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

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

JOHN GARRETT SMITH,
Defendant-Appellant.

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

The Honorable Robert Lewis, Judge

AMENDED APPELLANT'S OPENING BRIEF

JOHN HENRY BROWNE
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2. The trial court erred in concluding that "RCW 9.73.030(1) does not apply to this case because the people...were not attempting to communicate by electronic means." Conclusion of Law 7.

3. The trial court erred in concluding that RCW 9.73.030(1)(b) applies only when "two people are having a private, non-electronic, conversation and a third party attempts to record or intercept that conversation." Conclusion of Law 8.

4. The trial court erred in concluding that RCW 9.73.030(1)(b) does not apply in this case "because this information was recorded by the Defendant's phone inadvertently." Conclusion of Law 9.

5. The trial court erred in concluding that Smith's stepdaughter Skylar was not violating RCW 9.73.030 when she "opened the phone and listened to the contents." Conclusion of Law 11.

6. The trial court erred in concluding that none of the information gathered "up until the point that Officer Yong listened to the phone recording was gathered illegally." Conclusion of Law 13.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the defendant's stepdaughter took his phone without his consent, accessed its contents and listened to a recording on the phone without the consent of both participants to that private communication and then gave that private communication to the police, did the stepdaughter violate Washington's Privacy Act and should the evidence of this private communication have been suppressed?

III.
STATEMENT OF THE CASE

1. Procedural Facts

On June 6, 2013, John Garrett Smith [Garrett][1] was charged with first degree assault against his wife, Sheryl Smith [Sheryl]. CP 130. On December 10, 2013, the State amended the information to charge one count of attempted first degree murder and nine counts of violating a domestic violence protection order. CP 132. The nine counts of violating the domestic violence order were later dismissed. On October 7, 2014, the State again amended the information to charge one count of attempted first degree murder, one count of attempted second degree murder, one count of first degree assault and one count of second degree assault. CP 1.

[1] Because two of the witnesses have the same last name, counsel will use their first names in order to avoid confusion.

Garrett waived his right to a jury trial. At the close of the bench trial, Judge Robert Lewis found him not guilty of attempted first degree murder and not guilty of first degree assault. He did, however, find Garrett guilty of attempted second degree murder and second degree assault. CP 83.

The court found that these two crimes merged for purposes of sentencing. He also found that the State had failed to prove facts sufficient to impose an exceptional sentence. Thus, the trial court imposed a standard range sentence of 144 months in jail. CP 99. This timely appeal followed. CP 112.

2. Facts Relevant To The Substantive Issues.

On June 2, 2013, Sheryl Smith [Sheryl] called 911 from her home in Vancouver, WA and reported that her husband, John Garrett Smith [Garrett], "beat me up." RP 185. Garrett had then driven away in his truck. Id.

While Sheryl was on the phone with the 911 operator, her daughter Skylar, age 18, walked in. RP 189. Skylar took over the call and directed police to the home. RP 190. She reported that her mother's face was swollen to such an extent that she could not open her eyes. Id. Skylar reported that she had been at the gym and did not witness any assault. RP 194. But, she did report that she had left the

house because both Sheryl and Garrett had been drinking and arguing. RP 194. She said that Garrett had never hurt her mother before. Id.

When asked for Garrett's cell phone number, Skylar told the operator that Garrett had left the phone in the home. RP 196. Sheryl was transported to the hospital.

Skylar followed her mother to the hospital. She took Garrett's phone with her. At hospital, Skylar handed Officer Yong the phone and said: "I think you need to hear this." RP 60. She then played a recording from the phone on the speaker function. The recording included a man using obscenities and demanding the return of his phone. RP 205. There was a woman who stated "stop" and "leave me alone." The male states: "Just give me my phone and I will go." Id, Ex. 2. The call also included the male yelling at the female, calling her a bitch and stating "I will kill you." RP 241-242. This recording was admitted as Exhibit 2 at trial.

The police then sought a search warrant for the phone based upon Officer Yong's listening to the recording at Skylar's request.

At trial, Sheryl testified that on the date of the incident, she had been drinking. RP 234. After dinner she went down to sit on the beach and asked her daughter Skylar and Garrett to join her. When they did not arrive, she called them 8 times. RP 322.

When asked what she remembered regarding the assault, she said:

> I'm being strangled. Garrett's on top of me. My face is being punched. I feel like I'm in a very dark place inside my head, and there punches, and I'm being called a fat bitch, and I thought I was going to die.

RP 238. She passed out. RP 240.

Sheryl was asked to identify the two voices on Exhibit 2, the recording from Garrett's phone. RP 241. She identified her voice and the voice of Garrett. Sheryl testified that she did not have any independent recollection of this exchange. RP 243.

The remainder of Sheryl's testimony was devoted to her description of the extent of her injuries and recovery. A number of her treatment providers testified as well.

Garrett testified that his wife was exaggerating her injuries in order to gain control of his business while he was in custody. RP 765-68. He described her as very intoxicated on the evening of June 2. RP 772. He stated that he, too, had been drinking and had taken some opiate painkillers. RP 774, 784. He testified that Sheryl started the physical altercation and her injuries were incurred when he tried to get her to stop attacking him. RP 775-780.

Garrett said that the physical altercation had ended by the time his cell phone began recording. RP 780-81. He said that he never intended to make a recording of his interaction with his wife. RP 780. He had simply called his cell phone from the house phone in an attempt to local it by its ring. RP 781. He said the statement about wanting to kill his wife was hyperbole and that he never literally intended to kill her. RP 782.

Garrett denied strangling his wife. RP 782. He said that she was conscious throughout the encounter. RP 783.

IV.
ARGUMENT

A. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE PRIVATE COMMUNICATION INTERCEPTED BY THE DEFENDANT'S STEPDAUGHER.

Prior to trial, Garrett moved to suppress the recording Skylar accessed on his phone citing to Washington's Privacy Act, RCW 9.73. The trial court found that the Privacy Act did not apply. This Court reviews de novo a trial court's legal conclusions on a motion to suppress. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014).

Washington's privacy act, RCW Chapter 9.73, broadly protects individuals' privacy rights. *Roden*, at 898. It is one of the most restrictive electronic surveillance laws ever promulgated. *State v.*

Faford, 128 Wn.2d 476, 481, 910 P.2d 447 (1996) (citing *State v. O'Neill*, 103 Wn.2d 853, 878, 700 P.2d 711 (1985) (Dore, J., concurring in part, dissenting in part)). The act prohibits anyone not operating under a court order from intercepting or recording certain communications without the consent of all parties. RCW 9.73.030, .040, .090(2). There are four prongs this Court must consider when analyzing alleged violations of the privacy act. 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. *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004).

There is no question that a cell phone is an electronic device designed to record or transmits communications. There is no question that a private conversation was recorded by Garrett's cell phone. There is no dispute that neither Garrett nor Sheryl "consented" to the recording. The court found that Garrett's intent in calling his phone was to locate it. Finding of Fact 3.

The question of whether a particular communication is private is generally a question of fact, but one that may be decided as a question of law if the facts are undisputed. *Roden* at 900. The possibility that

an unintended party can intercept a text message due to his or her possession of another's cell phone is not sufficient to destroy a reasonable expectation of privacy in such a message. *Id.* at 901. Here the recorded conversation was private. It was conducted in the privacy of the Smith home. Moreover, it was an action designed solely to help Garrett find his own phone. He did not even "consent" to the recording in the sense that he was unaware that once the land line made contact with his cell phone, the cell phone would begin recording whatever conversation it intercepted.

The trial court found however that RCW 9.73 did not apply because no "third party" was attempting to record or intercept the conversation. But that is too narrow a view of the term "intercept." Here Skylar "intercepted" the recording without the permission of the either party to the conversation. She did not have permission to take Garrett's phone, open it, and listen to the messages. As the trial judge acknowledged, RCW 9.73 applies to all citizens of this state. *State v. Faford*, 128 Wn.2d 476, 479, 910 P.2d 447, 448 (1996) (Witness purchased a police scanner specifically to eavesdrop on the radio portion of those cordless telephone conversations and then related their substance to the police). Her act of opening the phone and reviewing

its contents was an action of "interception" and was prohibited by the Privacy Act.

In interpreting a statute, this court's primary obligation is to give effect to the legislature's intent. This inquiry always begins with the plain language of the statute. The court must not add words where the legislature has chosen not to do so. Additionally, where the statute is subject to more than one reasonable interpretation, this court may look to other sources of legislative intent, such as the legislative history. *State v. Christensen*, 153 Wn.2d 186, 195, 102 P.3d 789, 793 (2004).

Clearly RCW 9.73 protects recorded phone messages. It's plain language applies to "[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*." RCW 9.73.030. The privacy act prohibits recording of any "[p]rivate 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." *State v. Kipp*, 179 Wn.2d 718, 724, 317 P.3d 1029, 1031 (2014).

Nothing in the Act limits its reach to "intentional" rather than "inadvertent" recordings. If that were true then many conversations would have no protection at all even though all parties to the conversation never intended their private communications to be recorded. Nothing in the Act requires the interception to be made by a third party. In fact, in many cases, the recording has been made by one party to the conversation. See e.g. *State v. Kipp*, 179 Wn.2d 718, 723, 317 P.3d 1029, 1031 (2014).

This case is on all fours with *State v. Roden*, supra. In that case, a police detective spent 5 to 10 minutes browsing through a cell phone officers took from Daniel Lee incident to his arrest for possession of heroin. The detective noticed several text messages from Jonathan Roden, responded to Roden with a new text message, and arranged a drug deal. Roden was consequently arrested.

In *Roden*, the Court specifically rejected the argument that because the text messages were in electronic storage, they fell outside the scope of the Privacy Act. *Roden*, 906, 321 P.3d 1183, 1189 (2014). The Court held that was "a technicality that has no relevance under our state statute." Id.

Here Garrett's private communication was recorded inadvertently on his phone. Just like the police in *Roden*, Garrett's

step-daughter took his phone without his consent and listened to his private communications. She then turned the private communications over to the police. Her interception of the phone message violated the privacy act. Thus, Exhibit 2 and all references to it should have been excluded by the trial judge.

B. THE ADMISSION OF THE INTERCEPTED PRIVATE CONVERSATION WAS PREJUDICIAL.

Failure to suppress evidence obtained in violation of the Privacy Act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial. *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999).

Garrett was charged with attempted second degree murder under RCW 9A.32.050(1)(a). One element of that crime is the "intent to cause the death of another." Id. In his written findings of fact and in his oral decision, the trial judge clearly rested his finding that Garrett had formed an intent to kill Sheryl on the intercepted phone message. Finding of Fact RP 854.

Absent that finding, Garrett could not be convicted of attempted second degree murder. Thus, the introduction of the

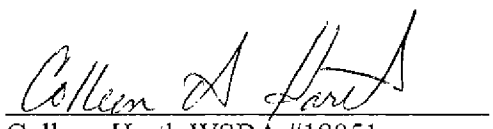
evidence materially affected the trial and conviction on that count and reversal is appropriate.

V.
CONCLUSION

For the reasons stated above, this Court must reverse the conviction and remand to the Superior Court for further proceedings.

DATED this 31st day of August, 2015.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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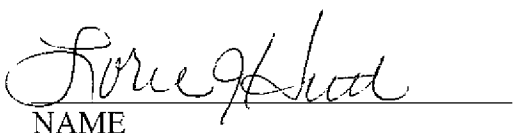

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