NO.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

JOHN GARRETT SMITH, Respondent

FROM THE COURT OF APPEALS DIVISION II
NO.47205-8-II

PETITION FOR REVIEW

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IDENTITY OF PETITIONER

The State of Washington asks this Court to accept review of the unpublished decision in Part B of this Petition.

DECISION

Petitioner State of Washington seeks review of the Court of Appeals, Division II's decision, which was published in part, filed on October 4, 2016, reversing the defendant's conviction for Attempted Murder in the Second Degree. A copy of the opinion of the Court of Appeals is attached as Appendix A.

ISSUES PRESENTED

I. **Do two people engage in a "private conversation" under the Privacy Act when the female is screaming, crying, and pleading for the male to "get away" and the male is yelling at her, assaulting her, and makes a threat to kill her?**

II. **Under the Privacy Act, does a person who leaves a voice message on an answering machine or who sets up an answering machine to record a voice message, consent, impliedly or not, to the recording?**

III. **Is the Privacy Act a strict liability statute such that inadvertent or accidental recordings of conversations without the participants' consent violate the statute?**

STATEMENT OF THE CASE

A. FACTUAL SUMMARY

John Garrett Smith and Sheryl Smith began dating in 2009 and were married in 2011. RP 232. On the evening of June 2, 2013, at the couples' home, however, Mr. Smith attempted to murder his wife. At first, the couple was simply arguing. RP 194, 250-51, 387, 425, 503-04, 517. Mr. Smith turned this argument into an attempt on Ms. Smith's life when he assaulted Ms. Smith to the point of unconsciousness by continuously punching her in the face and strangling her. RP 240-41, 250-51. Ms. Smith's last memories just prior to losing consciousness were that she could not see and she could not breath; but she could hear and the last thing she heard was Mr. Smith calling her a "fat bitch." RP 239.

When Ms. Smith returned to consciousness, her eyes were black and swollen shut, her whole face was swollen and was bleeding, and she complained about breathing problems. RP 263-64, 391-92, 439-441, 492-93, 502-03. Numerous pictures of Ms. Smith's injuries and how they progressed were admitted into evidence. Ex. 3-9, 34-36, 38-39, 41-43. Ms. Smith's injuries were severe as she was hospitalized for numerous days. RP 278, 412-13, 439, 737. She was diagnosed with a facial fracture as well as a concussion. RP 263-64, 442, 445-46, 461, 488. Moreover, she

suffered from severe head pain, double vision, nausea, and vertigo for months after the assault. RP 277-78, 454-461, 484, 522, 551.

Ms. Smith's memory of the attempt on her life at the time of trial was limited, she recalled:

> 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 of my head, and three punches, and I'm being called a fat bitch, and I thought I was going to die.

RP 238. Other admitted evidence filled in Ms. Smith's memory gaps to include her written statement, which was read into the record. RP 250-51. Additionally, there was a recording made of the incident. Ex. 2. During the incident, Mr. Smith used the home's landline cordless phone to dial his cellphone. RP 74-75, 81. Mr. Smith called his cellphone for the purpose of finding the phone not because he was attempting to communicate with somebody or because he wanted to leave a voicemail. RP 74-75, 81. Nonetheless, his cellphone's voicemail system recorded what was going on because Mr. Smith left the landline open during his attempt to find his cellphone. This voicemail contained the following audio:

> MALE: There, are you happy now?
> (Woman screaming.)
>
> MALE: You brought this shit on. I have never done this. You and your fucking Mexican. Fuckcocking three-timer. You're not going to get your (inaudible) three check.
>
> FEMALE: No! Leave me alone. (Screaming.)

MALE: Where is my phone?

FEMALE: Look what you've done to me! (Screaming.)

MALE: Just give me my phone and I'll leave.
(Woman speaking in background.)

MALE: Not your fucking -- you think she can ring -- give me my fucking phone.
(Woman shrieking.)

MALE: You're going to call (inaudible) and then you're going to be homeless. You bitch. Fuck you. Give me back –
(Woman screaming.)

MALE: You fat bitch.

WOMAN: Stop.

MALE: You think you're bleeding? (Inaudible.) You're the most fucked up person. Give me back the phone.

WOMAN: Get away.

MALE: No way. I will kill you.

WOMAN: I know.

MALE: Did you want to kill me? Give me back my phone.

WOMAN: No. Leave me alone.
(Woman screaming.)

MALE: Where is my phone?
(Woman screaming.)

MALE: Just give me my phone and I'll go.
(Woman screaming.)

WOMAN: Look what you did to me? Look what you did to me? (Continues screaming.)

MALE: Phone?
(Screaming continues.)

MALE: You fucking bitch. I've got your as –

WOMAN: Stop it.
(Screaming continues.)

MALE: (Inaudible.) Fucking bitch. (Inaudible.)
(Screaming continues.)

MALE: Where's your phone?
(Screaming continues.)

MALE: What'd you do with my fucking –

(Audio recording ends.)

RP 241-43, 70-71; Ex. 2; CP 78-80.[1] The female in the recording was identified as Ms. Smith and the male as Mr. Smith. RP 241. Mr. Smith fled the scene without his cellphone after strangling Ms. Smith to unconsciousness. The cellphone ended up in the possession of Skylar Williams, Ms. Smith's daughter and Mr. Smith's stepdaughter, after she returned to the house and helped her mother complete a 911 call. RP 58-60, 393-405, 409; Ex. 1.

On the 911 call, Ms. Smith can be heard gasping and pleading for help. RP 185. She reported being unable to see. RP 186. Ms. Smith

[1] Other transcripts of the recording were made. RP 70-71; CP 78-80. Each transcript of the recording is slightly different.

explained to the 911 operator that she was "beat to a pulp" by John Garrett Smith. RP 187-88. Ms. Williams, who had just arrived home, then grabs the phone and tells the 911 operator that her mother's face is "like ten times the size of normal and gushing blood" and that "she can't open her eyes because her face is so swollen." RP 190. Following the arrival of the police and paramedics, Ms. Smith received medical care and was transferred to the hospital. RP 489-495, 504-05.

While at the hospital, Ms. Williams looked at Mr. Smith's phone and saw a missed call and a voicemail from the family landline left around the time of the incident. RP 412. She listened to a bit of the voicemail and then played it for an officer. RP 60-62, 412, 508-09. The police, after hearing the voicemail, seized the phone and executed a search warrant on it. RP 60-69. While at the hospital, Ms. Williams received multiple calls from Mr. Smith. RP 409-411. During one of those calls Mr. Smith indicated that he was at the airport and he had a feeling that he needed to book a flight and leave. RP 411. Ms. Williams told him to instead meet her at the house, but her plan was to send the police to meet him. RP 411.

The police contacted Mr. Smith at the home and noticed that he had luggage and a lot of personal property in the front passenger seat of his truck. RP 510, 650; Ex. 48. At that time he denied any physical altercation between himself and Ms. Smith. RP 511-14. But the next

morning, Mr. Smith asked a detective "Is she going to make it?" despite not receiving any information from her about Ms. Smith's injuries. RP 636. Mr. Smith's multiple explanations for what happened that night varied. RP 280-310 (letters to Ms. Smith), RP 562-63, 583-87, 594 (jail calls), 769-820 (Mr. Smith's testimony). Ultimately, the trial court concluded that "the Defendant was not a credible witness as to the events that occurred." CP 84 (Conclusion of Law #1.1); RP 852-53.

B. PROCEDURAL HISTORY AND DECISION BELOW

John Garrett Smith was charged with Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Assault in the First Degree, and Assault in the Second Degree for the incident described above. CP 1-3. Prior to trial, Mr. Smith filed a motion to suppress the audio recording that captured part of the incident to include his threat to kill his wife. CP 4-12. Mr. Smith argued that Ms. Williams unlawfully intercepted the recording pursuant to the Privacy Act when she listened to the voice message left on his phone. CP 4-12; RCW 9.73.030. The trial court denied the motion to suppress. CP 90-93; RP 56-93.

The case proceeded to a bench trial before The Honorable Robert Lewis. RP 180-858. The trial court found Mr. Smith guilty of Attempted Murder in the Second Degree, Assault in the Second, and the related special allegations of domestic violence, but acquitted him of the

remaining counts and the aggravator. CP 83-89; RP 851-58. Mr. Smith was sentenced to a standard range sentence of 144 months. CP 99-108; RP 894-96. Mr. Smith appealed and his appellate counsel in her briefing focused exclusively on the denial of the motion to suppress and continued to assert that the recording was unlawfully admitted because Ms. Williams had unlawfully intercepted it. Accordingly, at no point did Mr. Smith argue that *he* had unlawfully recorded what had happened.

The Court of Appeals reversed Mr. Smith's conviction for Attempted Murder in the Second Degree, holding that the trial court erred in denying the motion to suppress the recording of the incident because (1) the recording was of a "private conversation" and (2) *Mr. Smith* unlawfully recorded the "private conversation," despite the fact that the recording was made inadvertently. In holding that the recording captured a "private conversation" the court contended that it relied on the dictionary definition of "conversation," but ultimately concluded "verbal exchanges" sufficed, asserted that this Court's case law holding that "running, shouting, and screams do not constitute 'conversation'"[2] as "*sui generis*" with "little bearing on the case," and that Ms. Smith's "screams were responsive to statements that John was making" and, thus "Sheryl's [(Ms.

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[2] *State v. Smith*, 85 Wash.2d 840, 846-47, 540 P.2d 424 (1975).

Smith)] screams serve as an expression of sentiments responsive to John's yelling and thus constitute part of the conversation." Appendix A, 3-5.

Additionally, the court rejected the consistent position of Mr. Smith at trial and on appeal—that Ms. Williams unlawfully intercepted the conversation—and decided the case on a different issue: whether Mr. Smith's actions violated the Privacy Act. This issue was raised *sua sponte* at oral argument[3] and the court did not request supplemental briefing.[4] The result of this holding is that Mr. Smith rendered inadmissible the recording of his threat to kill and his attempt to murder of his wife by supposedly violating the Privacy Act. A violation, according the court's opinion, that could only be accomplished by inadvertence because a purposeful recording would have necessarily required Mr. Smith's consent and, therefore, would have fallen under the threat exception to Privacy Act, which allows the admission of recordings of threats when only one party consents. RCW 9.73.030(2)(b). In other words, Mr. Smith could only be

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[3] Oral Argument 4/14/2016 at 9 minutes 10 seconds and 29 minutes 50 seconds.

[4] RAP 12.1(a) states that "[e] xcept as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs." Nonetheless, "[i]f the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court." RAP 12.1(b). Moreover, to the extent that appellant adopted the issue the Court of Appeals raised *sua sponte* "[a]bsent a change in applicable law, [reviewing courts] will not consider an issue raised for the first time during oral argument." *State v. Kirwin*, 137 Wn.App. 387, 394, 153 P.3d 883 (2007) (citing *State v. Olson*, 126 Wn.2d 315, 319-20, 893 P.2d 629 (1995). This rule makes sense since it "is particularly unfair to consider an argument when opposing counsel had no opportunity to prepare a response." *Id.*

guilty of unlawful recording under the Privacy Act if he inadvertently, rather than purposefully, recorded his threat to kill and his attempt to murder his wife.

For the reasons set forth below, the State asks this Court to accept review of this decision and reverse the decision.

ARGUMENT WHY PETITION SHOULD BE GRANTED

RAP 13.4(b) provides the considerations governing acceptance of review. Review may be granted:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The State asserts that review is appropriate under RAP 13.4(b) (1), (2), and (4).

I. When Ms. Smith was screaming, crying, and pleading for Mr. Smith to "get away" and Mr. Smith was yelling at her, assaulting her, and made a threat to kill her, the two were not having a "private conversation."

RCW 9A.73.030(1)(b) prohibits the recording of a"[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all the persons engaged in the conversation." Because the Privacy Act does not define "conversation," courts may use a dictionary to discern the plain meaning of that term. *Newton v. State*, 192 Wn.App. 931, 937, 369 P.3d 511, review denied, 186 Wn.2d 1003, --- P.3d ---- (2016). *Webster's Third New International Dictionary* 498 (2002), defines "conversation" in pertinent part as an "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse." The dictionary definition, as well as this Court's decision in *State v. Smith*, is instructive as to whether the recording at issue here was of a "private conversation." 85 Wn.2d 840, 540 P.2d 424 (1975).

In *Smith*, the victim received a phone call to meet a person in an alley in the evening. *Id.* at 842. He then purchased a tape recorder, which he concealed under his clothing and attached the microphone to his shirt. *Id.* at 843. The victim asked his next-door neighbor to accompany him. *Id.* The victim parked his car near the alley, exited his car, and walked

towards the alley while his neighbor remained near the car. *Id.* The victim met the defendant, who was in the alley parked in a truck, and the defendant shot the victim several times, killing him. *Id.*

The tape recording of the events was found on the victim's body during an autopsy. *Smith*, 85 Wn.2d at 843. The recording contradicted the defendant's statement and testimony. *Id.* 843-44. After some introductory remarks and discussion between the victim and his neighbor the recording contained the following:

> Then, suddenly are heard the sounds of running footsteps and shouting, the words 'Hey!' and 'Hold it!', [the victim] saying 'Dave Smith,' and a sound resembling a gunshot. The running stops, and Smith tells [the victim] to turn around. [The victim] asks, 'What's the deal?' Smith replies, 'You know what the deal is. I'll tell you one thing baby, you have had it.'
>
> Several more words are exchanged, not all of which are clearly intelligible, about whether Smith has 'a charge.' Then [the victim] asks, 'If you wanted me, why didn't you come to see me?' Smith replies, 'I'll tell you why.' A moment later, another shot is heard. . . . Then [the victim], screaming, repeatedly begs for his life. More shots are fired. There is a slight pause, two more shots are heard, then certain unclear sounds, then silence. . . .

Id. at 844-45. *Smith* held that the recording was not of a "private conversation" under the Privacy Act stating "[w]e are convinced that the events here involved do not comprise 'private conversation' within the meaning of the statute. Gunfire, running, shouting, and [the victim's]

screams do not constitute 'conversation' within *that term's ordinary connotation of oral exchange, discourse, or discussion.*" *Id.* at 846 (emphasis added). Notably, however, the court did not attempt to definitively define "private conversation" and did note that its holding was based on the "bizarre facts" of the case. *Id.* at 847. That said, the facts of this case regarding how the recording was made and what was captured are legally indistinguishable from *Smith* and equally unique.

Here, Mr. Smith called his cellphone from the home's landline and the cellphone's voicemail recorded what was going on in the room. And what was going on was similar to *Smith* as it pertains to whether a conversation took place. Ms. Smith spends the recording screaming, crying, and pleading for Mr. Smith to "get away," while Mr. Smith yells at her, assaults her, and threatens to kill her. RP 70-71, 241-43; CP 78-80, 84 (Finding of Fact #1.7), 85 (Finding of Fact #3.3), 86 (Finding of Fact #4.1, #4.4, #4.5); Ex. 2. Consequently, what was recorded was not a "conversation" within that term's ordinary meaning; it was not "discourse[] or discussion" between Mr. Smith and Ms. Smith captured on the recording, nor was it an "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse." *Smith*, 85 Wn.2d at 846; *Webster's Third New International Dictionary* 498 (2002). Rather, it was Ms. Smith being victimized.

In holding that the recording captured a "private conversation" between Mr. Smith and Ms. Smith, the Court of Appeals unconvincingly tried to avoid the precedential effect and persuasiveness of *Smith* by describing the opinion as "*sui generis*" with "little bearing on the case," instead of actually distinguishing the case other than to conclude "there was a much greater oral exchange of words and sentiments between John and Sheryl." App. A at 4. While *Smith* did not attempt "a definitive construction of the term 'private conversation'" it *did hold* that the "shouting, and . . . screams" that were present on that recording did not constitute conversation. 85 Wn.2d at 846.

Moreover, the Court of Appeals approvingly cited a dictionary definition for "conversation" as "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse" but then continued to use the term "verbal exchange" as synonym for "conversation"—it is not. The opinion then cites what it considers good examples of these "verbal exchanges" from the recording even though in half of these exchanges Ms. Smith's "response" is non-responsive. e.g., "(1) John calling Sheryl a '[f]at [b]itch' and Sheryl responding, 'Stop'; (2) John asking, 'Where is my phone?' and Sheryl screaming, 'Look what you have done to me!'" App A at 4. What's the topic of this conversation? Inexplicably, and in direct contravention of *Smith*, the opinion concludes that even Ms. Smith's

screams "constitute part of the conversation" because they are "responsive" to statements that Mr. Smith was making. *Id.* The State concedes that a victim who is getting attacked and threatened by her attacker may scream in response to being victimized or may make other audible noises to include screaming for help or saying "get away" that may in fact be responsive to the attack or threats, but it cannot be the case that anything short of silence on the part of the victim is the equivalent to her participating in a conversation with her attacker. The Court of Appeals erred in holding this to be a private conversation and this Court should grant review of this issue pursuant to RAP 13.4(b)(1).

The State also maintains that the "conversation" was not private and that any expectation of privacy was unreasonable. *Huff v. Spaw*, 794 F.3d 543, 552 (6th Cir. 2015) (holding "a person who knowingly operates a device that is capable of inadvertently exposing his conversations to third-party listeners and fails to take simple precautions to prevent such exposure does not have a reasonable expectation of privacy with respect to statements that are exposed to an outsider by the inadvertent operation of that device"). Any expectation of privacy in the conveyance of his threats was unreasonable because of the likelihood the victim would report—and the victim here did call 911 upon regaining consciousness—those threats and because of his use of what amounts to a recording device while

conveying his threat. *Id. State v. Duchow*, 320 Ws.2d 1, 22-27, 749 N.W.2d 913 (2008); *State v. Inciarrano*, 473 So.2d 1272, 1275-76 (FL 1985).

II. Under the Privacy Act, a person who leaves a voice message on an answering machine or sets up an answering machine to record a voice message consents to the recording.

The Court of Appeals concluded in a footnote that neither party consented to the "conversation" that was recorded. App. A at 3 FN 3. But the Court of Appeals did not have the benefit of briefing on that issue as consent was not germane to issues raised by Appellant. Consent, however, is an issue on the forefront of the determination of whether Mr. Smith violated the Privacy Act when the incident and his threat were recorded by his cellular phone's answering machine. Since the Court of Appeals was the first to argue that Mr. Smith violated the Privacy Act the State has not had an opportunity to respond to that specific argument.

A party to a conversation need not explicitly consent to the conversation being recorded for our courts to find that that party did indeed consent to the recording. *State v. Townsend*, 147 Wn.2d . 666, 57 P.3d 255 (2002). For example, "[a] party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded." *Id.* at 675;

RCW 9.73.030(3). Additionally, "a communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded." *Id.* (citing *In re Marriage of Farr*, 87 Wn.App. 177, 184, 940 P.2d 679 (1997)); *State v. Modica*, 164 Wn.3d 83, 186 P.3d 1062 (2008). Thus, a person who leaves a message on a telephone answering machine "consent[s] to the recording of his messages." *Farr*, 87 Wn.App at 184; *Townsend*, 147 Wn.2d at 676. Even where there is not an explicit announcement that a conversation will be recorded, however, consent to record may be implied when a person is using technology that the person "had to understand" was "among other things, a message recording device." *Townsend*, 147 Wn.2d at 676, 678. Importantly, the person who has setup the recording device to accept voice messages *does* consent to the recordings that will take place. *State v. Robinson*, 38 Wn.App. 871, 885, FN 5, 691 P.2d 213 (1984) (holding that where defendant left a threatening message on a person's answering machine, the defendant's consent to the recording was immaterial).

Here, Mr. Smith consented to the recording in two ways. First, Mr. Smith consented by setting up and using voicemail technology on his cellphone. *Robinson*, 38 Wn.App. at 885; *Townsend*, 147 Wn.2d at 676, 678. If Mr. Smith is considered the individual who "recorded" because it

was his cellphone's voicemail system that recorded the "conversation" then he consented to the recording under *Robinson* and *Townsend.*

Second, Mr. Smith consented because he dialed his cellphone and let it record when he did not hang up the landline telephone. Cellphones are ubiquitous; Mr. Smith undoubtedly knew that if any calls came to his phone and he did not answer the phone that the phone's voicemail technology would record whatever message was left. Furthermore, voicemail systems announce "in an effective manner that the conversation [will] be recorded." *Farr*, 87 Wn.App. at 184. That a person is not paying attention to the announcement or is otherwise preoccupied at the time of the announcement has not ever been part of the analysis of consent under the privacy act, especially where knowledge of the how the technology works can be presumed. *See Townsend* 147 Wn.2d at 676-78. Thus, if Mr. Smith is considered the person who "recorded" because he did not hang up the landline phone and, as a result, let his cellphone record the "conversation" then he consented to the recording.

Regardless of how Mr. Smith is considered to have "recorded" the incident, however, he consented to the recording, and it is only his consent that matters in this instance because of the threat exception of the Privacy Act. The threat exception of the Privacy Act allows that communications or conversations that "convey threats of . . . bodily harm, or other unlawful

requests or demands . . . may be recorded with the consent of one party to the conversation." RCW 9.73.030(2)(b). Because Mr. Smith both conveyed threats and consented to the recording, the recording was admissible at trial and the Court of Appeals erred in holding otherwise. This Court should grant review of this issue pursuant to RAP 13.4(b)(1),(2) since the decision of the Court of Appeals is in conflict with *Townsend*, *Farr*, and *Robinson*.

III. The Privacy Act is not a strict liability statute such that inadvertent or accidental recordings of conversations without the participants' consent violate the statute, especially in situations in which an intentional recording would not violate the statute.

Statutory interpretation begins by looking to the plain meaning of the words used in the statute. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Statutes, however, must be "construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided." *Id.* (citation omitted); *State v. Day*, 96 Wn.2d, 646, 648, 638 P.2d 546 (1981). The Privacy Act expresses "a legislative intent to safeguard the private conversations of citizens from dissemination . . . [and] a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement." *Fjermestad*, 114 Wn.3d at 836.

Here, the Court of Appeals' opinion claimed that "[w]hether John inadvertently or purposely recorded himself is beside the point; the statute

requires no specific mental state for a person to improperly record a conversation." App. A at 6. But such a construction leads to absurd results in multiple ways. First, such a construction criminalizes the entirely innocent and daily occurrence of pocket dialing. Second, the construction results in the conclusion that a person can unlawfully record and at the same time not consent to the recording. Third, because in the recording at issue Mr. Smith conveyed a threat, he could have only violated the statute by recording the incident inadvertently. And by violating the statute and committing another crime he receives the remedy of having evidence of his attempted murder excluded from his attempted murder trial. Meanwhile, if he had purposefully recorded the incident, the recording would have fallen under the threat exception and been properly admissible at trial—though he would have been innocent of any Privacy Act violation. Other absurd hypotheticals abound, such as determining who would have violated the Privacy Act if when Mr. Smith knocked Ms. Smith to the ground her phone inadvertently called another cellphone and a recording of the incident was made. Or who violated the act if Mr. Smith had accidently stepped on Ms.'s Smith phone, which in turn recorded the incident. The Court of Appeals' passing treatment of this issue and lack of acknowledgment of the absurd results resulting from the analysis is likely a byproduct of not having received briefing on this issue. Once again, the

State did not have opportunity to respond in detail since the applicable mental state of the Privacy Act was only minimally relevant to Appellant's actual arguments rather than the argument on which the Court of Appeals based its decision.

Aside from construing statutes to avoid absurd results, when faced with a criminal statute without a mental state element courts must determine whether the legislature intended to create a strict liability crime. *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). A statute's "failure to be explicit regarding a mental element is not, however, dispositive of legislative intent." *Id.* Indicia of a legislature's desire to create a strict liability crime include the removal of an existing intent element or the inclusion of an affirmative defense. *Id.* (citing cases). This Court in *State v. Bash* provided additional factors to look at to determine whether the legislature created a strict liability crime:

> (1) ... the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) ... the harshness of the penalty [;] ... (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of

> convicting innocent-minded and blameless people"; and (8) the number of prosecutions to be expected.

Anderson, 141 Wn.2d at 363 (quoting *Bash*, 130 Wn.2d at 594, 605-06, 925 P.2d 978 (1996). "All of these factors are to be read in light of the principle that offenses with no mental element are generally disfavored." *Id.* The most compelling of the *Bash* factors is that "entirely innocent conduct may fall within the net cast by the statute in question." *Id.* at 364, 366; *See also Staples v. United States,* 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

Here, the Court of Appeals concluded "[w]e are unwilling to risk compromising the scope of the privacy act by the doubtful implication of a mental state requirement from language saying nothing about a mental state. Therefore, the trial court erred by holding that John's inadvertence in recording the private conversation removed his actions from the reach of the privacy act." App. A at 6. But the court did no more analysis than the above and its conclusion omits an analysis of the *Bash* factors. Had the Court requested supplemental briefing on the issue, the State could have provided additional analysis on whether the legislature intended to create a strict liability crime regarding the recording of conversations without consent. The absurd results of such a construction and the large amount of entirely innocent conduct that would be criminalized suggest that the

legislature did not intend for the Privacy Act to be one of strict liability. Consequently, Mr. Smith's inadvertence in recording the incident takes his conduct outside of the scope of the Privacy Act. Thus, the recording was properly found to be admissible against him at trial. The Court of Appeals erred in holding that the mental state of Mr. Smith was immaterial in determining whether there was a violation of the Privacy Act and this Court should grant review of this issue pursuant to RAP 13.4(b)(4) as the public has a great interest in learning whether their common innocent conduct could in fact be criminal..

CONCLUSION

The State respectfully asks this Court to accept review of the decision of the Court of Appeals reversing Mr. Smith's conviction for Attempted Murder in the Second Degree.

DATED this 3 day of Nov, 2016.

Respectfully submitted:

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 4, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN GARRETT SMITH, Appellant.	No. 47205-8-II PART PUBLISHED OPINION

BJORGEN, C.J. — Following a bench trial, the trial court found John Garrett Smith guilty of second degree attempted murder and second degree assault, each with a domestic violence sentencing enhancement. He appeals these convictions and the enhancements, arguing that the trial court erred when it ruled that a voice mail recording containing part of a domestic dispute between him and his spouse, Sheryl Smith, was admissible and not in violation of Washington's privacy act, RCW 9.73.030. He also raises myriad arguments in his statement of additional grounds (SAG).

In the published portion of this opinion, we hold that the trial court erred in admitting the voice mail recording because its contents contained a private conversation that was recorded without the parties' consent. Because the trial court specifically relied on that recording to find

John[1] guilty of second degree attempted murder, its erroneous admission was prejudicial to that conviction. However, the improper admission of the recording had no prejudicial effect on the second degree assault conviction. Accordingly, we reverse and remand John's second degree attempted murder conviction and affirm his second degree assault conviction.

In the unpublished portion of the opinion, we address and reject John's SAG claims.

FACTS

John and Sheryl married in 2011 and lived in Vancouver with Sheryl's daughter, Skylar Williams. On June 2, 2013, John and Sheryl were in their residence drinking. They became intoxicated and began to argue, which prompted Williams to leave the house. While Sheryl and John were alone, John began to beat and strangle Sheryl, who lost consciousness due to the strangling.

Sometime during the attack, John used the residence's landline telephone to try to locate his cell phone. Unable to do so, he was unaware that his actions activated his cell phone's voice mail function, which started recording part of the dispute. In that recording, John is heard yelling insults at Sheryl and demands related to locating his cell phone. Sheryl responded to these statements by screaming unintelligibly or asking him to stop or leave her alone. At one point during the recording, Sheryl tells John to "[g]et away," to which he responds, "No way. I will kill you." Report of Proceedings (RP) at 241-43.

[1] For clarity, we refer to John Smith and Sheryl Smith by their first names. No disrespect intended.

Shortly after the voice mail was recorded, John left the residence. Sheryl called 911 and reported that John had beaten her. During the 911 call, Williams returned home and saw that Sheryl's head was bloodied and swollen. Ly Rota Yong, a police officer with the Vancouver Police Department, arrived at the residence, and Sheryl was transported to the hospital. At some point after Williams arrived home, she retrieved John's cell phone and listened to the voice mail. At the hospital, Williams played the voice mail recording for Yong, who took the phone into possession.

John was later arrested and charged with first degree attempted murder (domestic violence), second degree attempted murder (domestic violence), first degree assault (domestic violence), and second degree assault (domestic violence).

Before trial, John moved to suppress the cell phone voice mail recording based on RCW 9.73.030. The trial court held a CrR 3.6 hearing, denied his motion, and entered findings of fact and conclusions of law. Pertinent to his assignments of error on this appeal, the trial court made the following conclusions of law:

> 7. RCW 9.73.030(1)(a) does not apply to this case because the people in the room where the recording took place, [Sheryl] and [John], were not attempting to communicate by electronic means. Neither party attempted to communicate by electronic means.
>
> 8. RCW 9.73.030(1)(b) applies when two people are having a private, non-electronic, conversation and a third party attempts to record or intercept that conversation.
>
> 9. RCW 9.73.030(1)(b) does not apply to this case because this information was recorded by [John]'s phone inadvertently. At the time this information was recorded, nobody was trying to intercept or record what was occurring.
>
> . . . .

> 11. At the time [Williams] discovered the phone and opened it, neither of the activities prohibited by RCW 9.73.030 were taking place. [Williams] was not violating that statute when she opened the phone and listened to its contents.
>
> . . . .
>
> 13. None of the information that was gathered up until the point that Officer Yong listened to the phone recording was gathered illegally.

Clerk's Papers (CP) at 92-93.

At John's bench trial, he, Sheryl, Williams, several police officers, and expert witnesses testified. The recorded voice mail, 911 phone calls, and photographs of Sheryl's injuries were admitted into evidence. The trial court entered findings of fact and conclusions of law, finding John guilty of second degree attempted murder and second degree assault, both with domestic violence enhancements.[2] The trial court found that the convictions merged, so it sentenced him only on the second degree attempted murder conviction.

John appeals.

ANALYSIS

I. PRIVACY ACT VIOLATION

1. Standard of Review and Legal Principles

John does not challenge any of the trial court's findings of fact related to the CrR 3.6 hearing, and unchallenged findings are deemed verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). He does challenge several of the trial court's conclusions of law,

[2] The trial court acquitted John of his charges for first degree attempted murder and first degree assault.

which we review de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). We review conclusions of law to determine whether they are legally correct and whether they are supported by the findings. *State v. Cole*, 122 Wn. App. 319, 323, 93 P.3d 209 (2004); *see McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012).

Washington's privacy act, chapter 9.73 RCW, is "one of the most restrictive electronic surveillance laws ever promulgated," significantly expanding the minimum standards of its federal counterpart and offering a greater degree of protection to Washington residents. *Roden*, 179 Wn.2d at 898. RCW 9.73.030 provides in pertinent part,

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, . . . to intercept, or record any:
>
> (a) Private 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, without first obtaining the consent of all the participants in the communication;
>
> (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.

"Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case." RCW 9.73.050.[3]

[3] RCW 9.73.030(2) allows the recording of certain communications or conversations with the consent of one party to the conversation, including those of an emergency nature or which convey threats of bodily harm. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). Because neither John nor Sheryl consented to this recording, this provision does not apply to the circumstances presented.

2. Private Communication

John assigns error to conclusion 7 from the trial court's CrR 3.6 ruling, in which it ruled that RCW 9.73.030(1)(a) did not apply. In this, the trial court was correct.

Unequivocally, RCW 9.73.030(1)(a) requires a "[p]rivate communication *transmitted by telephone, telegraph, radio, or other device* between two or more individuals." (Emphasis added.); *see also Roden*, 179 Wn.2d at 898-900 (text messages between two cell phones); *State v. Christensen*, 153 Wn.2d 186, 191-92, 102 P.3d 789 (2004) (telephone calls); *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002) (e-mails, instant messaging). The unchallenged findings 1 and 2 and the evidence supporting them show that the voice mail feature recorded John and Sheryl communicating in person. They were not attempting to communicate through any device that would make the voice mail recording subject to RCW 9.73.030(1)(a). Accordingly, we hold that the trial court did not err in concluding that RCW 9.73.030(1)(a) was inapplicable.

3. Private Conversation

John raises three issues related to the trial court's conclusions 8, 9, 11, and 13 pertinent to RCW 9.73.030(1)(b): (1) whether the recorded voice mail's contents are a conversation; (2) if the contents are a conversation, whether it was private; and (3) if a private conversation, whether it was recorded or intercepted. For the following reasons, we hold that John recorded a private conversation in violation of RCW 9.73.030.

A. Conversation

To begin with, the parties dispute whether the contents of the recorded voice mail are a conversation under RCW 9.73.030(1)(b). Because the privacy act does not define

"conversation," we may use a dictionary to discern the plain meaning of that term. *Newton v. State*, 192 Wn. App. 931, 937, 369 P.3d 511, *review denied*, ___ P.3d ___ (2016). *Webster's Third New International Dictionary* 498 (2002), defines "conversation" in pertinent part as an "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse."

However, the State contends that *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975) complicates this dictionary definition. In *Smith*, the Washington Supreme Court held that the trial court did not err in admitting a tape that had recorded the moments immediately before Nicholas Kyreacos, the victim, was killed. *Id.* at 842-43, 846-47. Kyreacos was wearing a device to record his encounter with the defendant. *Id.* at 843. The recording begins with Kyreacos observing his surroundings while walking to meet with the defendant. *Id.* at 844. After Kyreacos' statement that "[e]verything looks quite normal," the *Smith* court described the pertinent contents of the tape recording in the following terms:

> Then, suddenly are heard the sounds of running footsteps and shouting, the words "Hey!" and "Hold it!", Kyreacos saying "Dave Smith," and a sound resembling a gunshot. The running stops, and Smith tells Kyreacos to turn around. Kyreacos asks, "What's the deal?" Smith replies, "You know what the deal is. I'll tell you one thing baby, you have had it."
>
> Several more words are exchanged, not all of which are clearly intelligible, about whether Smith has "a charge." Then Kyreacos asks, "If you wanted me, why didn't you come to see me?" Smith replies, "I'll tell you why." A moment later, another shot is heard. The quality of the recording becomes "tinny." (There was expert testimony that this shot damaged the microphone.) Then Kyreacos, screaming, repeatedly begs for his life. More shots are fired. There is a slight pause, two more shots are heard, then certain unclear sounds, then silence. After a period of nearly complete silence, a voice is heard to say, "We've already called the police." Another voice says, "Hey, I think this guy's dead, man." Afterward, the tape records police sirens and the sounds of the officers investigating.

Id. at 844-45. Based on this recording, the *Smith* court held that

> the material recorded was clearly "private conversation" within the simple meaning of that term. However, the special circumstances of the present case compel us to

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

Id. at 846-47.

The *Smith* court made clear that it was confining its holding to its specific facts and that its definition of "conversation" was not applicable in all cases. Because of its *sui generis* nature, *Smith* has little bearing on the case before us. Nevertheless, the State argues that the contents of the voice mail recording here are legally indistinguishable from and as unique as the recording in *Smith*. We disagree.

Unlike *Smith*, there was a much greater oral exchange of words and sentiments between John and Sheryl. Examples within the voice mail recording include: (1) John calling Sheryl a "[f]at [b]itch" and Sheryl responding, "Stop"; (2) John asking, "Where is my phone?" and Sheryl screaming, "Look what you have done to me!"; and (3) John telling Sheryl, "I will kill you" to which Sheryl responds, "I know." RP at 241-43. In this final example's complete context, the exchange particularly shows a clear dialogue between the two individuals:

John:	You think you're bleeding?. . . . You're the most fucked up person. Give me back the phone.
Sheryl:	Get away.
John:	No way. I will kill you.
Sheryl:	I know.
John:	Did you want to kill me? Give me back my phone.
Sheryl:	No. Leave me alone.

RP at 241-43. These examples from the voice mail recording are unmistakably verbal exchanges falling within the definition of conversation.

We agree with the State, that similar to *Smith*, some parts of the recorded voice mail may fall outside the definitional scope of conversation, particularly Sheryl's unintelligible screams. Standing alone, Sheryl's screams would not constitute a conversation. However, these screams were responsive to statements that John was making to Sheryl and were scattered throughout the entire dispute, which contained repeated verbal exchanges between the two individuals as outlined above. Within this context, Sheryl's screams serve as an expression of sentiments responsive to John's yelling and thus constitute part of a conversation.[4]

For the above reasons, the contents of the recorded voice mail constituted a conversation under RCW 9.73.030(1)(b).

B. Private

Both parties dispute whether the conversation between John and Sheryl was private under RCW 9.73.030(1)(b). For the following reasons, we hold that the conversation was private.

"A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." *Kipp*, 179 Wn.2d at 729. In determining a subjective intention of privacy, a party does not need to explicitly state such an intention during the conversation; rather, it can be inferred from the facts and circumstances of the specific case. *Id.* In ascertaining whether an expectation of privacy is reasonable, we examine the following factors: duration and subject matter of the conversation, the location of the conversation, the presence or potential presence of third parties at the conversation, and the role of the nonconsenting party and his or her relationship to the consenting party. *Id.* As with subjective

[4] We note that even if the screams themselves were not deemed to be conversation, their presence would not affect the status of the remaining verbal exchange as conversation.

intent, "[t]he reasonable expectation standard calls for a case-by-case consideration of all the facts." *Id.* Because the trial court's CrR 3.6 findings of fact are undisputed, we review de novo whether the conversation was private. *Id.* at 722-23.

Here, a domestic dispute occurred between two married persons in the privacy of their home. The dispute did not occur until Williams left, which signals a subjective intention and reasonable expectation that the conversation would be private. *Id.* at 729-31. Of the factors set out above, the location of the conversation, the relationship between the parties, and the absence of third parties all declare the privacy of the conversation. None of the considerations in *Kipp* dispute its privacy. On these facts, we hold that John had a subjective intention and reasonable expectation that the conversation with Sheryl would be private.

C. Recording and Interception

Finally, related to conclusions 8, 9, 11, and 13, John contends that the trial court erred in ruling that the conversation was not recorded or intercepted.

In conclusion 11, the trial court ruled: "At the time [Williams] discovered the phone and opened it, neither of the activities prohibited by RCW 9.73.030 were taking place. [Williams] was not violating that statute when she opened the phone and listened to its contents." CP at 93. In this, the trial court was correct. Williams did not record or intercept John's conversation when she merely opened his phone and played the voice mail for the police. John himself was the one who enabled the device to record the private conversation. Williams may have accessed a device that happened to record or intercept a conversation, but John was the one who recorded the conversation. Thus, the trial court did not err in concluding that Williams did not record or intercept the conversation.

In conclusion 8, the trial court ruled that "RCW 9.73.030(1)(b) applies when two people are having a private, non-electronic, conversation *and a third party* attempts to record or intercept that conversation." CP at 92 (emphasis added). The trial court erred in this conclusion.

RCW 9.73.030(1) by its plain language imposes its restraints on "any individual" without limitation to those not participating in the conversation. A broad and literal reading of this plain text is in step with the Supreme Court's characterization of our privacy act as requiring the consent of *all* parties to a private conversation. *Kipp*, 179 Wn.2d at 725. Further, although no case has held so directly, the case law has implied that no third party is required to record a conversation, i.e., a party to a private conversation can also be the person who impermissibly records the conversation. *Kipp*, 179 Wn.2d at 723; *Smith*, 85 Wn.2d at 843, 846-47; *State v. D.J.W.*, 76 Wn. App. 135, 139, 142, 882 P.2d 1199 (1994), *aff'd and remanded sub nom. by State v. Clark*, 129 Wn.2d 211 (1996). Thus, John's recording of this conversation can violate the privacy act, even though he was a party to it.

In conclusion 9, the trial court ruled that

> RCW 9.73.030(1)(b) does not apply to this case because this information was recorded by [John]'s phone *inadvertently*. At the time this information was recorded, nobody was trying to intercept or record what was occurring.

CP at 92 (emphasis added). The trial court also erred in this conclusion.

Whether John inadvertently or purposely recorded himself is beside the point; the statute requires no specific mental state for a person to improperly record a conversation. *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006); *Haymond v. Dep't of Licensing*, 73 Wn. App. 758, 762, 872 P.2d 61 (1994). Although some cases involve a person who is both a party to a conversation and intentionally or knowingly records his or her own conversation, *e.g.*,

Kipp, 179 Wn.2d at 723, nothing in the plain language of RCW 9.73.030 imposes such a requirement. We are unwilling to risk compromising the scope of the privacy act by the doubtful implication of a mental state requirement from language saying nothing about a mental state. Therefore, the trial court erred by holding that John's inadvertence in recording the private conversation removed his actions from the reach of the privacy act.

In conclusion 13, the trial court ruled that "[n]one of the information that was gathered up until the point that Officer Yong listened to the phone recording was gathered illegally." CP at 93. Because John recorded a private conversation without Sheryl's consent, the trial court erred in this conclusion.[5]

For these reasons, the trial court erred in conclusions 8, 9, and 13 and by admitting the voice mail recording at John's trial.

4. Prejudice

Having concluded that the recorded voice mail was improperly admitted, we next turn to whether its admission was prejudicial to John's trial.

> 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.

Christensen, 153 Wn.2d at 200 (citation omitted). If the erroneous admission of evidence was prejudicial, we reverse. *State v. Courtney*, 137 Wn. App. 376, 383-84, 153 P.3d 238 (2007).

[5] Because we conclude that John recorded the conversation in violation of the privacy act, we need not decide whether his actions also constituted an interception of the same conversation under the act.

The trial court clearly relied on the voice mail recording in determining that John formed the intent to kill Sheryl, which was part of its basis for finding him guilty of second degree attempted[6] murder.[7] The trial court found:

> 4.1 [John] formed the intent to kill [Sheryl] and is heard telling [Sheryl] that "I will kill you" and then proceeds to beat her in the head and strangle her.
> . . . .
> 4.4 In the moment when [John] told [Sheryl], "I am going to kill you," the Court finds beyond a reasonable doubt that killing [Sheryl] was his exact intent. [John] did not say this because he was angry at [Sheryl], or for some other reason. He said it because he meant it.

CP at 86. Given these findings, we cannot say within reasonable probability that the trial court would have found John guilty of second degree attempted murder if the voice mail recording had been suppressed.

On the other hand, nothing in the trial court's findings supporting the second degree assault conviction suggest that it relied on the voice mail recording. The voice mail was merely cumulative evidence supporting that conviction, considering that several witnesses testified to Sheryl's injuries and corroborating pictures were admitted into evidence.

Accordingly, we reverse and remand the second degree attempted murder conviction,[8] but affirm the second degree assault conviction.

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[6] "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1)

[7] "A person is guilty of murder in the second degree when: (a) [w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." RCW 9A.32.050(1)(a).

[8] John does not argue in his briefing that the evidence of the second degree murder conviction is insufficient without the recording. In his SAG, he asks that the conviction be dismissed with prejudice, but only as the bare conclusion of his argument that the recording should be

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. SAG

In the unpublished part of this opinion, we examine and reject John's SAG claims. We do not address his arguments related to the second degree attempted murder conviction, since we are reversing that conviction on other grounds.[9] However, we analyze his contentions (1) that there is not substantial evidence to support the trial court's finding 6.1, which determined Sheryl had been strangled into unconsciousness; (2) that the State suppressed favorable and material evidence in violation of *Brady*;[10] (3) that the trial court erred in sustaining the State's objections to testimonial evidence related to Sheryl's financial motive; (4) that the State committed prosecutorial misconduct when the prosecutor disclosed at a pretrial conference that the attorney general's office was investigating John; and (5) that the trial judge was biased and failed to disclose that he sat in a prior, unrelated case involving Sheryl. For the reasons discussed below, we hold that all these claims fail.

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suppressed. Therefore, consistently with *Christensen*, 153 Wn.2d at 201, we reverse and remand.

[9] Thus, we do not address his arguments (1) that the trial court made contrary rulings in its conclusions related to first degree assault, of which John was acquitted, and second degree attempted murder, which we reverse; and (2) that the trial court did not give appropriate weight to the autism evidence as it related to his ability to form the intent to kill Sheryl. We also do not readdress his contention related to the trial court's error in admitting the recorded voice mail message under RCW 9.73.030, since we already examined that issue in the published portion of this opinion.

[10] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

1. Substantial Evidence of Strangulation and Loss of Consciousness

John argues that the trial court's finding 6.1, to the extent it determined that he strangled Sheryl to unconsciousness, is not supported by substantial evidence.[11] We disagree.

Generally, to determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any reasonable juror could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). Following a bench trial, "appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *Id.* at 105-06. "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id.* at 106 (internal quotation marks omitted). "We treat unchallenged findings of fact and findings of fact supported by substantial evidence as verities on appeal." *Id.* "We review challenges to a trial court's conclusions of law de novo." *Id.*

"In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *Id.* "These inferences 'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Further, we defer to the

[11] In his SAG, John challenged all the trial court's findings related to its determination that he had strangled Sheryl into unconsciousness. However, we do not address the trial court's findings 4.1 and 4.2 because those findings only supported the trial court's conclusion that John was guilty of second degree attempted murder, a conviction that we are reversing. We address only finding 6.1 because it supported the trial court's conclusion that John had committed second degree assault, a conviction we uphold.

trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *Id.*

Sheryl testified in detail that John strangled her to the point of unconsciousness. Photographic evidence, which depicts bruising and discoloration around Sheryl's neck after the attack, corroborated her testimony. The State also presented Sheryl's *Smith*[12] affidavit, which was read into the record and bolstered her version of the events. Expert witnesses also testified that she had neck pain and had suffered a concussion, which one of the State's expert witnesses defined as a "brief loss of consciousness." RP at 442, 445, 488. The aggregate of her testimony, the expert witnesses, and the photographic evidence supply substantial evidence that Sheryl was strangled into unconsciousness.

John raises several arguments challenging this evidence, including that Sheryl wrote her *Smith* affidavit 22 days after the attack, that she had a financial motive to exaggerate her injuries, that she had an alcohol allergy which caused her injuries, and that she was not strangled because of contrary expert testimony and medical evidence in the record. However, these arguments potentially affect only Sheryl's credibility[13] or are merely allegations of contrary evidence. We do not reweigh the credibility of the witnesses or make a different credibility finding than the trial court, as long as the challenged finding is supported by substantial evidence. *Dalton v.*

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[12] *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982); *see also* KARL B. TEGLAND, 5B WASH. PRAC.: EVIDENCE LAW AND PRACTICE § 801.21 (6th ed.).

[13] John also contends that the trial court erred in finding Sheryl credible because the record contains "49 counts of perjury." SAG at 18-19. As an initial matter, whether Sheryl committed theft, perjury, fraud, or other offenses are all allegations, and the record does not show whether she in fact was charged with or convicted of any of these crimes. Thus, the trial court considered that claimed evidence properly for what it was: potential impeachment of Sheryl's credibility as related to her financial motive to lie or exaggerate her injuries.

State, 130 Wn. App. 653, 667, 124 P.3d 305 (2005). Because there is substantial evidence to support the trial court's finding 6.1 as related to Sheryl's strangulation and loss of consciousness, John's claim fails.

2. *Brady* Evidence

John next argues that the State suppressed nine pieces of favorable and material evidence that he attached to his SAG, which included parts of medical documents, police reports, a deposition, a letter, and an e-mail. Specifically, he contends that the State put these pieces of evidence on a memory stick and compact disc, but that the technology was unreadable because he did not have the necessary equipment in jail to download the evidence.

In order to demonstrate a *Brady* violation, the defendant has the burden to establish that the evidence at issue (1) was favorable to the defendant because it is exculpatory or impeaching; (2) was willfully or inadvertently suppressed by the State; and (3) was material. *State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015). Even assuming his attached exhibits show a possibility of favorable, material evidence, John's *Brady* claims fail because he does not meet his burden in establishing that the State suppressed these items.

Here, the record supports that when John received the compact disc and memory stick two weeks before trial, he was not provided the necessary equipment to view the evidence contained on them. However, during this time he was pro se for a couple of weeks and the State was in the process of getting him "well over a thousand pages of discovery" in printed form, rather than the unreadable memory stick and compact discs. RP at 47-50. After this short period of pro se status, he decided to be represented by defense counsel again. At a status hearing, John's defense counsel confirmed that John did not have access to the evidence contained on the

memory stick and compact discs while he was pro se and in jail. However, John's defense counsel stated that he would "have access to those materials" and would prepare John's defense with consideration of those materials. RP at 162.

On these facts, John does not meet his burden in showing that the State suppressed any favorable material evidence. The record shows that his defense counsel was ultimately given all of the evidence contained on the memory stick and compact discs. Without any evidence that John continued to lack access to favorable evidence in his case, his *Brady* claims fail.

Furthermore, John has not met his burden to show that the information on the compact discs or memory stick actually contained the allegedly favorable material evidence that he attached in his SAG. Mere allegations are not enough to support a *Brady* claim. If John "wishes a reviewing court to consider matters outside the record, a personal restraint petition is the appropriate vehicle for bringing those matters before the court." *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Accordingly, on this record, we hold that his *Brady* claims fail.

3. Testimony Evidence Related to Sheryl's Financial Motive

John next argues that the trial court abused its discretion in not permitting certain testimony related to Sheryl's financial motive. We disagree.

John first challenges the trial court's decision to sustain the State's objection to a question to John's father, Lawrence Smith.[14] After Lawrence testified that Sheryl was trying to take control of John's patents, defense counsel asked Lawrence *how* he knew this information. The State objected on relevance grounds, which the trial court sustained. We do not find this to be an abuse of discretion. The trial court allowed Lawrence to testify that Sheryl was trying to take

[14] We refer to Lawrence Smith by his first name for clarity. No disrespect is intended.

control of John's patents, which would further the defense's purpose in impeaching her credibility. The trial court did not abuse its discretion in ruling that *how* Lawrence knew Sheryl was stealing patents was not relevant to further impeaching her credibility.

John also challenges the trial court's decision to sustain the State's objection to the opinion of one of the defense's witnesses, Guido Bini. Bini was prepared to testify that Sheryl's company, Echosmith, was stealing the business ideas of John's company, Stewardsmith. The defense's offer of proof showed that Bini's knowledge of Echosmith was derived from web sites researched on the internet. Specifically, by comparing the Echosmith and Stewardsmith web sites, he concluded that Sheryl was stealing Stewardsmith's assets. After the defense's offer of proof, the trial court ruled that Bini lacked personal knowledge on the issue and could not testify on the matter. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." ER 602. It was not an abuse of the trial court's discretion to determine that obtaining and comparing information from internet web sites does not constitute personal knowledge of this matter. John's claim that this testimony should have been admitted fails.

4. Prosecutorial Misconduct

John next argues that the prosecutor improperly disparaged him as a witness when she stated during a pretrial hearing that the attorney general's office was investigating him. To establish prosecutorial misconduct, the defendant must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). To show prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704,

286 P.3d 673 (2012). Assuming for purposes of argument that the prosecutor's remark was improper, John has not shown that the prosecutor's remark had any effect on the result of the trial. Therefore, he has not shown prosecutorial misconduct.

John further contends that the prosecutor was lying and disparaging him from opening statement to closing argument. However, his contention is not particularized enough to permit its analysis. RAP 10.10(c). Accordingly, this prosecutorial misconduct claim also fails.

5. Judicial Bias

John next contends that Judge Robert Lewis, who presided over the bench trial, failed to disclose his involvement in a prior case with Sheryl. Specifically, he alleges that Judge Lewis determined that Sheryl was not subject to a special needs trust in a prior case and that the resolution of that prior case made him biased toward her at the bench trial.

Principles of due process, the appearance of fairness doctrine, and the Code of Judicial Conduct require that a judge disqualify him or herself from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. *In re Marriage of Meredith*, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). "Before we can find a violation of this doctrine, however, there must be evidence of a judge's actual or potential bias." *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

John fails to bring any evidence that Judge Lewis actually presided over the action to change Sheryl's special needs trust to a standard one, if such an action ever took place. With no evidence that Judge Lewis was ever involved in a prior case with Sheryl, his claim for a violation of judicial fairness necessarily fails.

CONCLUSION

We reverse and remand John Smith's second degree attempted murder conviction and affirm his second degree assault conviction.

BJORGEN, C.J.

We concur:

WORSWICK, J.

LEE, J.

CLARK COUNTY PROSECUTOR

November 04, 2016 - 8:44 AM

Transmittal Letter

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Case Name: State v. John Garrett Smith

Court of Appeals Case Number: 47205-8

Is this a Personal Restraint Petition? Yes ■ No

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Affidavit

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■ Petition for Review (PRV)

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CORRECTED - ORIGINAL FILING WAS MISSING PAGE 17.

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