72102-0

NO. 72102-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALAN SINCLAIR, JR

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

REPLY BRIEF OF APPELLANT

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Attorney for Appellant

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A. ARGUMENT IN REPLY

1. A VOICEMAIL SYSTEM, LIKE ANY OTHER RECORDING DEVICE, FALLS UNDER THE PURVIEW OF CHAPTER 9.73 RCW

The State contends the privacy act does not apply because the voicemail system that recorded Sinclair's private conversation is not an "individual, partnership, corporation, association, or the state of Washington." Br. of Resp't at 13 (emphasis omitted) (citing RCW 9.73.030(1)). The same argument could be made about a tape recorder, an answering machine, or any other device that is capable of inadvertently recording a conversation. But the type of recording device employed is not determinative. Rather, the statute makes it unlawful to nonconsensually record any "[p]rivate communication transmitted by *telephone*, telegraph, radio, or other device between two or more individuals between points within or without the state by *any device electronic or otherwise designed to record* and/or transmit said communication *regardless how such device is powered or actuated* . . . ." RCW 9.73.030(1)(a) (emphasis added).

Sinclair's telephone transmitted a private communication. Br. of Appellant at 6-9. I.S.'s mother's voicemail system recorded the communication exactly as designed. Br. of Appellant at 9. Neither Sinclair nor I.S. consented to that recording. Br. of Appellant at 9-12. Because RCW 9.73.030 expressly prohibits the admission of *all* nonconsensual

recordings on *all* devices designed to record, this court should reject the State's argument that voicemail systems somehow fall outside of the privacy act's scope.

2. SINCLAIR ARGUES THAT NONCONSENSUAL RECORDINGS ARE INADMISSIBLE IN COURT, NOT THAT I.S.'S MOTHER IS GUILTY OF A CRIME

Rather than respond to Sinclair's statutory argument that "[a]ny information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any . . . criminal case in all courts of general or limited jurisdiction in this state," RCW 9.73.050, the State laments that the privacy act could potentially subject I.S.'s mother to strict criminal liability. Br. of Resp't at 13-15. Sinclair has not argued I.S.'s mother committed a strict liability crime, however, and the State's concern is misplaced.

As discussed, private conversations that are recorded without consent violate RCW 9.73.030(1). Violations of RCW 9.73.030(1) render recordings inadmissible in court under RCW 9.73.050. Under the pertinent statutes, nonconsensual recordings are inadmissible regardless of the intentions of the person whose device recorded the communication and regardless of the inadvertence of the recording. See Br. of Appellant at 10-12; see also State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014) (holding "privacy act broadly protects individuals' privacy rights" and "is one of the most restrictive electronic surveillance laws ever promulgated"); Lewis v. Dep't

of Licensing, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006) ("Moreover, if a police officer *accidentally recorded* a truly private conversation during a traffic stop, RCW 9.73.030 would protect that private conversation." (emphasis added)). The inadmissibility of the recording, not the potential criminal liability of others, is the only issue Sinclair has presented in this appeal. Br. of Appellant at 1.

Nonetheless, the State erects a straw man, claiming Sinclair's interpretation of the privacy act is absurd because it subjects I.S.'s mother to a strict liability crime even though she did not act intentionally or volitionally. Br. of Resp't at 13-14. Even assuming this were true, our supreme court has indicated there is no problem with subjecting defendants to strict liability crimes even when they lack volition. Indeed, in State v. Deer, 175 Wn.2d 725, 734-37, 287 P.3d 539 (2012), our supreme court opined that a woman who was unconscious while a 15-year-old minor 48 months her junior had sexual intercourse with her would be strictly liable for third degree rape of a child notwithstanding her lack of volition or consciousness. Under Deer, the defendant must prove his or her lack of volition to commit a strict liability offense by a preponderance of the evidence, exactly like an affirmative defense. Id. Thus, the State's concern, though misplaced in the context of this case, fails to demonstrate any absurdity under Washington law.

I.S.'s mother's intentions are not at issue in this appeal. The inadmissibility of the recording obtained without consent is. Because the nonconsensual recording of an extremely prejudicial private communication was admitted into evidence in violation of the privacy act, reversal is required.

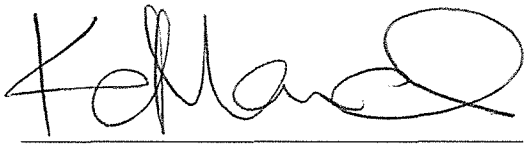
B. CONCLUSION

Sinclair's lack of consent to the recording of his private conversation rendered the recording inadmissible at trial. The erroneous admission of this prejudicial evidence requires reversal and a new trial.

DATED this 12th day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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	)	
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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 12TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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.
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CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF JUNE 2015.

X Patrick Mayovsky