

**NO. 41123-7-II**

JULY 12 2011 11:55  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**DONALD R. BABCOCK,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY  
(on an agreed change of venue from Klickitat County)

The Honorable John Nichols, Judge

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**BRIEF OF APPELLANT**

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## **I. ASSIGNMENT OF ERROR**

1. The trial court erred in refusing to suppress illegally recorded conversations between Babcock and Agent Floyd.

2. Without the evidence obtained through the illegally recorded conversations, the evidence that Babcock committed any crimes is insufficient.

3. The trial court erred in entering guilty findings against Babcock.

## **II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

In Washington, with some exceptions, conversations can only be recorded when all participants in the conversation consent to the recording. Here, Babcock did not consent to the recording of his conversations with Agent Floyd and no exceptions to the two-party consent rule legally applied. Did the trial court err in allowing the content of these conversations into evidence over Babcock's objection?

## **III. STATEMENT OF THE CASE**

### **1. Procedural History**

Donald Babcock was charged by an Amended Information with three crimes: conspiracy to commit murder in the first degree (count I), solicitation to commit murder in the first degree (count II) and felony harassment (count III). Clerk's Papers ("CP") 6-8. Although the

circumstances underlying that charges were allegedly committed in Klickitat County, the case was transferred to Clark County on an agreed change of venue. CP 3-5.

Prior to trial, the trial court presided over a lengthy CrR 3.5 hearing. Report of Proceedings (“RP”) 1RP<sup>1</sup> 4-114. The court found Babcock’s statement to Goldendale Police Sergeant Jay Hunziker and Alcohol, Tobacco, and Firearms and Explosives (“ATF”) Special Agent Eric Floyd admissible.<sup>2</sup> 1RP at 111-14. During that hearing, defense counsel discovered that most of the statements made by Babcock were recorded without Babcock’s consent. 1RP at 110. Consequently, defense counsel challenged the legality of the recordings. 2ARP at 132-72. The court ruled that two conversations between Babcock and Agent Floyd were recorded lawfully even though Babcock had not consented to the recording.<sup>3</sup> 2ARP at 167-74.

The case was tried before a jury. 3RP 342-516; 4ARP 520-653; 4BRP 654-749; 5RP 750-752. The jury heard the recordings over Babcock’s objection. 3RP at 3RP 363, 366-68, 465, 476. Babcock was convicted on all counts. CP 38, 39, 40.

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<sup>1</sup> The number/letter that appears before the “RP” is the volume number where the cited page is located.

<sup>2</sup> Findings of Fact and Conclusions of Law were entered. CP 41-46.

<sup>3</sup> No Findings of Fact and Conclusions of Law for that hearing have been entered to date.

At sentencing, the state agreed that the conspiracy and solicitation charges were the same criminal conduct. 5RP at 759. Babcock received a 240 month sentence. CP 49.

Babcock makes a timely appeal of all portions of his Judgment and Sentence. CP 58-71.

## **2. Trial**

In 2004, Donald Babcock was wrongfully convicted of rape of a child. 3RP at 433-35. The Court of Appeals reversed the wrongful conviction in 2008 and remanded the case back to the Klickitat County Superior Court for retrial. 3RP at 436.

In early 2009, Babcock was in custody at the Klickitat County jail awaiting retrial. 3RP at 453. Babcock was eager to have Harley Turner testify at the retrial. 4ARP at 523. Turner was a father figure for the alleged rape victim. 4ARP at 182. Turner had not, against Babcock's wishes, testified at the first trial. The tactical decision not to call Turner was made by Babcock's previous attorney. 4ARP at 523.

Being in jail gave Babcock time to talk about his pending retrial. Babcock expressed to other inmates that Reggie Bartowski, the primary detective in the rape case, was a crooked cop. Babcock also complained that he thought Harley Turner was a snitch. But with that said, Babcock did not wish, or promote, any ill will toward either man. 4ARP at 527.

However, some of Babcock's fellow inmates – none of whom testified at this trial – felt that Babcock was making threats to harm both Turner and Bartowski. August "Jimmy" Law was one of those inmates. 3RP at 454-56.

Goldendale Police Sergeant Jay Hunziker and Lieutenant Reggie Bartowski were concerned enough about this jail talk that they contacted agents at ATF in Yakima. 3RP at 437, 455. Because everybody knew everybody in the small community of Goldendale, ATF Special Agent Eric Floyd agreed to go undercover and contact Babcock in the jail. 3RP at 438, 455. Law enforcement contacted Jimmy Law and told him to tell Babcock that he knew somebody "who could take care of – you know, do the work for him, meaning commit these murders for him." 3RP at 345.

Agent Floyd, in his undercover capacity, met with Babcock in the jail visiting area three times between February and March 2009. The visiting area is set up such that the inmate and visitor sit in a booth separated by thick glass. 3RP at 347. As such, the inmate and visitor can see each other. Id. They communicate by speaking into a device that looks like a phone. 3RP at 348. However, the "phone" cannot be used to make calls. It is merely a direct communication link between the two parties on either side of the glass. 3RP at 347-48.

During the first visit, held on February 21, 2009, the jail told Babcock that he had an out-of-town visitor and would need to add the visitor to his visitor list before the visit. 3RP at 346. Babcock agreed to add Agent Floyd to his visitor list. 3RP at 458-59. Agent Floyd used the pseudonym of “Mr. Eric Schmidt” and “Mr. E.” and was otherwise unknown to Babcock. 3RP at 349, 457. During this first visit, Agent Floyd understood Babcock as wanting to see that both Lieutenant Bartowski and Harley Turner were killed. 3RP at 350. Per Agent Floyd, there was some discussion of how Babcock could pay for the “hitman” services of Agent Floyd. 3P at 351.

This visit was recorded by a digital recording device Sergeant Hunziker taped under the inmate side of the booth where Babcock was sitting. 3RP at 460-63. Before putting the digital device there, Sergeant Hunziker obtained authorization from a judge to record the conversations. (See Supplemental Statement of Arrangements, Memorandum of Authorities Re Suppression of Evidence Obtained in Violation of the Washington State Privacy Act, sub nom. 63.) The recording effort produced minimal results as the jail ambient noise interfered with the quality of the recording. 3RP at 463. Agent Floyd had also tried to record the visit via a recorded device secreted on his person but that device failed. 3RP at 409.

After the visit with Babcock, Agent Floyd met with Sergeant Hunziker and Lieutenant Bartowski. 3RP at 355, 438-39. He told both the sergeant and the lieutenant what Babcock allegedly said. Id. Lieutenant Bartowski was so concerned about the alleged threats that he bought additional firearms, made some adjustments to his home security system, starting taking different routes to work, and spent most of his work day in the office. 3RP at 439-41.

Between the first and second visit, Agent Floyd received a letter allegedly signed by Jimmy Law and Donald Babcock. 3RP at 356. The letter was sent to Agent Floyd's undercover post office box in Seattle. Id. During the first visit, Agent Floyd gave Babcock that address. Id. The letter was not in Babcock's handwriting. 3P at 356-57. The two signatures on the letter appeared to have been written by just one person. The essence of the letter was to encourage Agent Floyd - in his undercover capacity as Eric Schmidt - to visit Babcock a second time. 3RP at 356-27. Agent Floyd wrote to Babcock and told him that he would make a second visit. 3RP at 357. Agent Floyd wrote that Babcock should take paper and something to write with to the meeting. Id.

In anticipation of the second visit, Sergeant Hunziker again obtained a court order to record the visit between Babcock and Agent Floyd. (See Supplemental Statement of Arrangements, Memorandum of

Authorities Re Suppression of Evidence Obtained in Violation of the Washington State Privacy Act, sub nom. 63.) Agent Floyd prepared himself for the second visit by secreting a recording device on his person. 3RP at 358. The recording device could make both an audio and visual recording. 3RP at 362.

The second meeting between Babcock and Agent Floyd occurred on March 26, 2009. 3RP at 358, 466. Once again, the meeting occurred in the inmate visiting booth at the Klickitat County jail. 3RP at 357. Rather than communicating over the phone-like receiver, Agent Floyd told Babcock to communicate by writing notes back and forth and holding the notes up to the glass for the other to see. 3RP at 359, 365.

This time, Agent Floyd interpreted the conversation as Babcock agreeing that Jimmy Law would give methamphetamine to Agent Floyd in exchange for Floyd killing Harley Turner. 3RP at 366-75. Agent Floyd told Babcock that he had located Harley Turner and could get the job done once Babcock gave the approval. 3RP at 366, 379-80. To give the approval, Babcock was directed to send a letter to Agent Floyd's Seattle post office box with the word "yes" written on it. 3RP at 380.

Agent Floyd's secretly recorded audio and video of that meeting was played for the jury. 3RP at 363.

Agent Floyd received a letter from Babcock and later returned to the Klickitat County jail for his third and last visit with Babcock on April 23, 2009. 3RP at 395. Between the second and third visit, Sergeant Hunziker and Agent Floyd met with Harley Turner at his home in Idaho and staged a mock murder scene. 3RP at 390-91. Agent Floyd took pictures of the mock scene on his small flip type cell phone. 3RP at 391-92. One photo showed Turner with duct tape on his mouth and his hands tied behind his back. Another photo showed Turner in a shallow grave with fake blood and brain matter on him. 3RP at 394.

This third visit occurred in the jail visitor booth. 3RP at 395-96. This time, all communication between Babcock and Agent Floyd was by writing notes and putting them against the glass for the other to see. 3RP at 396. Agent Floyd also held his flip phone up to the glass to show Babcock the photos of the mock murder scene. 3RP at 396-97. Babcock responded by putting a note that said "thank you" against the glass. 3RP at 401.

Sergeant Hunziker recorded the third visit by videotaping the jail's real-time video monitor of the visitor booth where Babcock and Agent Floyd showed each other their written notes. 3RP at 471.

At trial, Agent Floyd had the notes he wrote and showed to Babcock 3RP at 361, 398. No notes attributed to Babcock were admitted as evidence. 3RP at 473-74.

During his trial testimony, Babcock assured the jury that although he was angry with Lieutenant Bartowski as it related to Bartowski's investigation of the rape case, he never made any threats to kill Bartowski. 4ARP at 527, 532-33. Babcock also testified that he only wanted Agent Floyd to keep Harley Turner from running to ground and being unavailable for testimony at the pending retrial. 4ARP at 533, 540. Babcock in no way wanted Turner killed. *Id.* Babcock was, however, in agreement that Jimmy Law could pay Agent Floyd with methamphetamine to assure that Harley Turner would appear as a witness at the pending rape trial. 4ARP at 547. When Babcock thanked Agent Floyd during their last visit, he was thanking Floyd for making sure Turner was available. Although he has seen at least a couple of the photos Agent Floyd showed him on the flip phone, he did not believe that Turner was dead. 4ARP at 552. He simply believed that Agent Floyd had roughed up Turner. 4ARP at 601.

#### IV. ARGUMENT

##### **THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS BABCOCK'S FIRST AND SECOND INTERVIEW WITH ATF AGENT FLOYD.**

- a. **With some limited exceptions in Washington, private conversations cannot be recorded without the consent of all participants.**

In Washington, generally speaking, private conversations cannot be lawfully recorded unless all of the participants in the conversation consent to the recording.

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions 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).

Exceptions to the consent requirement include “wire communications or conversations . . . (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands.” RCW 9.73.030(2).

Such calls may be recorded with the consent of one party to the conversation. RCW 9.73.030(2).

Another exception, a tool available to law enforcement, is found at RCW 9.73.090(2).

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a non-consenting party for a reasonable and specified period of time, if there is probable cause to believe that the non-consenting party has committed, is engaged in, or is about to commit a felony: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

RCW 9.93.130 augments the above section.

Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:

- (1) The authority of the applicant to make such application;
- (2) The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to record a communication or conversation is sought and the identity of whoever authorized the application;

(3) A particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including:

(a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;

(b) The details as to the particular offense that has been, is being, or is about to be committed;

(c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;

(d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;

(e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

(4) Where the application is for the renewal or extension of an authorization, a particular statement of facts showing the results thus far obtained from the recording, or a reasonable explanation of the failure to obtain such results;

(5) A complete statement of the facts concerning all previous

applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to record a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each application; and

(6) Such additional testimony or documentary evidence in support of the application as the judge may require.

**b. Babcock's conversations with Agent Floyd in the Klickitat County Jail were private conversations.**

While the term "private" is not defined in the Privacy Act, the Supreme Court has adopted the dictionary definition: " 'belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.' " Webster's Third New International Dictionary (1969), *quoted in State v. Townsend*, 147 Wn.2d. 666, 673, 57 P.3d 255 (2002); *see also, State v. Christensen*, 153 Wn.2d 186, 192-193, 102 P.3d 789 (2004). As such, a communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is objectively reasonable. *Townsend*, 147 Wn.2d at 673. Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law. *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996).

Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the non-consenting party and his relationship to the consenting party. *State v. Clark*, 129 Wn.2d at 225-27.

Under the facts of Babcock's case, Babcock met with Agent Floyd three times in a visitor booth at the Klickitat County Jail. Although only the first and second visits were recorded, the tenor of each visit remained the same: Babcock displayed an intent that the content of the visit remain private. During the first visit, Agent Floyd had Babcock's undivided attention as they spoke using the telephone-like handsets.

Although the communication occurred, of necessity, in the jail, that it was jailhouse communication is not determinative. The reasonable expectation of privacy as an inmate is less than that of a free citizen. *State v. Rainford*, 86 Wn.App. 431, 438, 936 P.2d 1210 (1997) (“[A]n inmate's expectation of privacy is necessarily lowered while in custody.”). *Accord State v. Campbell*, 103 Wn.2d 1, 23, 691 P.2d 929 (1984).

While Babcock's expectation of privacy as an inmate was less than that it might have otherwise been, that expectation was not absent. Babcock and Agent Floyd spoke to each other using a communication device that looked like a phone but was just a transmitter-receiver between

the two parties. It was not something that could be tapped into and recorded in the traditional sense. The only way the communication could be recorded was to do as Sergeant Hunziker did: conceal a digital recorder in the visitor booth; or as Agent Floyd did: wear a concealed recording device on his person. As Sergeant Hunziker found out, there is so much ambient noise in the jail, it is hard to hear other's conversations. That the jail is a busy and noisy place adds to the expectation that conversations can occur without others hearing them.

Moreover, the mere possibility that intrusion on otherwise private activities is feasible does not strip citizens of their privacy rights. *State v. Christensen*, 153 Wn.2d 186, 192-193, 102 P.3d 789(2004); *State v. Myrick*, 102 Wn.2d 506, 513-14, 688 P.2d 151 (1984).

Because Babcock and Agent Floyd engaged in private conversations, the trial court erred by admitting into evidence the recordings of those conversations in the jail visiting booth. The conversations were private within the meaning of the Privacy Act.

**c. The State failed in its efforts to make Babcock's recorded conversations with Agent Floyd lawful.**

- (i) Because the content of the two recordings was not clear, there is no exception for admission of the recordings under RCW 9.73.030.

As noted under section (a), there is an exception to the consent rules if the wire communication or conversations convey a threat of bodily harm or other unlawful requests or demands. RCW 9.73.030(2)(b). At the argument on the admissibility of the recorded conversations, the trial court found this exception persuasive in its decision to allow the recording and Agent Babcock's testimony about the first and second interview into evidence. In doing so, the trial court relied on the facts and holding of *Caliguri*. *State v. Caluguri*, 99 Wn.2d 501, 664 P.2d 466 (1983). But *Caliguri* is distinguishable.

In *Caliguri*, the facts involved a conspiracy to commit first degree murder and first degree arson. The defendant took part in a plan to burn down a tavern. A federal agent taped conversations with Caligury and others involved without their consent. During the recorded conversations, there was recognition by Caligury that the tavern janitor was going to die in the fire and that others might be injured as well. *Caligury*, 99 Wn.2d at 504. As the conspiracy and underlying request was to commit murder, a crime involving bodily harm, any conversation "convey[ing]" the request is squarely within the scope of RCW 9.73.030(2)(b). *Caligury*, 99 Wn.2d at 507.

In Babcock's case however, what was actually captured on the two recordings is not in any sense as stark as *Caligury's* assurance that the

janitor would die and others might die as well. Without proof that each recording captured a threat, the court erred in ruling that the recordings were admissible.

- (ii) Both court authorized intercept orders were legally insufficient.

Pursuant to RCW 9.93.130, Sergeant Hunziker obtained court orders to record both the first and second conversation between Babcock and Special Agent Floyd. (See Supplemental Statement of Arrangements, Memorandum of Authorities Re Suppression of Evidence Obtained in Violation of the Washington State Privacy Act, sub nom. 63.) But in both instances, the content of the application was legally insufficient. The trial court erred in failing to recognize the insufficiency and to suppress the use of the subsequent recordings.

Before recordings can be authorized under RCW 9.73.130, multiple criteria must be met. The missing criteria in Babcock's case is proof that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f). In both applications, Sergeant Hunziker explanation on this point was the same:

(e) Successful prosecution of this type of case requires proof of knowledge contained in a verbal exchange. Possession of this verbal exchange in the form of a recording resolves any issues as to exactly what was said, by whom, and in evidentiary value is worth dozens of witnesses testifying from their inexact memories. Furthermore, there are no other means readily available for obtaining such information. The inmate who came forward regarding the threats is not trained in investigative techniques or use of the equipment. Furthermore, the equipment would be difficult to get to the inmate and difficult for him to conceal. Discovery of the equipment by the suspect would obviously terminate the investigation and would likely jeopardize the safety and well-being of the inmate.

(See Supplemental Statement of Arrangements, Memorandum of Authorities Re Suppression of Evidence Obtained in Violation of the Washington State Privacy Act, sub nom. 63, Exhibit A, page 4 of 5; Exhibit C, page 4 of 5.)

But Sergeant Hunziker's explanation on this point is not legally sufficient. Before resorting to an application under RCW 9.73.130, the police must either try, or give serious consideration to, other methods and explain to the issuing judge why those other methods are inadequate in the particular case. *State v. Manning*, 81 Wn. App. 714, 720-721, 915 P.2d 1162 (1996); *State v. Cisneros*, 63 Wn. App. 724, 729, 821 P.2d 1262, *review denied*, 119 Wn.2d 1002, 832 P.2d 487 (1992). That serious consideration was not done here. There was nothing unique about the use of a verbal exchange such that Babcock's privacy need be invaded by a recording device. Proof of all crimes require, to one degree or another,

some sort of verbal exchange. In Babcock's case, the vital verbal exchange was with an ATF agent, a person who is presumed credible from the perspective of jurors. And while it may be true that informant Jimmy Law had no training in investigative techniques, Law's statements – as well as the alleged statements of other informants – suggests that none were needed. If believed, it seems that Babcock was willing to say just about anything to anybody. As such, no advanced investigative techniques were needed. The trial court erred when it refused to suppress the recording based on Sergeant Hunziker's inadequate wire application.

**d. The remedy for violation of the Privacy Act is to exclude all evidence collected as a result of the illegal recording.**

Any information obtained in violation of RCW 9.73.030, or pursuant to any order issued under the provisions of RCW 9.73.040, shall be inadmissible in a criminal case in all courts of general or limited jurisdiction in Washington.. RCW 9.73.050. That includes the exclusion of any evidence obtained to include simultaneous visual observation and assertive gestures. *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990). As Agent Floyd's first or second interview with Babcock was illegally recorded, no part of either interview should have been admitted at trial.

- e. **Once the taint of the illegally recorded conversations are removed from consideration, there is no evidence that Babcock committed any crime.**

Once all of the illegally obtained evidence is removed from Babcock's case, there is no evidence that Babcock committed any crime. His charges must be dismissed.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash. Const. Art. 1, § 3. "The reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. *State v. Devries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of

the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court must be satisfied that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *review denied*, 119 Wn. 1003, 832 P.2d 487 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994).

Babcock was convicted of three crimes: conspiracy to commit first degree murder; solicitation to commit first degree murder; and felony harassment. The elements of each crime, as instructed, are as follows:

Conspiracy to Commit First Degree Murder (Instruction 12)

- (1) That during the period of time from February 21, 2009, through May 15, 2009, the defendant agreed with one or more persons to engage in or cause the performance of conduct constitution the crime of murder in the first degree;
- (2) That the defendant made the agreement with the intent that such conduct be performed;
- (3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement; and
- (4) That any of these acts occurred in the State of Washington.

CP 28.

Criminal Solicitation (Instruction 14)

- (1) That during the period of time from February 21, 2009, through May 15, 2009, the defendant offered to give money or other thing of value to another to engage in specific conduct;
- (2) That such offering was done with the intent to promote or facilitate the commission of the crime of murder in the first degree;
- (3) That the specific conduct of the other person would constitute the crime of murder in the first degree if such crime had been committed;

and

- (4) That any of these acts occurred in Washington.

CP 30.

Felony Harassment (Instruction 18)

- (1) That on or about February 21, 2009, the defendant knowingly threatened to kill Reggie Bartowski immediately or in the future;
- (2) That the words or conduct of the defendant placed Reggie Bartowski in reasonable fear that the threat to kill would be carried out;
- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington.

CP 34.

The testimony provided by Agent Babcock as to his first and second conversation with Babcock was the essence of the state's case. Without those two conversations in evidence, there was no agreement or solicitation between Babcock and Agent Floyd to kill Harley Turner and there was no threat by Babcock to kill Reggie Bartowski. There simply was no evidence of any crime. Accordingly, all three of the charges against Babcock should be dismissed.

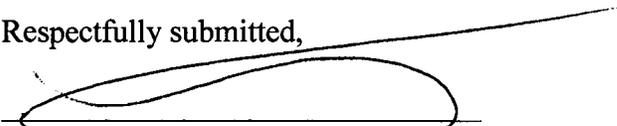
**E. CONCLUSION**

None of the state's evidence as to Agent Floyd's first and second conversation with Babcock should have been admitted into evidence.

Without that evidence, there is no proof that Babcock committed any crimes. Consequently, all charges against Babcock must be dismissed.

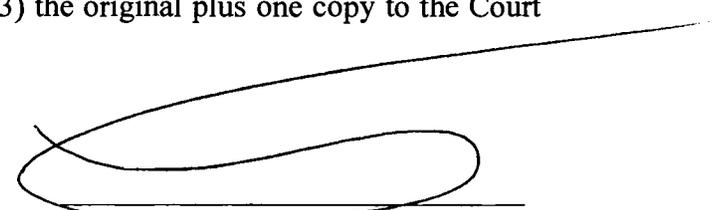
DATED this 9<sup>th</sup> day of May 2011.

Respectfully submitted,

  
LISA E. TABBUT/WSBA No. 21344  
Attorney for Donald Babcock

**CERTIFICATE OF MAILING**

I certify that on May 9, 2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Donald R. Babcock/DOC#257775, Washington State Penitentiary, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362; (2) John Hillman, Office of the Attorney General, 800 Fifth Avenue, Suite 2000; Seattle, WA 98104; and (3) the original plus one copy to the Court of Appeals, Division II.

  
LISA E. TABBUT, WSBA #21344