

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

CASES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT6

 A. BALLARD’S CLAIM THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT HE VIOLATED A NO CONTACT ORDER IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE SHOWED THAT: (1) BALLARD WAS AWARE OF THE NO CONTACT ORDER, AND (2) KNOWINGLY AND/OR INTENTIONALLY VIOLATED THE NO CONTACT ORDER BY CONTACTING THE VICTIM THROUGH A THIRD PARTY.....6

 B. THE TRIAL COURT DID NOT ERR IN ADMITTING BALLARD’S LETTER AS EVIDENCE BECAUSE WASHINGTON’S PRIVACY ACT DOES NOT PROHIBIT THE STATE FROM USING A LETTER INTERCEPTED BY A PRIVATE CITIZEN (EVEN IF THE INTERCEPTION MIGHT HAVE BEEN UNLAWFUL).....16

IV. CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Davis v. Dept of Licensing, 137 Wn. 2d 957, 977 P.2d 554 (1999)17

State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009).....8, 14

State v. Camarillo, 115 Wn. 2d 60, 794 P.2d 850 (1990).....7

State v. Cannon, 120 Wn. App. 86, 84 P.3d 283 (2004).....6

State v. Delmarter, 94 Wn. 2d 634, 618 P.2d 99 (1980)7

State v. Dold, 44 Wn. App. 519, 722 P.2d 1353 (1986)17

State v. Eisfeldt, 163 Wn. 2d 628, 185 P.3d 580 (2008).....17

State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980)7

State v. Jackson, 82 Wn. App. 594, 918 P.2d 945 (1996)6

State v. Knapstad, 107 Wn. 2d 346, 729 P.2d 48 (1986).....6

State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005)7

State v. Olson, 73 Wn. App. 348, 869 P.2d 110 (1994).....6

State v. Pirtle, 127 Wn. 2d 628, 904 P.2d 245 (1995)7

State v. Richards, 109 Wn. App. 648, 36 P.3d 1119 (2001).....6

State v. Scoby, 117 Wn. 2d 55, 810 P.2d 1358 (1991).....7

State v. Walter, 66 Wn. App. 862, 833 P.2d 440 (1992)17

State v. Walton, 64 Wn. App. 410, 824 P.2d 533 (1992).....7

State v. Ward, 148 Wn. 2d 803, 64 P.3d 640 (2003)13, 14

State v. Zakel, 61 Wn. App. 805, 812 P.2d 512 (1991)6

STATUTES

RCW 9.01.13012, 14

RCW 9.73.0204, 5, 18, 19

RCW 9.73.030 4, 17-19

RCW 9.73.050 4, 17-19

RCW 9A.08.0108

RCW 26.50.1107,8

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Ballard's claim that the State presented insufficient evidence that he violated a no contact order is without merit when, viewing the evidence in a light most favorable to the state, the evidence showed that: (1) Ballard was aware of the no contact order, and (2) knowingly and/or intentionally violated the no contact order by contacting the victim through a third party?

2. Whether the trial court erred in admitting Ballard's letter as evidence when Washington's Privacy Act does not prohibit the State from using a letter intercepted by a private citizen (even if the interception might have been unlawful)?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Donnie Ballard was charged by amended information filed in Kitsap County Superior Court with felony violation of a court order with a special allegation of domestic violence. CP 111.¹ A jury found Ballard guilty, and the trial court then imposed a standard range sentence. CP 141, 144. This appeal followed.

¹ The amended information also included an alternative charge of attempted felony violation of a no contact order. CP 111. The jury at trial, however, did not render a verdict on this alternative charge since they convicted Ballard of felony violation of a no contact order. See CP 141, 142.

B. FACTS

At trial, Michelle Garity testified that she has an 11 year-old son (D.B.) and that Ballard is the child's father. RP 63. Ballard, however, is prohibited from contacting Michelle Garity because the Kitsap County Superior Court had entered a no contact order that, among other things, prohibited Ballard from contacting her. See RP 65-67, Exhibit 1.² The no contact order specifically provided that Michelle Garity was the protected party and that Ballard was prohibited from,

Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing of service of process of court documents by a third party or contact by defendant's lawyers with the protected person.

Exhibit 1 (CP TBD).

The no contact order was entered as an exhibit at trial, and Michelle Garity recognized Ballard's signature on the no contact order. RP 65-66.

Laurie Garity testified that she is Michelle Garity's mother and the grandmother to D.B. (the child that Michelle Garity and Ballard have in common). RP 52. Laurie Garity explained that in May and June of 2009,

² Exhibits 1 and 2 were not included by the Appellant in his designation of Clerk's Papers. The State, however, has filed a Supplemental Designation of Clerk's Papers including the two exhibits. The exact numbering of these two additional Clerk's Papers, however, has yet to be determined. The no contact order, however, was included as part of a defense motion. See CP 103.

D.B. lived with her at her residence in Bremerton and that D.B. had lived with her “basically since [his] birth.” RP 52, 56.³

While Ballard was in prison in May of 2009, he sent a letter to Laurie Garity’s residence addressed to D.B. RP 53-54, 66, Exhibit 2.⁴ Laurie Garity opened the letter addressed to D.B. because she “wanted to screen the letter and make sure there wasn’t anything in there that was – that could be hurtful to him.” RP 54. When Laurie Garity saw that the letter contained correspondence for Michelle, she gave the documents to her. RP 55.⁵

After receiving the documents from Laurie Garity, Michelle Garity went to the Kitsap County Sheriff’s office on June 4, 2009, and gave him the letter, card, and note written by Ballard. RP 47-50, 66-67.

The letter from Ballard included a note to D.B. that included a specific request that he “Give the card to your mother and I will write you soon.” Exhibit 2 (CP TBD); See also CP 101. The letter also included a mother’s day card, a mother’s day note or poem in which Ballard wrote that,

³ Michelle Garity also lived with Laurie Garity and D.B. and Laurie Garity’s residence for a period of time, but apparently moved into a separate apartment at some point before the letter at issue was sent to Laurie Garity’s residence. See RP 56, 63.

⁴ The letter had Ballard’s name on it and Laurie Garity recognized the handwriting as Ballard’s as she was familiar with his handwriting. RP 54-55. The envelope also states that the sender is “Ballard,” and some of the notes inside were signed either “Ballard” or D.A. Ballard.” Exhibit 2.

“Today a special day’s [sic] so I hope we get along. You will always be the mother of our son and that I can’t take away;”

and

“I just want to remind you I’m his father, he needs to know. Happy mother’s day and have plenty more from a man who became a father that you already know.”

Exhibit 2 (CP TBD, See also CP 101.

Prior to the admission of the letter at trial, Ballard argued that the letter was inadmissible because it was a private communication that was intercepted and opened in violation of Washington’s Privacy Act. RP 31.

Ballard argued that RCW 9.73.050 prohibited the admission of communications that were intercepted in violation of RCW 9.73.030. RP 31.

Ballard acknowledged that the interception of letters and written materials were covered but a different statute, RCW 9.73.020 (as opposed to RCW 9.73.030 which dealt with communication transmitted by telephone, telegraph, radio or other device). RP 31. Nevertheless, Ballard argued that RCW 9.73.030 was ambiguous, and that under the rule of lenity, written communications should also be inadmissible under RCW 9.73.030 and RCW 9.73.050. RP 31-32.

The State argued that the language of the statute only addressed admissibility concerning violations of 9.73.030 and said nothing about the

⁵ Laurie Garity did not ever give the letter or any of its contents to D.B. RP 55.

interceptions of written materials or letters which were covered by a different statute, RCW 9.73.020. The State also argued that a violation of 9.73.020 had not been shown because that issue requires a determination of whether someone had lawful authority to open someone else's mail and the State believed the evidence would show that the letter was properly opened by someone with authority to do so.

The trial court then ruled as follows:

I'm satisfied, as well, that the statute, 050, that expressly addresses admissibility of intercepted communications does not apply to letters. [RCW 9.73.] 020 doesn't contain any specific language that would require suppression or affect admissibility, if, in fact, it were obtained in violation of that statute. And there is no indication at this time that there was a violation of the statute.

But even assuming that there was, for purposes of the Defendant's argument, it does not apply to letters. The motion to restrict the admissibility of the letter . . . on that basis is overruled.

RP 32-33.

III. ARGUMENT

A. BALLARD’S CLAIM THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT HE VIOLATED A NO CONTACT ORDER IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE SHOWED THAT: (1) BALLARD WAS AWARE OF THE NO CONTACT ORDER, AND (2) KNOWINGLY AND/OR INTENTIONALLY VIOLATED THE NO CONTACT ORDER BY CONTACTING THE VICTIM THROUGH A THIRD PARTY.

Ballard argues that the evidence was insufficient to show that he violated a no contact order. App.’s Br. at 2.⁶ This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a

⁶ In addition to challenging the sufficiency of the evidence at trial, Ballard also argues that the trial court erred in denying his pre-trial motion to dismiss pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). See App.’s Br. at 8-9. Ballard, however, ignores the well-settled principle that, “after proceeding to trial, a defendant cannot appeal the denial of a *Knapstad* motion, which is a pretrial challenge to the sufficiency of the evidence.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004) (citing *State v. Richards*, 109 Wn. App. 648, 653, 36 P.3d 1119 (2001)); See also, *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994); *State v. Zakel*, 61 Wn. App. 805, 811 n. 3, 812 P.2d 512 (1991). After a verdict, an appellate court is to review the sufficiency of evidence supporting that verdict, not the propriety of the denial of the motion to dismiss. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006, 932 P.2d 644 (1997). Thus, while the issue of the sufficiency of the evidence is properly before this Court, the trial court’s denial of the *Knapstad* motion is not.

reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

RCW 26.50.110 provides, inter alia, that a person commits a crime when he or she has knowledge of the existence of a no contact order and violates the restraint provisions of that order. Caselaw has also held that in

addition to proving that a defendant had knowledge of the existence of the order, the State must also prove that the defendant “knowingly” violated the restraint provisions. *See State v. Allen*, 150 Wn. App. 300, 313, 207 P.3d 483 (2009), *citing State v. Snapp*, 119 Wn. App. 614, 625, 82 P.3d 252 (2004) (must prove a knowing violation of restraint provisions in no-contact order to convict under RCW 26.50.110(1)).

In the present case, the instructions to the jury (which were not challenged below or on appeal) stated that a defendant commits the crime of felony violation of a no contact order if he, with knowledge of the order at issue, violates the no contact order “by knowingly violating the restraint provisions.” CP 130, 132.

The term “knowledge” is defined by RCW 9A.08.010, which provides that a person “knows or acts knowingly” when he or she is aware of a particular fact or circumstance. The statute, however, also provides that a person acts knowingly when he “has information which would lead a reasonable man in the same situation to believe that facts exist.” RCW 9A.08.010(1)(b). Finally, the statute provides that “when acting knowingly suffices to establish an element, such element is also established if a person acts intentionally.” RCW 9A.08.010(2).

Based upon the above mentioned statute, the trial court in the present case instructed the jury that,

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If the person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

CP 131. Ballard has not challenged this instruction either in the trial court or on appeal.

Furthermore, it is undisputed that the restraint provisions of the no contact order in the present case prohibited the defendant from,

“Coming near and from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, except for mailing of service or process of court documents by a third party or contact by defendant’s lawyers with the protected person(s)”

Exhibit 1 (CP TBD), App.’s Br. at 5-6.

In the present case the uncontested evidence showed that Ballard mailed a letter from prison to his son, D.B., and included in that letter a note for the victim and asked the son to forward the note to the victim. RP 53-54,

66; Exhibit 2 (CP TBD). In addition, the evidence showed that the victim received the note and reported the contact to the police. RP 47-50, 66-67.

From this evidence, a reasonable fact finder could conclude that Ballard knowingly violated the restraint provisions of the no contact order. As Ballard mailed a letter from prison that included a note for the victim and specifically asked that the note be forwarded to the victim, a reasonable juror could conclude that Ballard intentionally contacted the victim through a third party, since Ballard's own writing evidence his intention that the note be forwarded to the victim.

In addition, a reasonable juror could have also concluded that Ballard knowingly violated the restraint provisions as he knew or should have known that the note would be forwarded to the victim; especially in light of the fact that he had specifically asked that the note be forwarded to the victim. Furthermore, the fact that the adult caring for the child might ultimately read the letter and forward the note to the victim was not unforeseeable and a reasonable person in Ballard's position should have known that this might have occurred.

Ballard's argument on appeal centers on his claim that the evidence was insufficient because the manner in which the note was ultimately

forwarded to the victim was slightly different than the manner that he expressly intended.

The State, however, is only required to prove the elements of the offense; there is no requirement that the State prove that every intermediate step in the offense occurred exactly as intended. For instance, imagine a case where a defendant is prohibited from contacting a victim, but nevertheless writes a letter to the victim and instructs his or her secretary to mail the letter overnight via Federal Express to the victim. If the secretary chooses to overnight the letter to the victim via UPS instead of Federal Express, it would be absurd to conclude that the defendant did not knowingly violate the order merely because the secretary chose a different postal carrier to deliver the letter. Rather, as the defendant in this example violated the order either intentionally or knowingly, the evidence is sufficient to prove the actual elements of the offense, even though the precise manner may have differed from the defendant's plan. In short, it would be absurd to find that the defendant in this example did not intentionally or knowingly violated the no contact order when he wrote a letter and intended it to be sent to the victim and when the letter was in fact sent to the victim.⁷

⁷ Another alternative way of viewing the above example is simply to conclude that the defendant in this example knowingly violated the no contact order because he should have known that his secretary might have chosen to use a different mail carrier. In the present case, the jury could have reached the same conclusion and found that Ballard should have known that when he wrote a letter to a 11-year old asking him to forward a note to the victim

In the present case the undisputed evidence showed that Ballard intended that the note be forwarded to the victim. Ballard acknowledges as much on appeal. App.'s Br. at 6 (acknowledging that Ballard "wanted to make contact with Ms. Garity" and "hoped that his son would give his mother the card"). This evidence was sufficient to establish that Ballard intentionally or knowingly violated the restraint provisions of the no contact order that prohibited him from having any contact with the victim through a third party.

In addition, the evidence below was sufficient to establish that the elements of the crime of violation of a no contact order were established at the point in time when Ballard deposited the letter containing the note into the mail system with the express intention that it was to be delivered to the victim in violation of the order. RCW 9.01.130, for instance, states that,

Whenever any statute makes the sending of a letter criminal, the offense shall be deemed complete from the time it is deposited in any post office or other place, or delivered to any person, with intent that it shall be forwarded.

RCW 9.01.130. This statute essentially stands for the proposition that the actual manner in which a letter is ultimately delivered to the victim is irrelevant. The relevant factors are whether the defendant put the letter into

that the 11-year-old (or an adult caring for that 11-year-old) might well follow his instructions and forward the note to the victim. In short, Ballard can hardly complain that his express instructions were ultimately followed, even if the note was delivered by someone other than the one he intended.

the mail or gave it to another with the intent that it ultimately be forwarded to the victim.

The Washington Supreme Court has also reached a similar conclusion in a violation of a no contact order case. In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), a defendant (Baker) had violated a no contact order by calling the victim's home. The victim, however, did not personally answer the call. Rather, the victim's wife answered the call and spoke to the defendant. *Ward*, 148 Wn.2d at 809. On appeal, the defendant argued that the evidence was insufficient to support a finding that he had violated the no contact order because he did not personally have contact with the victim and that the victim's wife never testified that she told the victim of the phone call. *Ward*, 148 Wn.2d at 815.⁸ The defendant, therefore, argued that, "the evidence at trial established no more than an attempted violation in that he called [the victim's] phone number and spoke to [the victim's] wife." *Ward*, 148 Wn.2d at 815.

The Court of Appeals held that a jury could reasonably infer that the wife told the victim about the defendant's phone call because the victim and his wife lived in the same house, both had been affected by the ongoing problems with the defendant, and the victim's wife was concerned enough to

⁸ The victim did not testify at trial. *Ward*, 148 Wn.2d at 809, 815.

notify police officers. *Ward*, 148 Wn.2d at 815, citing *State v. Ward*, 108 Wn. App. 621, 630, 32 P.3d 1007 (2001). The Supreme Court, however, took a different approach and held as follows:

We agree with the Court of Appeals that a rational trier of fact could have found Baker guilty beyond a reasonable doubt of the misdemeanor violation. We do not, however, find it necessary to engage in speculation as to whether [the victim's wife] told [the victim] of the phone call. The no-contact order prohibited Baker from contacting [the victim] by telephone or through an intermediary, and the evidence shows that Baker telephoned [the victim's] home and conveyed information about [the victim] to his wife. Based on this conduct alone, a jury was entitled to find that Baker violated the order. Accordingly, we affirm Baker's conviction of a misdemeanor violation of a no-contact order.

Ward, 148 Wn.2d at 816.

The *Ward* Court's conclusion that the defendant's conduct in contacting a third party was sufficient in and of itself to show a violation is consistent with the concept outlined in RCW 9.01.130 and with the argument above that the State is only required to prove the elements of the offense and is not required to prove that every intermediate step in the commission of a crime went exactly as planned.⁹

⁹ Another way of viewing this argument is that the focus in a case of violation of a no contact order is on the *defendant's* conduct, not on the conduct of the victim or a third party intermediary. Further support for this argument can be found in this Court's recent decision in *State v. Allen*, 150 Wn. App. 300, 207 P.3d 483 (2009). In *Allen*, the defendant had sent two emails order (one on February 12 and one on February 14) to the victim in violation of a no contact order. *Allen*, 150 Wn. App. at 305. Although the victim did not check her email until March 4, the State charged Allen with two counts of violation of the no contact order.

In the present case, of course, the evidence showed more than the evidence in *Ward*. First, the evidence below showed that the victim in the present case actually received the note written by Ballard. In addition, Ballard's intention that the communication (here a note) be forwarded to the victim was clear, as Ballard expressly requested that the note be forwarded to the victim. The contact, therefore, was not inadvertent or accidental. Rather, the evidence showed that Ballard mailed a letter including a note for the victim with the express intention that the note be forwarded to the victim. The note was, in fact, forwarded to the victim. Viewing this evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt as the evidence showed that Ballard intentionally or knowingly violated the no contact

On appeal, Allen argued that it was unclear whether emails sent on different dates but read on the same date constituted one or two violations of the order, and that under the rule of lenity, the only punishable violation occurred when the victim opened her emails. *Allen*, 150 Wn. App. at 313. This Court rejected Allen's argument and noted that "a knowing violation under the statute rests on the defendant's rather than the victim's actions." *Id.* This Court then concluded that,

Allen sent Foley different e-mail messages on different days. The no-contact order prohibited him from contacting her in this manner, and his punishment for those violations should not depend on when Foley happened to read her e-mail. Allen's two convictions for violating a domestic violence no-contact order did not violate double jeopardy.

Allen, 150 Wn. App. at 314. The *Allen* decision thus ultimately represents another example of the concept that the focus in these cases is on the defendant's actions, and that the actions of an intermediary or the victim is essentially irrelevant. Thus the fact that the victim in *Allen* did not read the emails on the date they were sent was simply not an issue, as the focus was on the defendant's actions and his intentional or knowing violation of the order. As the punishment for Allen's violations should not depend on when his victim happened to read her e-mail, Ballard's punishment in the present case should not depend on whether the note that he clearly intended to be forwarded to the victim was ultimately forwarded to the victim in a

order's restraint provision that prohibited him from having any contact whatsoever, in person or through others, by phone, mail or any means, directly or indirectly, with the victim.

For all of these reasons, Ballard's argument that the evidence was insufficient must fail.

B. THE TRIAL COURT DID NOT ERR IN ADMITTING BALLARD'S LETTER AS EVIDENCE BECAUSE WASHINGTON'S PRIVACY ACT DOES NOT PROHIBIT THE STATE FROM USING A LETTER INTERCEPTED BY A PRIVATE CITIZEN (EVEN IF THE INTERCEPTION MIGHT HAVE BEEN UNLAWFUL).

Ballard next claims that the trial court erred in allowing the letter to be admitted into evidence when the Privacy Act precludes such items from being admitted as evidence. App.'s Br. at 10. This claim is without merit because the trial court correctly held that (even assuming that the letter below was improperly opened by Laurie Garity) the Privacy Act does not provide that mail that is improperly opened by a private citizen is inadmissible in a criminal trial.

As a preliminary matter, under Washington law a defendant's constitutional right to privacy is not violated when a private citizen opens and

manner that was slightly different than Ballard intended.

reads a letter, discovers incriminating material, and forwards it to the police. See e.g., *State v. Dold*, 44 Wn. App. 519, 522, 722 P.2d 1353 (1986)(holding that police search of a private letter was not unconstitutional where the letter had been previously opened by a nonstate actor).¹⁰ Ballard, however, argues that the Privacy Act precluded the letter in the present case from being admitted at trial.

The court's duty when interpreting a statute is to give effect to the Legislature's intent as written. *Davis v. Department of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999). Where a statute is plain, unambiguous, and clear on its face, there is no room for construction. *Davis*, 137 Wn.2d at 963-64.

One statute within the Privacy Act discusses the suppression of evidence obtained in violation of the Act. That statute, RCW 9.73.050, states in relevant part:

Any information obtained in violation of *RCW 9.73.030* or pursuant to any order issued under the provisions of *RCW 9.73.040* {court order permitting interception} shall be inadmissible in any civil or criminal case....

¹⁰ See also, *State v. Eisfeldt*, 163 Wn.2d 628, 638 n. 9, 185 P.3d 580 (2008), in which the majority and the concurrence agreed that “citizens do not retain a privacy interest in evidence of a crime obtained by a private actor and delivered to the police,” and that “where the evidence obtained during a private search is given to the State; constitutional protections do not apply to private actors.” See also, *State v. Walter*, 66 Wn. App. 862, 833 P.2d 440 (1992)(cited in *Eisfeldt*).

RCW 9.73.050 (emphasis added). RCW 9.73.030, in turn, provides that it is unlawful for an 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.

RCW 9.73.030(1).

The act of unlawfully opening written communications or mail, however, is covered by a different statute: RCW 9.73.020. That statute makes it a misdemeanor for any person to “willfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person.” RCW 9.73.020.

Although RCW 9.73.050 provides that information obtained in violation of *RCW 9.73.030* shall be inadmissible in a criminal case, the statutes does not say that information or evidence obtained in violation of *RCW 9.73.020* shall be inadmissible.

In addition, RCW 9.73.020 does not contain a provision requiring suppression of evidence obtained in violation of that statute. The Legislature easily could have included mail in the list of inadmissible information set forth in RCW 9.73.050. The Legislature, however, apparently did not see fit to include exclusion of any form of intercepted mail; much less mail from a prison inmate to a minor child intercepted by a concerned caregiver. Absent any statutory language prohibiting the admission of mail opened by a private citizen, there was no basis for the court to conclude that the Legislature intended to suppress the use of letters such as the letter in the present case (even if the trial court were to assume that Ballard's letter was unlawfully intercepted and read by a private citizen in violation of the Privacy Act).

Rather, a plain reading of RCW 9.73.050 reveals that information obtained in violation of RCW 9.73.030 is inadmissible, the statute does not similarly state that information obtained in violation of RCW 9.73.020 is inadmissible. Thus, although RCW 9.73.020 makes it a misdemeanor for any person to "willfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person," there is simply no statutory provision stating that evidence obtained in this manner statute is inadmissible in a criminal case.

In short, Washington's Privacy Act does not prohibit the State from using a letter intercepted by a private citizen (even if the interception was

unlawful). Accordingly, the trial court did not err in refusing to suppress the letter in the present case.

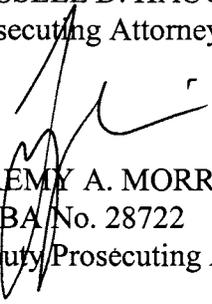
IV. CONCLUSION

For the foregoing reasons, Ballard's conviction and sentence should be affirmed.

DATED September 14, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1