Ms. Mellick to make the call to Mr. Jackson. (RP 121:15-20)

Detective Leavitt told Ms. Mellick what to say to Mr. Jackson and passed Ms. Mellick notes during the conversation to prompt Mr. Jackson to make particular statements. (RP 50:20-51:5) Ms. Mellick testified that Detective Leavitt was passing notes because "even though they had [M.M.'s] testimony about what had happened, they wanted him to confess to what he'd done." (RP 69:18-22, 70:12-15) The notes were designed to get Mr. Jackson to provide specific details regarding allegations that he had abused M.M. in Washington and Idaho. (RP 70:1-11) Ms. Mellick testified that she probably talked to Mr. Jackson for an hour and twenty minutes: "It was a long time." (RP 70: 21-24)

Detective Nichols was able to listen to the telephone call from outside the interview room. (RP 162:24-163:3, 164:19-165:1)

3.4. Immediately after Mr. Jackson's recorded conversation with Ms. Mellick, Detective Nichols interviews Mr. Jackson without first Mirandizing him.

Immediately after the telephone call, Detectives Leavitt and Nichols went to Mr. Jackson's home in Clarkston, Washington. (CR 6, RP 133:14-16, 165:2-9) Mr. Jackson indicated that he had been expecting them. (RP 133:19-23) Detective Nichols did not advise Mr. Jackson of his rights until after she had completed questioning. (See CR 8; RP 133:19-23, 142:22-24)

As Mr. Jackson had during the recorded conversation that had just taken place between himself and Ms. Mellick, Mr. Jackson admitted he had feelings for M.M. and admitted to the March Incident at his home. (RP 134:18-24, 137:4-22) At the conclusion of the interview, Detective Nichols placed Mr. Jackson under arrest. (RP 142: 21-24)

Detective Nichols testified that after the arrest of Mr. Jackson, she wrote a search warrant for Mr. Jackson's residence. (RP 143:3-7) During the search, Detective Nichols found a pistol under the pillow on the bed in Mr. Jackson's bedroom and a wildlife game camera. (RP 143:21-144:8) Detective Nichols testified she wrote a separate warrant to include the game camera and his computer. (RP 149:7-12) The Asotin County

Sheriff's Department discovered a series of photographs of the March 15 incident in the deleted files on Mr. Jackson's computer. (RP 150:7-24)

3.5. Although the State disclosed its intent to introduce Mr. Jackson's statements at trial, the trial court did not hold a CrR 3.5 hearing.

The State charged Mr. Jackson by information with one count attempted rape of a child in the second degree and one count assault with a deadly weapon. (CR 12-13) By omnibus application, the defense requested a CrR 3.5 hearing. (CR 30) The trial court reserved ruling. Id. On May 2, 2014, the State filed its Response to Omnibus Application. (CR 35-36) In it, the State disclosed it intended "to offer statements made by the Defendant into evidence at trial. These statements were either not [sic] the product of custodial interrogation." (CR 36) No CrR 3.5 hearing was held prior to trial. (See CR 37-38, 42, 54)

On July 16, 2014, the State filed a motion to amend the information to add a firearms enhancement and a sexual motivation enhancement. (CR 41) The motion was granted and the amended information filed on July 21, 2014. (CR 43-45)

The defense moved in limine to exclude the recording of Ms. Mellick's telephone conversation with Mr. Jackson and all testimony regarding the content of the conversation. (CR 48-49) The defense argued that Ms. Mellick was acting as an agent of both the State of Idaho and the

State of Washington when she called Mr. Jackson and elicited statements relating to M.M.'s allegations. (RP 18:1-21:3, 16-22:1) The trial court reserved ruling. (RP 22:2-3)

At trial, the defense reiterated its argument that Ms. Mellick's telephone call to Mr. Jackson was a violation of Washington law because it was part of a global investigation in which Washington law enforcement was intimately involved from the beginning. (RP 34:15-37:1) Thus, the taint is carried through the remainder of the case regardless of whether Detective Nichols was actually in the room while the phone call was made. (RP 37:2-13) The trial court ruled the content of the phone call was inadmissible, but admitted Mr. Jackson's statements to law enforcement. (RP 53:15-20, 134:14-142:24)

3.6. Mr. Jackson's statements to Detective Nichols were admitted at trial.

It was Detective Nichols' recounting of her interrogation of Mr. Jackson that convinced the trial court that Mr. Jackson intended to rape M.M. (RP 266:5-12)

Detective Nichols testified Mr. Jackson had disclosed that on or about March 15, 2014, he and M.M. were both in his bedroom when he asked her, "What would you do if I raped you or said I was going to rape you." (RP 137:13-22) Mr. Jackson explained to Detective Nichols that as

soon as M.M. began to cry, he stopped. (RP 138:4-5, 20-21) Detective Nichols testified that Mr. Jackson told her that "he couldn't go through with it." (RP 139:7-8) Detective Nichols testified that during her interrogation of Mr. Jackson he stated he believed there was something wrong with him because "he wanted to have sex with [M.M.] and he couldn't go through with it and that he was the world's worst rapist. (RP 175:17-24)

Detective Nichols' testimony was so significant that the State opted to end its rebuttal argument with Detective Nichols' alleged quote from Mr. Jackson, stating, "Lynn said he's the world's worst rapist. I thank God he is." (RP 254:8-10)

The following day, the trial court gave its ruling. Judge Gallina first addressed Count 2, assault with a deadly weapon. Judge Gallina stated:

> In order to make that finding, I have to find that there was a nexus between the weapon which was alleged to have been used and the assaultive behavior. I can't find that nexus on that charge. Although there was a firearm present, there was no testimony from the victim that she was assaulted with a firearm, placed in fear by the firearm or that it was used in any kind of offensive manner against her.

(RP 260:8-17) The trial court therefore reduced Count Two to the lesser included offense of assault in the fourth degree. (RP 260:2-4)

In finding the intent necessary to convict Mr. Jackson of attempted child rape, the trial court told Mr. Jackson:

> Probably the most important piece of testimony in my finding your intent was a statement you made to Detective Nichols, the statement that you confirmed in cross examination, that at the point you saw the first tear from [M.M.], in your words, you decided you couldn't go through with it. Well, that kind of begs the question couldn't go through with what? Couldn't go through with the rape that you intended to commit until that young girl started crying...

(RP 266:5-15) The trial court thus found Mr. Jackson guilty of attempted rape of a child in the second degree. (RP 268:17-20)

The trial court also found there was "sufficient evidence" to support the firearms enhancement. (RP 268:21-24) The trial judge ruled that placing the pistol on the bed immediately before the assaultive conduct began was sufficient to create a nexus between Mr. Jackson, the gun, and the crime. (RP 269:8-11)

On October 3, the trial court entered a Judgment and Sentence, sentencing Mr. Jackson to 120 months to life on Count One (including the 60 month firearm enhancement), to run concurrently with a 364 day sentence on Count 2. (CR 144)

IV. ARGUMENT

The trial court erred when it admitted Detective Nichols's statements and the evidence flowing from Mr. Jackson's statements to Detective Nichols without first holding a CrR 3.5 and 3.6 hearing. Because the solicited statements and resulting physical evidence were obtained by the State as a result of a violation of the Privacy Act, they are inadmissible and should not have been considered or relied upon at trial.

The trial court also erred in ruling the firearms enhancement applied even though the trial court had already determined there was no nexus between the firearm and the assaultive conduct that formed the basis for both counts. This court should therefore strike the portion of Mr. Jackson's sentence arising from the firearms enhancement.

4.1. Detective Nichols's testimony about statements Mr. Jackson made to her during the April 4, 2014 interview that took place at Mr. Jackson's house should not have been relied on by the Judge in finding Mr. Jackson guilty.

During trial, Detective Nichols testified at length about her conversation with Mr. Jackson on April 4, 2014. (RP 135-42, 155-56, 174-75) The statements reported by Detective Nichols were damning. (See, e.g., RP 175:22-24) Not only were Mr. Jackson's statements tantamount to a confession, but they were obtained immediately following a violation of Mr. Jackson's privacy rights and without Mr. Jackson

receiving Miranda warnings. Further, the testimony was admitted into evidence without any of the proper procedural safeguards the State owed to Mr. Jackson. It was therefore error for the court to rely on Detective Nichols's testimony in finding that Mr. Jackson had the specific intent necessary to commit the crime of attempted rape.

4.1.1. RAP 2.5(a) does not prohibit Mr. Jackson from raising this issue for the first time on appeal.

At trial and in its motions in limine, the defense objected to the admission of Mr. Jackson's recorded statements. If this court determines those objections were insufficient, it should nonetheless review whether Mr. Jackson's statements to law enforcement and other evidence obtained as a result of the recorded phone call should have been excluded.

RAP 2.5(a) allows this court to retain discretion to consider issues raised for the first time on appeal. State v. Kindell, 181 Wn. App. 844, 849, 326 P.3d 876 (2014) (electing to consider issue on appeal despite the defendant's failure to properly object at trial). Further, Washington courts consider manifest errors affecting constitutional rights even if no objection was made at trial. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P2d 1251 (1995); State v. Campos-Cerna, 154 Wn.App. 702, 710, 226 P.3d 185 (2010).

Both the United States Constitution and the Washington State Constitution protect a criminal defendant's right against self-incrimination. U.S. Const. amend. V; Wash. Const. art. I, §9; State v. Terry, 181 Wn. App. 880, 889, 328 P.3d 932 (2014). To ensure this right remains adequately protected, a criminal defendant is afforded multiple levels of protection. First, a criminal defendant subject to custodial interrogation must be advised of his Miranda rights or any of the defendant's statements are presumed involuntary and inadmissible. E.g., State v. Rosas-Miranda, 176 Wn. App. 773, 775, 309 P.3d 728 (2013). Whenever the State intends to offer evidence of a defendant's statements, the defendant is entitled to a hearing to determine their admissibility in advance of trial. CrR 3.5(a) ("shall hold"); State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983) ("CrR 3.5 is a mandatory rule.").

Mr. Jackson was not advised of his Miranda rights prior to being interrogated by the two detectives inside his home, and he did not receive a hearing pursuant to CrR 3.5. More importantly, Detective Nichols elicited the statements from Mr. Jackson immediately following a knowing and intentional violation of Washington's Privacy Act, RCW 9.73.010 - .260 ("Privacy Act").[2] As a result of the Privacy Act violation and lack of procedural protections given to Mr. Jackson, Detective Nichols

[2]The Privacy Act violation also implicates Mr. Jackson's privacy rights under article 1, §7 of the Washington State Constitution. See Section 4.1.3, infra.

was allowed to testify about Mr. Jackson's confession during the interrogation, thereby severely circumscribing Mr. Jackson's Constitutional right against self-incrimination.[3]

RAP 2.5(a) requires the "manifest" nature of the error be shown by demonstrating actual prejudice. McFarland, 127 Wn.2d at 333; Campos-Cerna, 154 Wn. App. at 710, 226 P.3d 185. Evidence obtained in violation of the Privacy Act is presumed prejudicial. See State v. Christiansen, 153 Wn.2d 186, 200, 102 P.3d 789 (2004).

Mr. Jackson's incriminating statements were obtained immediately after Detective Nichols violated the Privacy Act, and are presumed prejudicial. The "manifest" nature of the error is shown by the trial court's reliance on Detective Nichols's testimony. In its verdict, the judge stated:

> Probably the most important piece of testimony in my finding your intent was a statement that you made to Detective Nichols, the statement that you confirmed in cross examination, that at the point

[3]While it is undisputed that Mr. Jackson took the stand and testified on his own behalf, he faced the proverbial "Hobson's choice" following the extensive testimony from Detective Nichols about exactly what Mr. Jackson said during the interrogation, which was undoubtedly influenced by what Detective Nichols overheard on the phone call. Consequently, Mr. Jackson's trial testimony should have also been inadmissible. E.g., Harrison v. United States, 392 U.S. 219, 222, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968) ("The question is not whether petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."); Lujan v. Garcia, 734 F.3d 917, 930 (9th Cir. 2013) ("Under the Harrison exclusionary rule, when a criminal defendant's trial testimony is induced by the erroneous admission of his out-of-court confession into evidence as part of the government's case-in-chief, that trial testimony cannot be introduced in a subsequent prosecution, nor can it be used to support the initial conviction on harmless error review, because to do so would perpetrate the underlying constitutional error.").

> you saw the first tear from [M.M.], in your words, you decided you couldn't go through with it. Well, that kind of begs the question couldn't go through with what? Couldn't go through with the rape that you intended to commit until that young girl started crying and somehow then you decided to change your course of action, and I'm glad that you did, but you still can't unring the bell. It happened.

(RP 266:5-18) Because the defense raised objections based upon the Privacy Act and because the admission of Mr. Jackson's statements was manifest error affecting his right against self-incrimination and right to privacy, this court should consider whether the trial court erred in admitting evidence obtained as a result of the violation of the Privacy Act.

4.1.2. Because law enforcement violated the Privacy Act immediately before interrogating Mr. Jackson, testimony concerning incriminating statements made by Mr. Jackson should have been inadmissible.

Washington State has a long history of protecting the privacy of its citizens, and its "privacy act is considered one of the most restrictive in the nation." State v. Kipp, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014). Additionally, the Washington Supreme Court interprets the Privacy Act and its terms broadly in an effort to fulfill its purpose. State v. Roden, 179 Wn.2d 893, 906, 321 P.3d 1183 (2014); State v. Faford, 128 Wn.2d 476, 483-84, 910 P.2d 447 (1996). The supreme court has consistently taken a dim view of Privacy Act violations used to support criminal convictions. E.g., Roden, 179 Wn.2d at 906-07; Kipp, 179 Wn.2d at 733; State v.

Christiansen, 153 Wn.2d 186, 200, 102 P.3d 789 (2004). Indeed, law enforcement is held to a high standard when it comes to respecting individual privacy interests. See, e.g., Faford, 128 Wn.2d at 488-89.

It is unlawful for any person, including the State, to "intercept" a "private communication . . . by any device . . . designed to record and/or transmit . . . without first obtaining the *consent of all participants* in the communication." RCW 9.73.030(1)(a) (emphasis added).[4] Evidence obtained in violation of RCW 9.73.030 is inadmissible for *any purpose* at trial. RCW 9.73.050; Kipp, 179 Wn.2d at 724.

On April 4, 2014, Detective Nichols, an agent of the Asotin County Sheriff, participated in an interview with Ms. Mellick and M.M. at the Lewiston Police Department. (RP 128:10-14; CP 004-005) Following the interview with Ms. Mellick, Detective Nichols knowingly intercepted a recorded phone call between Ms. Mellick and Mr. Jackson. (RP 133:1-11, 164:10-165:1; CP 005) Detective Nichols did so despite being fully aware that if the phone call had originated in Washington, she could not have intercepted the call without a warrant. (RP 133:6-11, 164:14-18)

Detective Nichols's actions were exactly what the supreme court warned against in State v. Fowler, when it stated "[o]f course,

[4]Washington is one of only 11 states that require consent from all parties, and since its enactment in 1967, the legislature has consistently refused to alter the all-party consent provision. Kipp, 179 Wn.2d at 725.

RCW 9.73.030 may be violated by a recording made outside of this state if the recording was made for use of the evidence in Washington by an agent of a Washington official or other person." 157 Wn.2d 387, 395-96, 139 P.3d 342 (2006). Detective Nichols participated in the interception and recording of the phone call, despite her knowledge that those actions would have required a warrant if done in Washington, (RP 133:6-11). Her violation of Mr. Jackson's privacy rights was intentional and knowing.

Immediately after, and as a direct result of listening to the phone call, Detective Nichols traveled from Lewiston, Idaho back to Mr. Jackson's home in Clarkston, Washington, where she and Lewiston Police Detective Jason Leavitt interrogated Mr. Jackson for close to an hour. (RP 166:2-6) During the interrogation, Mr. Jackson made several incriminating statements (CP 007) which Detective Nichols then testified about at trial. (RP 134:17-141:24, 166:7-15, 175:17-24)

The proximity and relationship between the Privacy Act violation and Mr. Jackson's incriminating statements should have resulted in their suppression at trial. See Faford, 128 Wn.2d at 489. It was error for the trial court to rely on the statements to find that Mr. Jackson had the specific intent to rape M.M. It was also error for the court to rely on Mr. Jackson's trial testimony, because Mr. Jackson had no choice but to take the stand after the court erroneously allowed Detective Nichols to

testify about Mr. Jackson's incriminating statements to law enforcement. See supra, Note 3.

4.1.2.1. Detective Nichols violated Mr. Jackson's right to privacy under RCW 9.73.010- .260 when she knowingly listened to the recorded phone conversation between Mr. Jackson and Ms. Mellick from a separate room at the Lewiston, Idaho Police Department.

Courts consider four prongs when analyzing whether a Privacy Act violation occurred: (1) whether there was a private communication transmitted by a device; (2) whether the communication was intercepted or recorded; (3) whether the interception was by means of a device designed to record and/or transmit; and (4) whether all parties to the communication consented. Roden, 179 Wn.2d at 899. When Detective Nichols listened to the phone call between Mr. Jackson and Ms. Mellick, all four prongs were satisfied.

First, there was a private communication transmitted by a device. Privacy depends on whether the parties manifest a subjective intention that the communication be private and the expectation is reasonable. Christiansen, 153 Wn.2d at 193. Although a party must have a subjective intent that a communication will remain private, the party does not have to expressly voice that intention. Kipp, 179 Wn.2d at 729. The fact that a conversation can be intercepted through technologically feasible means

does not impact whether the conversation remains private. See Roden, 179 Wn.2d at 901; State v. Young, 123 Wn.2d 173, 186, 867 P.2d 593 (1994). Factors that bear on the reasonableness of a subjective intention include duration and subject matter of the communication, the location and presence of third parties, and the relationship between the consenting and nonconsenting party. Id. Conversations between two parties are generally presumed to be private. Roden, 179 Wn.2d at 900; Kipp, 179 Wn.2d at 732 ("Generally, two people in a conversation hold a reasonable belief that one of them is not recording the conversation."). Conversations involving incriminating statements are typical of those protected by the Privacy Act. Kipp, 179 Wn.2d at 730.

It cannot be disputed that the communication between Mr. Jackson and Ms. Mellick was transmitted by a device and that it was private. The conversation was between two persons who had recently broken off their engagement. Ms. Mellick testified that Detective Leavitt, of the Lewiston Police Department, asked her to call Mr. Jackson with the goal of getting him to incriminate himself. (RP 50:2-51:6, 68:16-70:14) To further that goal, Detective Leavitt was passing Ms. Mellick pieces of paper telling her what to say during the call, which lasted for over an hour. (RP 51:2-5, 69:14-71:4) While on the phone with Ms. Mellick, Mr. Jackson admitted to having fallen in love with his ex-fiancée's daughter and being sexually

attracted to her. (CP 005) This was a conversation Mr. Jackson reasonably believed was private.

With respect to the second and third prongs, the communication between Ms. Mellick and Mr. Jackson was intercepted by a device designed to transmit. Detective Nichols testified that she was able to listen to the phone call from another room and was aware of what Mr. Jackson was saying. (RP 164:14-165:1; see also, CP 005)

Finally, there is nothing in the record to indicate Mr. Jackson was aware that law enforcement was listening in on the conversation or that Ms. Mellick informed him of this fact. Nor is there anything in the record showing that Mr. Jackson consented to having the phone call intercepted and recorded by law enforcement. While Ms. Mellick may have consented to police listening to the phone call and recording it, the Privacy Act makes it clear that one party's consent is not enough. Thus, the fourth prong was satisfied.

4.1.2.2. Because Detective Nichols violated the Privacy Act right before interrogating Mr. Jackson at his home, the information and statements Mr. Jackson made to Detective Nichols were inadmissible for any purpose.

All evidence obtained in violation of the Privacy Act is inadmissible at trial for any purpose. RCW 9.73.050; Kipp, 179 Wn.2d at 724; Roden, 179 Wn.2d at 899. The scope of what must be excluded

following a violation of the Privacy Act includes other evidence obtained in violation of the Privacy Act. State v. Salinas, 121 Wn.2d 689, 693, 853 P.2d 439 (1993) (excluding observations made by law enforcement while wearing unauthorized wire); State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990) (same). Additionally, evidence obtained through a knowing exploitation of a Privacy Act violation is subject to exclusion as fruit of the poisonous tree. State v. Faford, 128 Wn.2d 476, 489, 910 P.2d 447 (1996); see also, Kipp, 179 Wn.2d at 731 n.6; State v. Courtney, 137 Wn. App. 376, 383, 153 P.3d 238 (2007) ("The portion of the [privacy] act requiring suppression of derivative evidence only applies to private conversations.").

The exact boundaries of the exclusionary rule as it applies to violations of the Privacy Act have not been defined by the courts. However, Faford, is instructive. In that case, an inquisitive neighbor purchased a police scanner and listened to the defendants' cordless telephone conversations. 128 Wn.2d at 479. He also observed the defendants' activities. Id. at 479. Based upon his visual observations and what he heard over the police scanner, he reported a marijuana grow operation to law enforcement. Id. at 480. Armed with this information, law enforcement went to the defendants' house, and questioned one of the defendants, who eventually led the officers to the shed in the backyard

where the grow operation was located. Id. at 480. At trial, the court allowed evidence from the intercepted phone conversations and ensuing searches. Id. at 481.

On appeal, the Washington Supreme Court addressed the subsequent search of the defendants' home. It noted the search was valid only if the consent to search was valid, to which the Court stated:

> The police obtained consent to search solely through the *knowing exploitation* of [the illegally intercepted phone conversations]. To permit the State to introduce evidence exclusively and directly flowing from a privacy act violation would render any privacy protection illusory and meaningless.

Id. at 488-89 (emphasis added) (citations omitted). Thus, the exploitation of the Privacy Act violation tainted the subsequent search and demanded suppression of that evidence as well. Id. at 489.

Here, Detective Nichols's conduct is more egregious than the law enforcement officers in Faford. Those officers did not directly violate the Privacy Act but rather exploited information obtained by a private citizen. Detective Nichols knowingly exploited the information she obtained from her own violation the Privacy Act. (CP 005)

Although neither the recording nor testimony about its contents were admitted into evidence at trial (RP 132:21-23), the Privacy Act violation tainted Detective Nichols' subsequent interrogation of Mr. Jackson. Detective Nichols wasted no time in knowingly exploiting

the information she had illegally obtained. Armed with the incriminating statements she had just heard Mr. Jackson make to Ms. Mellick, Detective Nichols traveled back to Washington and interrogated him regarding the same conduct and events he had confessed to Ms. Mellick. Practically speaking, the cat was already out of the bag. Cf. State v. Lavaris, 99 Wn.2d 851, 859, 664 P.2d 1234 (1983) ("As a practical matter, Miranda warnings are of little use to a person who has already confessed." (citation omitted)). If the fruit of the poisonous tree doctrine required suppression of derivative evidence in Faford, it should also apply to statements Mr. Jackson made to Detective Nichols following her direct violation of the Privacy Act.

What is particularly troubling about Detective Nichols listening to the phone call, or participating in the phone call at all, is the fact that she knew placing the phone call to Mr. Jackson was not permitted in Washington without a warrant. (RP 51-52, 68-69, 132-33, 164-65) This type of law enforcement conduct - i.e., crossing state lines to sidestep the Privacy Act - is exactly the type of conduct warned against in Fowler. If the Privacy Act is to be anything more than "illusory and meaningless," law enforcement must be deterred from knowingly exploiting violations to obtain incriminating statements from suspects.

Because Detective Nichols knowingly violated the Privacy Act and then exploited that violation to obtain incriminating statements from Mr. Jackson, her testimony regarding the interrogation should have been inadmissible.[5] This matter should therefore be remanded for a determination of what evidence introduced at trial was tainted by the violations of the Privacy Act and Mr. Jackson's right to privacy.

4.1.3. The knowing and intentional violation of Mr. Jackson's privacy rights by law enforcement is a violation article I, §7 of the Washington Constitution.

The Washington State Constitution, article I, §7, provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Although Privacy Act violations do not always implicate one's constitutional right to privacy, Kipp, 179 Wn.2d at 725, it is a constitutional violation where it is the State that violates the Privacy Act. No Washington case has directly confronted this particular issue.

The issue in Kipp was whether the trial court erred by not suppressing a recording secretly made by the defendant's brother-in-law in which the brother-in-law confronted the defendant about accusations of sexually assaulting his daughters. Id. at 723, 726. Not only was law

[5]As will be discussed in Section 4.1.5, infra, the trial court also failed to hold a CrR 3.5 hearing. Had a 3.5 hearing been held, it would have been the State's burden to prove that Mr. Jackson's statements to Detective Nichols were admissible. See Faford, 128 Wn.2d at 489.

enforcement not involved in the Privacy Act violation, but the defendant did not raise a constitutional argument. See id.

Kipp cited State v. Corliss, 123 Wn.2d 656, 663-64, 870 P.2d 317 (1994), for the principle that a Privacy Act violation is never a constitutional violation. The issue in Corliss was whether law enforcement violated the Privacy Act when an informant tilted a phone receiver so they could listen to the conversation. 123 Wn.2d at 661. The Court held that no Privacy Act violation occurred "because the conversation was not 'intercepted' by a 'device' designed to record or transmit." Id. at 662.

Nevertheless, the petitioner in Corliss argued that *even without a violation* of the Privacy Act, law enforcement violated his privacy rights under the Washington Constitution. Id. at 663. The Court relied exclusively on State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992), and concluded the petitioner's state constitutional rights were not violated. Corliss, 123 Wn.2d at 664.

Corliss is distinguishable from the facts here because Detective Nichols did violate the Privacy Act. See Section 4.1.2.1, supra. She did not overhear the conversation by having Ms. Mellick tilt the phone receiver; she intercepted the phone call and listened to it from another room at the police station in a state where her conduct was legal. (RP 162:24-163:3, 164:19-165:1)

A closer reading of Salinas and the cases cited therein reveals that the Washington Supreme Court has never fully addressed how RCW 9.73.030 relates to the state constitution. Salinas involved RCW 9.73.230, a provision in the Privacy Act allowing a chief law enforcement officer to authorize intercepting communications related to drug trafficking and/or commercial sexual exploitation of minors as long as one party consents. 119 Wn.2d at 198-99. The Salinas court held RCW 9.73.230, when scrupulously followed, did not violate article 1, §7. Id. at 199. The court did not address a violation of RCW 9.73.030 by law enforcement.

Moreover, none of the cases relied upon by Salinas analyzed the state constitution and RCW 9.73.030. E.g., State v. Jennen, 58 Wn.2d 171, 173-74, 361 P.2d 739 (1961) (looking only at the Supreme Court's interpretation of Federal Communications Act and concluding that no constitutional violation occurred); State v. Wright, 74 Wn.2d 355, 357, 444 P.2d 676 (1968) ("The sole issue presented to this court is whether . . . the tape recording and the testimony of the monitored conversations should have been suppressed as the products of an illegal search violative of the fourth amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment . . ."); State v. Goddard,

74 Wn.2d 848, 852, 447 P.2d 180 (1968) (addressing petitioner's Fourth Amendment argument for the first time on appeal).

Of those three cases—Jennen, Wright, and Goddard—the only one that arguably addressed the state constitution was Jennen, the facts of which centered around eavesdropping on a phone conversation via an extension line. 58 Wn.2d at 173. Prevalent use of extension lines at that time led the court to conclude that parties to the phone call had no expectation of privacy because the call could have been answered by more than one phone. See id. at 173-74; see also, Corliss, 123 Wn.2d at 663-64.

The premise that parties to a phone call have no expectation of privacy because of the possibility of the phone call being intercepted was expressly rejected in Christensen, where the court held that eavesdropping on a cordless phone conversation by activating the speakerphone on the base unit violated the parties' expectation of privacy. 153 Wn.2d at 201; see also, Roden, 179 Wn.2d at 901. Notably, it was not law enforcement who violated the Privacy Act in Christianen. 153 Wn.2d at 190-91.

Since Jennen, Wright, and Goddard were decided, our supreme court has repeatedly held that article 1, §7 is more protective of individuals' privacy interests than the Fourth Amendment. E.g., State v. Hinton, 179 Wn,2d 862, 868, 319 P.3d 9 (2014); State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994); see also, State v. Gunwall, 106

Wn.2d 54, 65, 720 P.2d 808 (1986) ("[U]nlike the federal constitution, our state constitution expressly provides protection for a citizen's 'private affairs'").

If our state constitution is indeed more protective of individual privacy than its federal counterpart, one must question the continued validity of wiretapping precedent that is rooted in federal law. In a digital age where everything from phone calls to personal emails are increasingly subject to being illegally and unknowingly intercepted, it is time to evaluate whether *law enforcement's* knowing and intentional violation of RCW 9.73.030 disturbs a person's "private affairs" under the Washington State Constitution.

4.1.4. Detective Nichols should have Mirandized Mr. Jackson prior to interrogating him at his home with Detective Leavitt.

Miranda warnings protect a defendant's constitutional right to avoid making incriminating statements to law enforcement while in custody. State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Miranda warnings are necessary any time a suspect is subject to custodial interrogation by an agent of the State. Id. at 214 Absent Miranda warnings, "a suspect's statements during custodial interrogation are presumed involuntary." Id. at 214 There is no question that Mr. Jackson was questioned by Detective Nichols or that Detective Nichols was acting

as an agent of the State; thus, the only issue is whether Mr. Jackson was in custody at the time he made the incriminating statements.

Custody, for Miranda purposes, is objectively assessed based on "whether a reasonable person in the suspect's position would have felt that his or her freedom was curtailed to the degree of formal arrest." Heritage, 152 Wn.2d at 218. Courts look at the totality of circumstances to determine whether a suspect is in custody. State v. Rosas-Miranda, 176 Wn. App. 773, 779, 309 P.3d 728 (2013). The critical question is whether a reasonable person would feel free to terminate the interrogation and leave. Thompson v. Keohane, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

"Police questioning within the confines of a person's own home may be custodial interrogation." Rosas-Miranda, 176 Wn.App. at 780. (citing Orozco v. Texas, 394 U.S. 324, 326-27, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969)). In determining whether interrogation within one's home is custodial, courts have noted the following four factors:

> (1) the number of law enforcement personnel and whether they were armed;
> (2) whether the suspect was at any point restrained, either by physical force or by threats;
> (3) whether the suspect was isolated from others; and
> (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

Rosas-Miranda, 176 Wn.App. at 783 (quoting United States v. Craighead, 539 F.3d 1073, 1084 (9th Cir. 2008)). A totality of the four factors show that Mr. Jackson was in custody at the time Detective Nichols interrogated him.

First, it is probably safe to assume the detectives were armed at the time of the interrogation because they had already heard from M.M. that Mr. Jackson owned a handgun and kept it at his house. (CP 005) The record is also clear that there were two law enforcement officers present during the interrogation and Mr. Jackson was alone. Id.

Second, although Mr. Jackson was not restrained by law enforcement during the interrogation, he testified that when the officers arrived, he believed he may have broken some law, just not the one for which he was charged and ultimately convicted. (RP 203:1-4) During the 45 minute interrogation that ensued, (RP 166:1-5), a reasonable person in Mr. Jackson's position would not feel free to terminate the interrogation and leave.

Third, Detective Nichols and Leavitt interrogated Mr. Jackson in the confines of Mr. Jackson's home while no one else was present. He was completely isolated from others. Moreover, sitting on chairs in the kitchen of an otherwise unfurnished house is not all that different from sitting in an interrogation room at the police department. (See CP 006)

Fourth, the detectives did not inform Mr. Jackson he was free to leave or terminate the interview.[6] Detective Nichols arrived at the house shortly after she violated Mr. Jackson's right to privacy, and she had just heard him make several incriminating statements over the phone. (CP 005-006) Mr. Jackson was not informed that he was free to terminate the interrogations because the officers had no intention of leaving without placing Mr. Jackson under arrest.[7]

Based on the four factors, Mr. Jackson was in custody at the time Detectives Nichols and Leavitt interrogated him. Two law enforcement officers showed up at Mr. Jackson's house unannounced, immediately after they illegally eavesdropped on the phone call in which he incriminated himself, and interrogated him in the confines of his home without informing him he was free to terminate the interrogation. A reasonable person in Mr. Jackson's situation would not have felt free to

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[6]The fourth factor addresses concerned similar to those in State v. Ferrier, where the Supreme Court mandated law enforcement give warnings prior to conducting a search following a "knock and talk" because of the belief that "any 'knock and talk' is inherently coercive to some degree." 136 Wn.2d 103, 115, 960 P.2d 927 (1998). Just as a homeowner must be informed of his or her right to limit the scope of or terminate a search following a "knock and talk," so too should a suspect be told he or she can end an interrogation following a "knock and talk."

[7]Normally, a police officer's subjective intentions are not relevant to whether the suspect is in custody for Miranda purposes. See State v. Lorenz, 152 Wn.2d 22, 37, 93 P.3d 133 (2004). Other than being a logical explanation for the fourth factor (not informing him that he was free to terminate the interview), Mr. Jackson is not asserting that Detective Nichols's subjective intent to place him under arrest contributed to him being in custody.

terminate the interrogation and leave. Therefore, law enforcement should been informed Mr. Jackson of his right to avoid self-incrimination.[8]

4.1.5. Because the judge relied on Detective Nichols's testimony in finding Mr. Jackson's intent, the lack of a CrR 3.5 hearing further contributed to the prejudice suffered by Mr. Jackson.

"When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." CrR 3.5(a). Hearings are mandatory.[9] E.g., State v. Ustimenko, 137 Wn.App. 109, 115, 151 P.3d 256 (2007). The right protected by a CrR 3.5 hearing is "to have the voluntariness of an incriminating statement assessed prior to its admission into trial." State v. Williams, 137 Wn.2d 746, 754, 975 P.2d 963 (1999).

Mr. Jackson asked for a CrR 3.5 hearing in his omnibus application, but the court reserved ruling. (CR 30) In its response to the omnibus application, the State indicated that it intended to introduce at

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[8]It is worth noting that even when she formally arrested him, Detective Nichols may not have fully Mirandized Mr. Jackson. (CP 008) ("I told Lynn he was under arrest, handcuffed him and told him he had the right to an attorney and phone call. I told Lynn if he could not afford an attorney he would be appointed one without cost.").

[9]While there is some authority that a defendant is not entitled to a CrR 3.5 hearing in a bench trial, this presupposes that the judge does not rely on inadmissible evidence in reaching a decision. See State v. Wolfer, 39 Wn.App. 287, 292, 693 P.2d 154 (1984) abrogated on other grounds by State v. Heritage, 152 Wn.2d 210, 95 P.3d 345 (2004). Because the judge in this case relied on what should have been inadmissible testimony from Detective Nichols, the need for a CrR 3.5 hearing cannot be excused after the fact.

trial the statements Mr. Jackson made to law enforcement. (CP 036) Following this disclosure, a CrR 3.5 hearing was mandatory, but none occurred. The voluntariness of Mr. Jackson's statements to police—indeed, what was tantamount a confession—was not determined prior to trial.

Had a 3.5 hearing been held, the testimony about Mr. Jackson's statements to police may have been ruled inadmissible as fruit of the poisonous tree stemming from the Privacy Act violation. Without a 3.5 hearing, Detective Nichols was able to testify that Mr. Jackson told her he couldn't go through with it and he was the world's worst rapist. (RP 175:22-24) This is the type of testimony a 3.5 hearing is designed to weigh in advance of trial.

Once Detective Nichols testified about what Mr. Jackson said during the interview at his house, (RP 134:14-141:24, 165:2-168:19, 174:2-175:24), the State had all the evidence it needed to convince the judge that Mr. Jackson had formed the specific intent necessary to attempt the crime. The prosecutor even went so far as to finish closing arguments with the following statement: "Detective Nichols testified that he wished that [M.M.] would've shot him because he thought there was something wrong with him. Lynn said he wanted to have sex with [M.M.] but

couldn't. Lynn said he's the world's worst rapist. I thank God that he is." (RP 254:5-11).

Not surprisingly, the prosecutor's statement about Detective Nichols's testimony resonated with the judge. The impact of that testimony is clearly shown by the judge's findings, where he referred to Detective Nichols's testimony as the "most important piece of testimony." (RP 266:5-18). The most important piece of testimony, however, should have been declared inadmissible during a CrR 3.5 hearing. Consequently, the lack of a CrR 3.5 further prejudiced Mr. Jackson.

4.2. The trial court erred in imposing the firearm enhancement after specifically finding no nexus between Mr. Jackson's holstered pistol and the crime.

The State filed its Amended Information on July 21, 2014. (CR 44-45) The Amended Information added a special allegation "that at the time of the commission of this crime the Defendant was armed with a firearm." (CR 44) RCW 9.94A.533(a) provides that five years shall be added to the sentence for any class A felony only if the defendant is found to be armed with a firearm. Whether a person is armed is a mixed question of law and fact, reviewed de novo. State v. Ague-Masters, 138 Wn. App. 86, 102-03, 156 P.3d 265 (2007) (citing State v. Schelin, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002)). Where there is no dispute over the defendant's constructive possession of a firearm, the court may determine as a matter

of law whether the facts are sufficient to prove the defendant was armed. State v. Mills, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995).

"[A] person is *not* armed simply because a weapon is present during the commission of a crime." State v. Johnson, 94 Wn. App. 882, 892, 974 P.2d 885 (1999). "The theory behind the weapons enhancement is that a crime is potentially more dangerous to the victim, bystanders, or the police because the defendant is armed while he is committing the crime because someone may be killed or injured." State v. Johnson, 94 Wn. App. 882, 895, 974 P.2d 885 (1999). This "underlying rationale can only apply where there is a possibility the defendant would *use* the weapon." Id. at 895-96. Otherwise application of the enhancement runs the risk of intruding on the defendant's constitutional right to bear arms by subjecting defendants to an enhanced sentence whenever a crime occurs where a weapon is present. Id. at 896.

4.2.1. A defendant is "armed" for purposes of RCW 9.94A.533(2) only if the firearm is accessible and easily available *to be used* at the time of the crime.

Washington courts have established a two-part test for determining whether the firearms sentencing enhancement may be applied. First, the firearm must have been readily accessible and easily available at the time of the crime. State v. Easterlin, 159 Wn.2d 203, 206, 149 P.3d 366 (2006). Second, there must be a nexus between the defendant, the weapon, and the

crime. Id. The Washington Supreme Court has interpreted this requirement to mean that "where the weapon is not actually used in the commission of a crime, it must be there to be used." State v. Gurske, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). Additionally, "the weapon must be easy to get to for *use* against another person." Id. at 139.

The nexus analysis is then broken into an examination of each connection. First, the court must determine whether there is a nexus between the defendant and the weapon during the commission of the crime. Gurske, 155 Wn.2d at 141. This determination generally rests on the defendant's physical proximity to the weapon and his ability to readily access it for use. Id. at 141; State v. Mills, 80 Wn. App. 231, 237, 907 P.2d 316 (1995) (finding no physical proximity at the time when availability for use would have been critical); State v. Johnson, 94 Wn. App. at 888 (finding no nexus between the defendant and the weapon where the defendant was handcuffed and unable to access the handgun).

4.2.2. Mr. Jackson's act of moving a firearm into the scene of the crime is insufficient without proof that his intent was to *use* the firearm against M.M.

"[M]ere proximity or mere constructive possession is insufficient to establish that the defendant was armed at the time the crime was committed." Gurske, 155 Wn.2d at 138. The second step of the nexus analysis examines the relationship between the weapon and the crime to

determine if the weapon was either used in the commission of the crime or present so that it could be used. Id. at 138, 142. To determine whether this nexus exists, the trial court looks to the nature of the crime, the type of the weapon and the circumstances under which the weapon is found. Id. at 142. The Washington Supreme Court has stated that the purpose of this examination is to determine whether the defendant actually intended to use the weapon in the commission of the crime: "[T]he defendant's intent or willingness to use the [firearm] is a condition of the nexus requirement." State v. Brown, 162 Wn.2d 422, 434, 173 P.3d 245 (2007).

The Brown court reviewed the nexus analysis in a number of enhancement cases and concluded that a nexus between the weapon and the crime required evidence that the defendant's purpose in having the weapon present was to use it. Id. at 432-34. A defendant will not be found to be armed merely because he handled a firearm during the course of the criminal conduct or could have had the firearm available for use by taking a few steps. Brown, 162 Wn.2d at 432-33; State v. Ague-Masters, 138 Wn.App. 86, 104, 156 P.3d 265 (2007). In Brown, the court reversed the Court of Appeals and held that evidence the defendant had handled a firearm and moved it onto a bed during the course of a burglary was insufficient to establish a nexus between the defendant, the firearm, and the crime because there was no evidence the defendant intended to use the

firearm. 162 Wn.2d at 434-35. In Gurske, the court found no intent or willingness to use a firearm where the defendant had not positioned the gun to make it easily accessible and made no movement toward the gun. 155 Wn.2d at 143.

Requiring intent or willingness to use a firearm in the commission of the crime is important in reconciling the firearms enhancement with the right to bear arms. Brown, 162 Wn.2d at 435. Constitutionally protected behavior cannot be the basis for criminal punishment. State v. Rupe, 101 Wn.2d 664, 704, 683 P.2d 571 (1984) (citing Hess v. Indiana, 414 U.S. 105, 107, 94 S. Ct. 326 (1973)). "To protect the integrity of constitutional rights, the courts have developed two related propositions. The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." Id. at 705; Rupe, 101 Wn.2d at 705 (citing United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1209 (1968)).

4.2.3. The evidence at trial established that the firearm was present, but that Mr. Jackson did not use the firearm or express his intent to use it other than his direction to M.M. to use the firearm against himself.

In this case, there was insufficient evidence to find Mr. Jackson's purpose in having his holstered .22 caliber pistol present was to use it

against M.M. She testified the holstered gun was present on the day Mr. Jackson had engaged in the conduct that led to the charges of attempted rape and assault, but also testified that the only time Mr. Jackson used or attempted to use the gun was when he pushed it toward M.M. and asked her to shoot him. (RP 88:7-89:5, 96:16-20, 101:8-18, 111:7-17)

M.M. testified that after she saw the holstered pistol under the bed, Mr. Jackson picked it up and tossed it onto the bed. (RP 88:7-11, 96:17-24, 110:13-19) Mr. Jackson testified that he keeps his gun on the bed next to his pillow because his home had been broken into. (RP 191:10-21' 224:20-24) No evidence was entered contradicting this testimony or suggesting that Mr. Jackson tossed the holstered gun onto the bed for any reason other than the fact that he kept the gun on the bed.

In fact, although he and M.M. were alone in the house and M.M. was physically struggling with him, M.M. testified Mr. Jackson never pointed the gun at M.M., brandished it, or threatened M.M. with it. (RP 112:9-15) There was no evidence that Mr. Jackson had any contact with the gun or moved toward it until he gave the holstered pistol to M.M. (See 101:5-18, 111:12-112:4) Even then, Mr. Jackson pushed the holstered gun toward M.M. so that the gun was facing away from M.M. (RP 112:16-

23) M.M. gave no testimony suggesting Mr. Jackson used the gun to place her in fear or coerce her in any way.

There was no evidence that Mr. Jackson removed the pistol from its holster. The only evidence entered regarding Mr. Jackson's use or intended use of the holstered gun was the testimony of Mr. Jackson and M.M., who both stated Mr. Jackson suggested that M.M. use the gun to shoot Mr. Jackson.

4.2.4. The trial court erred in finding Mr. Jackson was armed based solely on Mr. Jackson placing the pistol at the scene, after also finding no nexus between the pistol and the assaultive conduct.

Based on this evidence, the trial judge found no nexus between the firearm and the conduct that formed the basis for the both the assault charge and the attempted rape charge. (RP 260:8-12) "Although there was a firearm present, there was no testimony from the victim that she was assaulted with the firearm, placed in fear by the firearm or that it was used in any kind of offensive manner against her." (RP 260:12-17)

When ruling on the firearms enhancement, however, the trial judge found that Mr. Jackson's act of tossing the holstered gun onto the bed before assaultive behavior began was sufficient to establish a nexus between [Mr. Jackson], the crime and the handgun." (RP 269:5-11) In light of Mr. Jackson's constitutional right to keep a handgun in his home,

his tossing of the gun onto the bed (where he customarily kept it) after M.M. discovered it under the bed (where it did not belong), is insufficient to establish Mr. Jackson's intent or willingness to use the handgun against M.M. beyond a reasonable doubt.

The theory behind the firearms enhancement is that a person is potentially more dangerous to others if he is armed while committing a crime. The evidence here established only that Mr. Jackson was more dangerous to himself. Although the holstered pistol was present during his struggle with M.M., there was no evidence that he reached toward the gun, removed it from its holster, or made any attempt to use it in any manner until he pushed it toward M.M. and told her to shoot him. The trial judge applied the wrong legal standard when he found that Mr. Jackson was armed based solely on the availability of the pistol without determining that Mr. Jackson's purpose in having the pistol present was to use it against M.M., particularly after specifically finding no nexus between the pistol and Mr. Jackson's assaultive conduct. This court should therefore strike the firearm enhancement from Mr. Jackson's sentence.

V. CONCLUSION

The Privacy Act violation, combined with the lack of Miranda warnings, failure to hold a CrR 3.5 hearing, and Detective Nichols's testimony during trial, virtually eliminated any chance Mr. Jackson had of

receiving a fair trial. In light of the knowing violation of Washington law and complete lack of procedural protection, Mr. Jackson's conviction must be reversed.

The trial court erred in finding a nexus between Mr. Jackson, the handgun, and the assaultive conduct based solely on the presence of the handgun during the conduct, particularly where the trial court had already found the handgun was not used during the assaultive conduct. This court should therefore strike the firearm enhancement from Mr. Jackson's sentence.

DATED this 17th day of April, 2015.

COLLETTE C. LELAND
COREY QUINN
WINSTON & CASHATT,
LAWYERS, a Professional Service
Corporation
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on April 17, 2015, I caused the foregoing document to be served on the following counsel in the manner indicated:

Benjamin Curler Nichols	**VIA REGULAR MAIL**	☒
Asotin County Prosecutor's Office	**VIA CERTIFIED MAIL**	☐
P.O. Box 220	**HAND DELIVERED**	☐
Asotin, WA 99402-0220	**BY FACSIMILE**	☐
	VIA FEDERAL EXPRESS	☐

DATED on April 17, 2015, at Spokane, Washington

Janel Martindale