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NO. 72102-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

ALAN SINCLAIR, JR

Appellant.

REC'D
JAN 27 2015
King County Prosecutor
Appellate Unit

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

The Honorable Jeffrey Ramsdell, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

When he was having a private conversation with his granddaughter, Alan James Sinclair, Jr.'s¹ phone inadvertently made a telephone call and a portion of the conversation was recorded on the recipient's voicemail. Neither Sinclair nor his granddaughter consented to the recording. Because no party to the recording consented, the recording was inadmissible under chapter 9.73 RCW (the privacy act). The trial court's erroneous admission of the recording into evidence requires reversal and a new trial.

B. ASSIGNMENT OF ERROR

The trial court violated the privacy act by admitting Exhibit 19A, a CD that contained a recording of Sinclair's private conversation with I.S., his granddaughter, because neither Sinclair nor I.S. consented to the recording.

Issues Pertaining to Assignment of Error

1. When parties to a conversation manifest a reasonable expectation of privacy in the content of the conversation and there is no evidence that any third parties could overhear the conversation, is such a conversation private thereby making the nonconsensual recording of the conversation unlawful under the privacy act?

¹ The trial court's and this court's captions state Sinclair's name is Sinclair. It rather than Sinclair, Jr. Sinclair maintains his name is Sinclair, Jr.

2. When a voicemail system records a private conversation as designed, is the voicemail system a device designed to record for the purposes of the privacy act?

3. When no party consents to the recording, does the lack of consent categorically render the recording unlawful and inadmissible as a matter of statutory interpretation?

4. Does the erroneous admission of a recording require reversal and remand for retrial when it materially affected the outcome of trial?

C. STATEMENT OF THE CASE

The State initially charged Sinclair with two counts of third degree child molestation and one count of communication with a minor for immoral purposes based on reports that Sinclair had repeatedly kissed I.S., his granddaughter, and had groped her breasts. CP 1-2, 4-5. Based on further investigation, the State later amended its information to add one count of rape of child in the second degree and one count of sexual exploitation of a minor. CP 7-9. The State amended its information a second time to replace the sexual exploitation charge with another count of second degree child rape. CP 93-94.

Prior to trial, Sinclair moved to suppress a voicemail recording of his conversation with I.S. that had been inadvertently transmitted to and

recorded by I.S.'s mother's voicemail due to a "pocket dial" from Sinclair's mobile telephone. CP 86-88. Specifically, Sinclair argued the voicemail recording was inadmissible because it recorded a private conversation without his or I.S.'s consent in violation of the privacy act. CP 86-88; IRP² 44-65.

The trial court admitted the recording, noting, "I can't believe the legislature intended to make it unlawful for somebody to inadvertently do something All [Sinclair] did was inadvertently make a phone call, which inadvertently caused another party's device to inadvertently make a recording." IRP 68. The trial court did not "believe [this] falls within the prohibition of being usable at trial." IRP 68-69. The trial court also ruled the recording conveyed "veiled threats" to I.S., which, in its view, also rendered the recording admissible under a privacy act exception. IRP 69.

The recording was repeatedly played for the jury, including during the State's opening statement.³ 8RP 4; 9RP 6-8, 52-53. The lead detective also discussed the voicemail recording as part of his criminal investigation.

² This brief refers to the verbatim reports of proceedings as follows: IRP—three-volume, consecutively paginated proceedings of March 28, April 3 and 22, May 15 and 19, and June 19, 2014; 2RP—April 16, 2014; 3RP—April 22, 2014; 4RP—May 1, 2014; 5RP—May 5, 2014; 6RP—May 6, 2014; 7RP—May 7, 2014; 8RP—May 13, 2014; 9RP—May 14, 2014.

³ Sinclair awaits transcription of voir dire and opening statements, but assumes the State played the recording for jurors at the very beginning of trial given its express statement of intent to do so.

8RP 26-27. The State also repeated the contents of the recording during closing argument. 1RP 224.

I.S. testified that "tongue kissing" with Sinclair started when she was 11 or 12 years old. 9RP 57-58. According to I.S., the kissing progressed to oral sex starting when she was 13.⁴ 9RP 64, 109. I.S. also said Sinclair and she had vaginal intercourse once when she was 13 or 14 and Sinclair watched her insert a pink rubber dildo into her vagina. 9RP 70-72, 78.

According to I.S., Sinclair would photograph or videotape her during some of their sexual encounters, though she could not remember when specific photos were taken. 9RP 66-69, 99-105, 116-18. Some of these videos and photos were admitted into evidence. 1RP 132, 139-41, 151-52, 161-65, 169; 9RP 32-33, 59, 81, 88, 92-93, 101-02.

The jury returned guilty verdicts on two counts of rape of a child in the second degree, two counts of child molestation in the third degree, and one count of communication with a minor for immoral purposes. CP 103-07; 1RP 301-04.

With regard to the two second degree child rape convictions, the trial court imposed high-end standard-range, indeterminate, and concurrent sentences of 280 months. CP 146; 1RP 325. The trial court imposed

⁴ I.S. testified she performed oral sex on Sinclair 20 or more times when she was 13. 9RP 109. This testimony conflicted with her previous statements to law enforcement that oral sex had occurred only five to six times before she turned 14 and had occurred more than 20 times after turning 14. 8RP 112; 9RP 109.

additional concurrent sentences of 60 months for the two third degree child molestation convictions. CP 145; IRP 325. For the communication with a minor for immoral purposes misdemeanor, the trial court imposed a 364-day concurrent sentence. CP 153; IRP 325.

Sinclair timely appeals. CP 157.

D. ARGUMENT

THE RECORDING OF SINCLAIR'S PRIVATE CONVERSATION VIOLATED HIS RIGHT TO PRIVACY UNDER THE PRIVACY ACT

It is unlawful to record any private conversation without the consent of all parties involved. I.S.'s mother's voicemail system recorded Sinclair's private conversation with I.S. when Sinclair's cell phone inadvertently dialed I.S.'s mother's number. Sinclair and I.S. did not consent to this recording. Their lack of consent rendered the recording inadmissible at trial. Because the admission of the recording into evidence was prejudicial error, this court must reverse and remand for a new trial.

"Washington's privacy act broadly protects individuals' privacy rights." State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). Indeed, "[i]t is one of the most restrictive electronic surveillance laws ever promulgated." Id.

The privacy act makes it unlawful

for any individual, partnership, corporation, [or] association . . . 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.

RCW 9.73.030(1)(b). Excepted from this prohibition are conversations that “convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands.” RCW 9.73.030(2)(b). “Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any . . . criminal case in all courts of general . . . jurisdiction in this state” unless the crime jeopardizes national security. RCW 9.73.050.

Washington courts consider four prongs of analysis to determine whether a violation of the privacy act has occurred: “There must have been (1) a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the private communication.” Roden, 179 Wn.2d at 899 (citing State v. Christensen, 153 Wn.2d 186, 192, 102 P.3d 789 (2004)). In light of these factors, the record before this court reveals a violation of the privacy act necessitating reversal.

1. Sinclair’s conversation with I.S. was private

“Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it

is a question of law.” Lewis v. Dep’t of Licensing, 157 Wn.2d 446, 458, 139 P.3d 1078 (2006). The Washington Supreme Court has adopted a dictionary definition of the term “private,” which, for the purposes of the privacy act 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 in public.”” Kardorianian v. Bellingham Police Dep’t, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992) (quoting State v. Forrester, 21 Wn. App. 855, 861, 587 P.2d 179 (1979) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY (1969))). To determine whether a conversation is private, courts “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.” Roden, 179 Wn.2d at 900.

Sinclair’s conversation with I.S. was private. Sinclair’s subjective intent was to keep his communications just between him and I.S. This clear intent was manifested by I.S.’s testimony that Sinclair “made sure I didn’t tell anybody” “[b]ecause then I would get in trouble, really big trouble. And he would get in trouble. And maybe I would go to jail or he would.” 9RP 65. The sexual subject matter of the conversation—involving Sinclair

expressing that he really missed I.S.'s tongue and wanted to kiss her "tongue to tongue," 9RP 51—"strongly suggests that [Sinclair] intended the communications to be private." State v. Townsend, 147 Wn.2d 666, 674, 57 P.3d 255 (2002). After all, in Townsend, our supreme court held that "graphic discussions about sexual topics including sexual intercourse" between Townsend and a fictitious minor were private. Id. at 671, 674.

As for the location of the conversation and the presence of potential third parties, this conversation took place in the private driveway outside I.S.'s home. 9RP 47, 53, 84. There is no indication in the record that other persons were present or could have overheard the conversation, a fact the State conceded below. 1RP 60. And, even if a passerby *could have* eavesdropped—as the State argued to the trial court, 1RP 60-61—"the mere possibility of intrusion will not strip citizens of their privacy rights." Roden, 179 Wn.2d at 901; accord Townsend, 147 Wn.2d at 674; State v. Faford, 128 Wn.2d 476, 485, 910 P.2d 447 (1996).

Based on Sinclair's and I.S.'s subjective intentions as well as the subject matter and location of their communications, Sinclair's conversation was unquestionably a private one.

2. Sinclair's conversation was recorded by a device designed to record

Turning to the second and third prongs of analysis, this court should have little trouble concluding that the voicemail system connected with I.S.'s mother's cell phone recorded Sinclair's conversation with I.S. and that the voicemail system is a device designed to record.

A voicemail system, like an answering machine, has one function: "to record messages." In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997). The performance of this unremarkable function is exactly what occurred in this case. I.S.'s mother's voicemail did what it was designed to do: it recorded the conversation between Sinclair and I.S. after I.S.'s mother did not answer a telephone call. 8RP 26-27, 153; 9RP 6-8 (testimony regarding I.S.'s mother's receipt of the recorded voicemail). The language of RCW 9.73.030(1) is broad and refers to devices "electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated" See Townsend, 147 Wn.2d at 674 (noting broad statutory language regarding such devices). The voicemail system of I.S.'s mother actually did record the conversation. The voicemail system is clearly a qualifying device under RCW 9.73.030.

3. Neither Sinclair nor I.S. consented to the recording

Because Sinclair and I.S. did not know they were being recorded, neither could have consented to the recording. The recording of their

conversation without consent violated RCW 9.73.030(1). This violation rendered the recording inadmissible under RCW 9.73.050. The trial court erred in concluding otherwise.

RCW 9.73.030(1) unambiguously states that it is unlawful to record a private conversation unless all parties consent to the recording. “If [statutory] language is unambiguous, [courts] give effect to that language and that language alone because [courts] presume that the legislature says what it means and means what it says.” State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). As discussed, Sinclair’s conversation with I.S. was private. This court should give effect to the unambiguous language of RCW 9.73.030(1) by holding that the recording of the conversation without consent was unlawful.

The trial court ignored the plain language of RCW 9.73.030(1) by focusing on the fact that the recording was inadvertent or accidental. The trial court stated,

[T]he statute seems to declare it to be unlawful to do this, and I can’t believe the legislature intended to make it unlawful for somebody to inadvertently do something All he did was inadvertently make a phone call, which inadvertently caused another party’s device to inadvertently make a recording. And I can’t believe that you would say the recipient of that call had acted unlawfully.

IRP 68. The trial court erred in grounding its admissibility determination on the mental state of the recipient of the recorded message rather than on RCW

9.73.030(1)'s plain text. Under the statute, the mindset of a recorded message's recipient does not matter. RCW 9.73.030(1)'s focus is on the unlawfulness of a nonconsensual recording, not on the intention of the person or entity who records. RCW 9.73.030(1) strictly makes any nonconsensual recording of a private conversation unlawful, regardless of the intent of the person who first receives or hears the recorded communication. This court should reject the trial court's misconstruction of RCW 9.73.030.

The trial court's interpretation also conflicts with a clear statement from the Washington Supreme Court regarding accidental recordings. In Lewis, the court considered whether conversations recorded by police during traffic stops without the drivers' consent violated the privacy act. 157 Wn.2d at 452-57. The court rejected the drivers' claims under RCW 9.73.030 because it determined that citizens' conversations with officers during traffic stops were not private. Id. at 460. Nonetheless, the court concluded that the officers violated RCW 9.73.090(1), which unequivocally requires law enforcement officers to advise persons they are being recorded. Id. at 465-66. In analyzing the statutes, the court stated, "if a police officer accidentally recorded a truly private conversation during a traffic stop, RCW 9.73.030 would protect that private conversation." Id. at 465. This statement reveals our supreme court's clear belief that RCW 9.73.030 makes

even accidental or inadvertent recordings unlawful. The accidental recording of Sinclair's conversation must be suppressed.

The trial court also suggested that Sinclair's conversations contained veiled threats and were therefore admissible under RCW 9.73.030(2)(b). The trial court was mistaken.

RCW 9.73.030(2)(b) allows conversations "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands" to "be recorded with the consent of one party to the conversation." The State argued, "the bulk of [Sinclair]'s statements are of threats, by his ancestors, to harm [I.S.] and her mother if their sexual relationship is revealed. [Sinclair] threatens to go ballistic if the victim says she is afraid of him." CP 175. To the contrary, Sinclair was discussing a dream about his ancestors, and specifically his grandmother, describing how ancestors could sometimes "be too mean" and break bones. CP 179. Sinclair also said he told his ancestors, "don't do anything to [I.S.]" and that he was "protecting [I.S.]" CP 179. Sinclair also told I.S. to "stand up for" herself. CP 180. He did say he would go ballistic, expressing that he was upset at the thought I.S. would be afraid of him. CP 180. As the State itself acknowledged, Sinclair was "not directly threatening to harm [I.S.] . . ." CP 175. Sinclair's conversation did not convey threats of bodily harm.

Not only were Sinclair's statements not threats, they are inadmissible for another reason. RCW 9.73.030(2) provides that threats may only be recorded "with the consent of one party to the conversation." Neither Sinclair nor I.S. knew they were being recorded so neither of them consented to the recording. Because neither party to the conversation consented, the exception in RCW 9.73.030(2) does not apply. The recording of Sinclair's private conversation with I.S. remains unlawful under RCW 9.73.030(1) and is therefore inadmissible under RCW 9.73.050. It was error for the trial court to admit the recorded conversation.

4. The erroneous admission of the recording affected the outcome of the trial

When a trial court errs in admitting evidence, reversal is required where, within reasonable probabilities, the admission of the evidence materially affected the outcome of trial. State v. Ashurst, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). In this case, it is reasonably probable the admission of the recording affected the jury's verdict.

Jurors heard Sinclair's private conversation with I.S. regarding sexual matters in his own voice. It should go without saying that this evidence was exceptionally prejudicial to Sinclair. The erroneous admission of this extremely damaging evidence certainly affected the outcome of trial.

The State seized on the opportunity to use this evidence against Sinclair, intending to play the recording for jurors during its opening statement. 8RP 4. The State played the recording again at trial during the testimony of I.S.'s mother. 9RP 6-8. I.S.'s mother described her feelings of anger upon hearing the recording as well as taking the voicemail to the police. 9RP 8, 14-15, 18. The State replayed the recording a third time during I.S.'s testimony. 9RP 52-53. The State also used the voicemail during the lead detective's testimony about hearing the recording and retaining it for use as evidence. 8RP 26-27. The State repeated the contents of the voicemail recording during closing argument. 1RP 224. The State's heavy focus on the recording throughout trial demonstrates that it believed—correctly—the recording would materially affect the trial's outcome.

The admission of the voicemail recording violated the privacy act. Because it is highly probable, if not certain, that the admission of this evidence affected the jury's verdict, this court must reverse and remand for a new trial that excludes the recording.


E. CONCLUSION

No one consented to the recording of Sinclair's private conversation with his granddaughter, which rendered the recording inadmissible at trial. The trial court erred in admitting this extremely prejudicial evidence against Sinclair, requiring reversal and a new trial.

DATED this 17th day of January, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "K. March", written over a horizontal line.

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DIVISION ONE

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)	
Respondent,)	
)	
v.)	COA NO. 72102-0-1
)	
ALAN SINCLAIR, JR.)	
)	
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 27TH DAY OF JANUARY 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] ALAN SINCLAIR, JR.
DOC NO. 374557
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JANUARY 2015.

x Patrick Mayovsky