

JUL 21 2011

NO. 41123-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

DONALD RAY BABCOCK,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 21 PM 4:05

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

John Hillman
Assistant Attorney General
WSBA #25071
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-6430

FILED
COURT OF APPEALS
DIVISION II
11 JUL 25 AM 9:35
STATE OF WASHINGTON
BY AM
DEPUTY

 ORIGINAL

TABLE OF CONTENTS

I. ISSUE PERTAINING TO ASSIGNMENT OF ERROR1

II. STATEMENT OF THE CASE2

 A. Procedure2

 B. Facts3

III. LAW AND ARGUMENT.....15

 A. The trial court properly admitted the testimony and recordings because the conversations were not “private” within the meaning of RCW 9.73.030(1)(b).16

 1. The defendant did not have a reasonable expectation of privacy because the conversations took place in the inmate visiting area of a county jail.....17

 2. Defendant did not have a reasonable expectation of privacy during his conversations with SA Floyd because the conversations took place in the presence of third parties.....20

 3. The defendant had no reasonable expectation that illicit conversations with a stranger would remain private.23

 B. The trial court properly admitted evidence of the conversations under RCW 9.73.030(2)(b) because the conversations conveyed threats of bodily harm.24

 C. The trial court properly admitted evidence of the conversations because SA Floyd and Sgt. Hunziker had court authorization to record the conversations pursuant to RCW 9.73.090(2).....29

 D. The trial court properly admitted evidence of the defendant’s conversations with SA Floyd because the

defendant consented to the recording of the conversations.....	35
IV. CONCLUSION	37

TABLE OF AUTHORITIES

Cases

<i>Bell v. Wolfish</i> , 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).....	18
<i>Hudson v. Palmer</i> , 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1983).....	17, 18
<i>Hudson v. Palmer</i> , 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1983) (quoting <i>Bell v. Wolfish</i> , 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979))	17
<i>State v. Archie</i> , 148 Wn. App. 198, 199 P.3d 1005 (2009).....	18
<i>State v. Archie</i> , 148 Wn. App. 198, 199 P.3d 1005 (2009) (quoting <i>Bell v. Wolfish</i> , 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1997)).....	18
<i>State v. Avery</i> , 103 Wn. App. 527, 13 P.3d 226 (2000).....	35
<i>State v. Caliguri</i> , 99 Wn.2d 501, 664 P.2d 466 (1983).....	25, 26, 28, 29
<i>State v. Caliguri</i> , 99 Wn.2d 501, 664 P.2d 466 (1983) (quoting Webster’s Third New International Dictionary 499 (1971))	26
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	16, 22
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004) (citing <i>State v. Townsend</i> , 147 Wn.2d 666, 57 P.3d 255 (2002))	17

<i>State v. Cisneros</i> , 63 Wn. App. 724, 821 P.2d 1262 (1992).....	30
<i>State v. Cisneros</i> , 63 Wn. App. 724, 821 P.2d 1262 (1992), (quoting <i>State v. Knight</i> , 54 Wn. App. 143, 772 P.2d 1042 (1989))	30
<i>State v. Clark</i> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	20
<i>State v. Goucher</i> , 124 Wn.2d 778, 881 P.2d 210 (1994).....	23, 24
<i>State v. Knight</i> , 54 Wn. App. 143, 772 P.2d 1042 (1989).....	31, 32, 34
<i>State v. Knight</i> , 54 Wn. App. 143, 772 P.2d 1042 (1989), (citing <i>United States v. Vento</i> , 533 F.2d 838, (3d Cir. 1978) and <i>United States v. Santarpio</i> , 560 F.2d 448, (1st Cir. 1977))	32
<i>State v. Modica</i> , 136 Wn. App. 434, 149 P.3d 446 (2006).....	16, 35, 36, 37
<i>State v. Modica</i> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	18, 19, 20, 36
<i>State v. Myrick</i> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	22
<i>State v. Platz</i> , 33 Wn. App. 345, 655 P.2d 710 (1982).....	31, 34
<i>State v. Puapuaga</i> , 164 Wn.2d 515, 192 P.3d 360 (2008).....	18
<i>State v. Rainford</i> , 86 Wn. App. 431, 936 P.2d 1210 (1997).....	18
<i>State v. Surge</i> , 160 Wn.2d 65, 156 P.3d 208 (2007).....	18, 20

State v. Townsend,
147 Wn.2d 666, 57 P.3d 255 (2002)..... 35

Statutes

RCW 9.73 1, 24
RCW 9.73.030(1)..... 15, 20
RCW 9.73.030(1)(b) 15, 16, 35
RCW 9.73.030(2)(b) 24, 25, 26, 28
RCW 9.73.050 15
RCW 9.73.090(2)..... 29
RCW 9.73.130 31, 34
RCW 9.73.130(3)(f)..... 29, 30, 32
RCW 9.73.130(f) 31, 34

I. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Washington's Privacy Act (Chapter 9.73 RCW) applies only to "private" conversations. The Privacy Act requires the consent of all parties in order to electronically record a private conversation unless the conversation involves threats of bodily harm or a court order authorizes the recording.

Appellant Donald Ray Babcock ("defendant"), while an inmate at the Klickitat County Jail, conversed with an undercover federal agent who visited him in the jail. The conversations were electronically recorded and offered as evidence at trial. The defendant moved to suppress the conversations on grounds that they were recorded in violation of the Privacy Act. The trial court denied the motion and admitted evidence of the recorded conversations.

The issue in the present appeal is whether the trial court properly admitted the recorded conversations where (1) the conversations occurred between strangers in a crowded jail, (2) the conversations involved threats of bodily harm and the hiring of a "hit man," (3) a judge gave prior written judicial authorization to record the conversations, and (4) the defendant was warned prior to the conversations that all conversations in the jail were subject to audio and video recording.

II. STATEMENT OF THE CASE

A. Procedure

On May 18, 2009, the State filed an information in Klickitat County Superior Court charging the defendant with one count of conspiracy to commit murder in the first degree. CP 1-2. Venue was later transferred to Clark County Superior Court. CP 3-4.

The defendant was tried in Clark County on an amended information charging (1) conspiracy to commit murder in the first degree, (2) solicitation to commit murder in the first degree, and (3) felony harassment. CP 3-6. Counts I and II accused the defendant of soliciting and conspiring with a “hit man” to have Harley Turner murdered. CP 3-6. In Count III, the defendant was accused of threatening to kill Goldendale Police Lieutenant Reggie Bartkowski. CP 3-6.

The defendant moved pretrial to suppress recorded conversations the defendant had with an undercover police officer while the defendant was incarcerated in the Klickitat County Jail. CP 75-100; RP 132-174. The defendant argued that the conversations were secretly recorded without the defendant’s consent in violation of Washington’s Privacy Act. CP 75-100; RP 133-154, 164-66. The trial court ruled (1) the conversations were not “private” and therefore did not fall within the scope of the Privacy Act, (2) the conversations were exempt from the

Privacy Act's two-party consent rule because the conversations included threats of bodily harm, and (3) the conversations were properly recorded after police obtained judicial approval to do so. RP 167-174. The trial court ruled that the recorded conversations were admissible at trial. RP 167-174.

The case was tried to a Clark County jury in July 2010. RP 340-754. The undercover officer testified at trial and related the defendant's recorded verbal and written statements to the jury. RP 341-429. The recordings were also admitted as evidence and played for the jury. RP 363 (Exhibit 2); RP 464 (Exhibit 6); RP 472 (Exhibit 13).

On July 22, 2010, the jury returned verdicts of guilty as charged. CP 38-40. At sentencing, the State conceded that Count II (solicitation to commit murder) should be dismissed for double jeopardy reasons. RP 759. The defendant received a standard range sentence for one count of conspiracy to commit murder and one count of felony harassment. CP 47-57. The defendant appeals his convictions. CP 58-71.

B. Facts

In 2003, the defendant was the subject of a criminal investigation conducted by Goldendale Police Detective Reggie Bartkowski. RP 434. As part of the criminal investigation, Detective Bartkowski interviewed Harley Turner and his two children. RP 434. Detective Bartkowski's

criminal investigation resulted in the filing of formal criminal charges against the defendant. RP 435.

In 2004, the criminal case went to trial. RP 435. Detective Bartkowski sat at counsel table with the deputy prosecutor throughout the trial. RP 443. Detective Bartkowski testified for the State at the trial. RP 435. Harley Turner's two children were called to the stand to testify for the State. RP 435, 581-82. One of the children took the stand briefly but could not testify after taking the stand. RP 559, 581-82. The defendant was convicted and sentenced to prison.¹ RP 435.

The defendant appealed his convictions. RP 435. The court of appeals reversed the defendant's conviction on grounds that out-of-court statements of the child who refused to testify were improperly admitted. RP 436, 559. The court of appeals ordered a new trial. RP 436. The defendant was returned to the Klickitat County Jail for his new trial in September 2008 and he remained there pending trial. RP 436, 453. It was anticipated that Detective Bartkowski² and Harley Turner's two children would again be called to testify against the defendant at the new trial. RP 436-37.

¹ Defendant was convicted of multiple acts of rape of a child. RP 5-6. The jury that decided the present case was not informed of the nature of the crimes for which the defendant was previously convicted, only that he was accused and convicted of "a crime."

² Detective Bartkowski was Lieutenant (Lt.) Bartkowski by the time the present case was tried in July 2010.

Upon his return to the Klickitat County Jail, the defendant told other inmates that he wanted to kill Turner and Lt. Bartkowski.³ RP 6, 454. Several inmates in the jail reported the defendant's statements to the Goldendale Police Department. CP 88-89; RP 6, 454. One of these inmates was August "Jimmy" Law, who asked his lawyer to notify the police about the defendant's statements. RP 36, 456. Law cooperated in the subsequent police investigation. RP 36, 456.

Goldendale Police Sergeant Jay Hunziker investigated the reported threats. RP 5. Sgt. Hunziker knew that information from jail inmates was suspect and he wanted to confirm with reliable evidence that the defendant wanted to hire someone to kill persons associated with the prosecution. CP 90. The Goldendale Police Department was a small department and its members were known to the defendant. RP 438, 455. Goldendale officers could not go into the jail undercover. RP 438, 455. Nor was it feasible to wire an inmate for recording or put a listening device in the defendant's jail cell. CP 90; RP 32-33.

The police feared that the defendant could hire someone to kill Bartkowski and Turner and therefore they "needed a plan of action in

³ Inmates further reported that the defendant threatened to kill the trial judge from his first trial, as well as the elected prosecutor and the deputy prosecutor who tried the case. CP 88-89; RP 49-50. The defendant only discussed Turner and Lt. Bartkowski with SA Floyd. The jury that decided the present case only heard evidence about the threats to Bartkowski and Turner.

order to prevent . . . a homicide.” RP 50. Sgt. Hunziker sought the assistance of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). RP 48, 454. Sgt. Hunziker met with ATF Special Agent (SA) Eric Floyd on January 15, 2009. RP 48, 456. SA Floyd agreed to assist. RP 48, 456.

Sgt. Hunziker and SA Floyd devised a plan. RP 49. First, they would find out if the defendant “was serious about having these people killed.” RP 51, 56-57. The police determined to ask Law to tell the defendant that he knew “a person who takes care of problems,” i.e., a “hit man.” RP 51, 56-57, 456. The police believed that at that point the defendant would either choose to stop making threats, or he would meet with the hit man. RP 56-57. If the defendant declared that he was serious and would meet with the hit man, SA Floyd would visit him in the jail under the alias of “Mr. Eric Schmidt,” a man who committed “murder for a fee.” RP 51, 56.

The defendant agreed to meet with SA Floyd, aka “Eric Schmidt.” RP 51, 456. During the ensuing undercover operation, SA Floyd visited the defendant three times posing as hit-man-for-hire “Eric Schmidt.” SA Floyd met with the defendant inside the Jail on February 21, March 26, and April 23, 2009. RP 7, 11, 13. All three meetings occurred in the inmate visiting area of the Jail. RP 8.

The inmate visiting room was a two-sided room separated by brick and safety glass. RP 8, 460. Each side of the room had three connected visiting stations, essentially cubicles with a chair. RP 8, 53, 348, 460. The visiting area allowed each inmate to sit across from his or her visitor, separated by a panel of glass. RP 53. Inmates and visitors normally communicated by use of an intercom system connected by two telephone handsets on each side of the separator. RP 8, 53-54, 460.

The inmate visiting room was equipped with surveillance cameras that provided a live feed to jailers in the control room adjacent to the inmate visiting room. RP 459. Jailers watched the live video feed of activities in the visiting room on a television monitor. RP 459, 462. The live video feed did not contain audio. RP 459. An intercom system between the visiting room and the jail control room allowed jailers to listen in on conversations in the visiting room if they chose to do so. RP 30. However, if an inmate tried to use the intercom system while jailers were listening, an electronic sound would result that alerted all inmates that the intercom system was "on." RP 30-31.

Signs were posted throughout the jail informing inmates and visitors that conversations in the inmate visiting room were subject to audio and video recording. RP 9-10. It was common knowledge among the jail inmates that their activities and conversations inside the jail were

recorded. RP 513. Inmates and visitors in the visiting room could also hear each other's conversations. RP 348, 513.

Prior to the defendant's meeting with "E. Schmidt" on February 21, 2009, Sgt. Hunziker obtained a court order authorizing law enforcement to record SA Floyd's conversation with the defendant. CP 92-93; RP 8. Pursuant to the court order, and prior to the defendant's entry into the visiting room, Sgt. Hunziker secreted a digital audio recorder underneath the desktop of one of the inmate carrels in the visiting room. RP 29. SA Floyd concealed another recording device on his person pursuant to the court order. RP 346-47.

SA Floyd appeared at the jail on February 21, 2009, to meet with the defendant. RP 7. Jail staff informed the defendant that an "out-of-town visitor" had arrived to meet him. RP 8. Jail rules required inmates to list prospective visitors on a "visiting log" as a prerequisite to meeting with a visitor. RP 458. The defendant agreed to list "E. Schmidt" on his visitor's log and he met "E. Schmidt" in the inmate visiting room. RP 7, 459. Sgt. Hunziker watched the meeting on the monitor in the jail control room. RP 7.

The defendant met with SA Floyd for 11 minutes on February 21, 2009. Exhibit 6; RP 462. The defendant discussed with SA Floyd his desire to hire someone to kill Lt. Bartkowski and Turner.

RP 57-58. The defendant and SA Floyd did not reach an agreement that day to kill Lt. Bartkowski or Turner because the defendant could not afford SA Floyd's services. RP 58. SA Floyd told the defendant that he would also accept drugs, in lieu of cash, to murder Turner and/or Bartkowski. RP 58. The defendant requested SA Floyd's mailing address so that he could contact him if he was able to make arrangements to pay for the murders. RP 59. SA Floyd provided the defendant with an ATF post office box number as a means of contact. RP 59. SA Floyd left the jail. RP 59.

Sgt. Hunziker's recording device captured only fragments of the conversation on February 21 due to its placement and background noise in the jail. Exhibit 6; RP 463. SA Floyd's recording device experienced technical failure and did not record at all. RP 352.

Sgt. Hunziker and SA Floyd met with Lt. Bartkowski immediately after the February 21 meeting and they debriefed SA Floyd. RP 438, 465-66. SA Floyd related to Lt. Bartkowski the defendant's threats to kill Lt. Bartkowski. RP 355, 439. Lt. Bartkowski knew the defendant bore him animosity because of Lt. Bartkowski's role in the prior criminal investigation and trial. RP 440. Lt. Bartkowski knew from SA Floyd that the defendant was actively trying to hire a "hit man." RP 440. Lt. Bartkowski took the defendant's threats seriously. RP 439-440.

Lt. Bartkowski feared for his life and for his family's safety. RP 439-440. After being advised of the defendant's threats, Lt. Bartkowski purchased home security equipment for his residence; he purchased additional firearms for protection; he changed his route to and from work; and he wore a bullet-proof vest at times when he normally would not. RP 440-41.

On March 6, 2009, the ATF post office box received a letter signed by both Law and the defendant. RP 59. Following receipt of the letter, SA Floyd told the defendant that he would meet him in the jail on March 26, 2009. RP 61-62. SA Floyd instructed the defendant to bring pen and paper. RP 61-62. Sgt. Hunziker obtained judicial authorization to record the meeting scheduled for March 26, 2009. CP 99-100; RP 11.

SA Floyd arrived at the jail on March 26 wearing a device on his person that could record audio and video as authorized by the court order. RP 72, 358. The name "E. Schmidt" was again on the defendant's visitor's log. RP 466. SA Floyd met with the defendant in the visitor's room for approximately 30 minutes. Exhibit 2; RP 63-64, 467. SA Floyd and the defendant communicated by writing their statements on paper and holding the paper up to the glass separator so the other could read. RP 63-64, 359, 467. SA Floyd informed the defendant that he had located Turner and he asked the defendant, "Are you sure you want him done?" RP 68,

366. The defendant responded in writing, "10-4." RP 68, 366-67. The two discussed payment for the murder and worked out a scheme whereby Law would cook two pounds of methamphetamine after he was released from jail in order to pay the defendant's debt. RP 68-70, 368-380. The defendant in turn would pay Law after the defendant was released from jail. RP 68-70 368-380. The street value of the methamphetamine Law was to provide to SA Floyd was approximately \$40,000. RP 384.

At the conclusion of the March 26 meeting, the defendant asked SA Floyd for some time to think about the deal they had discussed. RP 380. The defendant told SA Floyd he would accept or reject Floyd's terms by "writ[ing] 'yes' or 'no' on a piece of paper and send[ing] it to" the ATF mailbox. RP 71-72, 380. The only question left to be answered following the meeting was whether the defendant wanted "E. Schmidt" to kill Harley Turner in exchange for two pounds of methamphetamine. RP 389.

SA Floyd's recording device captured audio and video footage of his conversation with the defendant on March 26, 2009. Exhibit 2; RP 72. SA Floyd further kept the written notes he used to communicate with the defendant that day. RP 360. Sgt. Hunziker watched the meeting live via the television monitor in the jail control room. RP 467.

On March 30, 2009, the defendant mailed a letter addressed to "Mr. E. Schmidt" to the ATF post office box number. RP 73, 386-88. The defendant's acceptance of SA Floyd's terms was conveyed in a single sentence: "The answer to the question is 'YES.'" RP 73, 389.

Upon receipt of the defendant's letter confirming the deal to kill Turner in exchange for two pounds of methamphetamine, Sgt. Hunziker telephoned Turner at his home in Idaho. RP 390, 468. On April 16, 2009, Sgt. Hunziker and SA Floyd traveled to Idaho and met with Turner. RP 74, 390-91, 469. In order to convince the defendant that SA Floyd had killed Turner, SA Floyd and Sgt. Hunziker staged a fake execution with Turner's cooperation. RP 74, 469. SA Floyd took several photographs with his cell phone to document the staged murder. RP 391, 470. The photographs showed Turner bound with duct tape; Turner on the ground covered in fake blood and brain matter; and Turner partially buried in a shallow grave in the woods. RP 74-75, 391. SA Floyd saved the pictures on his cell phone. RP 392.

SA Floyd returned to the Klickitat County Jail and met with the defendant for the last time on April 23, 2009. RP 75, 392, 470. The two met for about ten minutes. RP 396, 473. Once more, SA Floyd and the defendant communicated by writing on paper and placing the paper against the glass separator for the other to read. RP 76. SA Floyd took

out his cell phone and showed the defendant the pictures of Turner's staged murder. RP 76, 395. The defendant nodded after viewing each photograph. RP 397. SA Floyd told the defendant that Law, who had since been released from jail, had "already taken care of one pound" of the methamphetamine payment and that he was "[w]orking on the second now." RP 399. SA Floyd wrote, "Any more work you want done, let me know. We are square right now so we're good." RP 400. As SA Floyd got up to leave the visiting room, the defendant wrote "THANK YOU" on a piece of paper and held it up against the glass separator for SA Floyd to see. RP 79, 401.

Sgt. Hunziker watched the April 23 meeting on the television monitor in the jail control room. RP 471. Sgt. Hunziker also recorded the Jail's live video feed. Exhibit 13; RP 471. The defendant was captured on video communicating in writing and examining the pictures on SA Floyd's phone. Exhibit 13; RP 402, 479. SA Floyd kept the written notes he used to converse with the defendant on April 23, 2009. RP 397-98.

On May 15, 2009, police searched the defendant's jail cell in an effort to find the defendant's notes. RP 474. The notes were not found in his cell and were never located. RP 474.

Also on May 15, 2009, Sgt. Hunziker interviewed the defendant in the jail. RP 556. Sgt. Hunziker confronted the defendant with the fact

that an "E. Schmidt" was listed on the defendant's jail visitor list. RP 22, 579. Sgt. Hunziker asked the defendant how he knew "E. Schmidt." RP 578. The defendant lied to Sgt. Hunziker and told him that he had known E. Schmidt for "years." RP 578-79. Sgt. Hunziker employed a ruse and told the defendant that Seattle Police arrested Schmidt and recovered photographs of a dead body from him, as well as a letter from the defendant. RP 579. Sgt. Hunziker showed the defendant the letter the defendant wrote to Schmidt that said, "The answer to the question is 'YES'." RP 22, 579-80. Sgt. Hunziker confronted the defendant and asked him what the letter referenced. RP 580. The defendant lied and told Sgt. Hunziker that it referenced a "deal we made a long, long time ago . . . concerning some vehicles." RP 23, 580.

At trial, the defendant testified in his own defense. RP 519. The defendant's version of events differed significantly from the events described by SA Floyd and Sgt. Hunziker. The defendant denied that Law ever told him that Eric Schmidt was a hit man. RP 527-28. The defendant testified that he had "no idea" who Schmidt/SA Floyd was. RP 531. The defendant acknowledged that he understood Eric Schmidt to be someone who "solved problems with violence." RP 560-61.

Defendant testified that he believed he had hired SA Floyd to bring Turner to Washington to testify at his trial, not to kill him. RP 533, 540-

41, 549, 563-65. The defendant explained that he believed SA Floyd's statement, "When I leave here we have a deal. Harley is fucking dead!" meant that SA Floyd would "kidnap" Turner with "pretty heavy violence," but not murder. RP 565, 563-65. The defendant claimed that he understood this to mean a "pretty severe beating" and that SA Floyd would "hurt" Turner. RP 565-66. The defendant testified that he agreed to pay SA Floyd two pounds of methamphetamine to find Turner and bring him to Goldendale. RP 544, 547, 573. The defendant attributed his lack of a reaction to the gruesome photographs at the third meeting to the fact that he couldn't see the pictures SA Floyd showed him on the cell phone's small screen. RP 552.

III. LAW AND ARGUMENT

Washington's Privacy Act provides:

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: ... (b) Private conversation, by any device electronic or otherwise designed to record . . . without first obtaining the consent of all the persons engaged in the conversation."

RCW 9.73.030(1). Conversations recorded in violation of the Privacy Act are not admissible as evidence in a criminal trial. RCW 9.73.050.

However, there are numerous exceptions to the "two-party consent" rule set forth in RCW 9.73.030(1)(b). The trial court properly

admitted evidence of the conversations between SA Floyd and the defendant because (a) the conversations were not private, (b) the conversations fell within the statutory exception for “threats of bodily harm,” (c) the police obtained judicial approval to record the conversations, and (d) the defendant gave implied consent to record the conversations.

A. The trial court properly admitted the testimony and recordings because the conversations were not “private” within the meaning of RCW 9.73.030(1)(b).

The Privacy Act only protects private conversations from being recorded without the consent of all parties to the conversation. RCW 9.73.030(1)(b); *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004). For purposes of the Privacy Act, a “communication is private (1) when parties manifest a subjective intention that it be private, and (2) where that expectation is reasonable.” *Christensen*, 153 Wn.2d at 192-93.

Even if the parties have a subjective intent to keep a communication private, the communication is not “private” if there is no reasonable expectation that the communication will remain private. *State v. Modica*, 136 Wn. App. 434, 448, 149 P.3d 446 (2006). The reasonableness of a party’s expectation of privacy is measured by examining the “duration and subject 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 or her relationship to the consenting party.” *Christensen*, 153 Wn.2d at 193 (citing *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002)).

1. The defendant did not have a reasonable expectation of privacy because the conversations took place in the inmate visiting area of a county jail.

“[I]t is accepted by our society that ‘[l]oss of freedom of choice and privacy are inherent incidents of confinement.’” *Hudson v. Palmer*, 468 U.S. 517, 528, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1983) (quoting *Bell v. Wolfish*, 441 U.S. 520, 537, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)). The elimination of privacy for incarcerated persons stems from the need to monitor inmates in order to prevent crime and violence within the correctional facility. *See Hudson*, 468 U.S. at 523-28 . The presumption of innocence afforded a person detained pending trial does not affect the lessening of privacy rights within a correctional facility:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.... *But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.*

State v. Archie, 148 Wn. App. 198, 203-04, 199 P.3d 1005 (2009) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1997) (citations omitted)) (emphasis added).

Prisoners have no reasonable expectation of privacy in their communications, living spaces, or even their own bodies while incarcerated. *Hudson v. Palmer*, 468 U.S. 517, 523-28, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1983) (inmates have no reasonable expectation of privacy in their cells); *Bell v. Wolfish*, 441 U.S. 520, 555, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (inmates have no reasonable expectation of privacy in their living areas); *State v. Puapuaga*, 164 Wn.2d 515, 523, 192 P.3d 360 (2008) (an arrestee has no reasonable expectation of privacy in personal effects); *State v. Surge*, 160 Wn.2d 65, 71-81, 156 P.3d 208 (2007) (inmates have no expectation of privacy in their identity or DNA); *State v. Archie*, 148 Wn. App. 198, 202-04, 199 P.3d 1005 (2009) (no reasonable expectation of privacy in inmate communications, phone calls, and mail after advisement that such communications are monitored); *State v. Modica*, 164 Wn.2d 83, 186 P.3d 1062 (2008) (no reasonable expectation of privacy in phone calls made over the jail telephone system after advisement that all calls are recorded); *State v. Rainford*, 86 Wn. App. 431, 438, 936 P.2d 1210 (1997) (inmates have a reduced expectation of privacy in bodily functions).

In *State v. Modica*, the defendant was an inmate in the county jail pending trial. *State v. Modica*, 164 Wn.2d 83, 86, 186 P.3d 1062 (2008). The defendant was warned by signs and an automated recording that all inmate phone calls were recorded. *Id.* The defendant conversed with his grandmother on the telephone and the recordings were admitted at trial over the defendant's objection. *Id.* at 87. The Washington Supreme Court affirmed, holding that a conversation held in a jail after both parties are warned that the conversation is subject to recording is not a "private" conversation for purposes of the Privacy Act. *Id.* at 87-90.

Here, the jailhouse location of the defendant's conversations with SA Floyd removed any objectively reasonable expectation of privacy. Inmates in the Klickitat Jail in 2009 were monitored by jail staff, including use of audio and video surveillance systems, in order to prevent crime and violence. Inmates and visitors in the visiting room at the jail could hear each other's conversations. RP 348, 513. Like *Modica*, posted signs advised inmates that communications within the jail were recorded. RP 9-10. Jail staff monitored a live video feed of the activity occurring in the visiting room. RP 459, 462. Sgt. Hunziker watched all three of the defendant's meetings with SA Floyd on the jail's live video feed of the inmate visiting room. RP 7, 459, 467, 471. The defendant's own witness,

Mr. Schilling, testified that the inmates knew that activities within the jail , including the visiting room, were monitored and recorded. RP 513.

The trial court ruled that the jailhouse setting of the conversation eliminated any reasonable expectation of privacy. RP 169. The trial court noted that guards monitored the visiting room and third parties were present. RP 169. Like *Modica, supra*, inmates in the Klickitat County Jail had no reasonable expectation of privacy within the visiting room because they were on notice that all communications were subject to recording. The defendant's conversations with Floyd were not private and were not subject to the general two-party consent rule in RCW 9.73.030(1). The trial court properly admitted the conversations at trial.

2. Defendant did not have a reasonable expectation of privacy during his conversations with SA Floyd because the conversations took place in the presence of third parties.

The presence of third parties nullifies the reasonableness of any expectation of privacy. *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384 (1996). Similarly, voluntarily exposing information to the public eliminates any reasonable expectation of privacy. *State v. Surge*, 160 Wn.2d 65, 72, 156 P.3d 208 (2007).

The defendant's conversations with Floyd occurred in the presence of other inmates, visitors, and jail staff. SA Floyd testified that the

configuration of the inmate visiting area was such that he could hear other visitors talking during each of his visits. RP 348. Inmate Schilling testified that when he received visitors in the inmate visiting room he could hear the other inmates in the room talking to their visitors. RP 513. Schilling further testified that it was common knowledge to the inmates that the jail monitored conversations in the inmate visiting room. RP 513. The video footage of the April 23 meeting shows other inmates in the room with the defendant while he is communicating with SA Floyd.⁴ Exhibit 13. The carrels where the inmates and visitors sit are not “private;” the room is open and there are only small dividers between each carrel, which do not block sound. Exhibit 13. Nor is there anything to prevent an inmate or visitor to stand up and observe notes being shown through the glass window. Exhibit 13.

Further, the Jail corrections staff was effectively a third party present in the inmate visiting room. Posted signs indicated, and the inmates generally knew, that the jail staff monitored conversations by use of audio and video surveillance equipment. RP 9-10, 513. Jail staff could watch all of the conversations that took place between SA Floyd and the

⁴ This was the only meeting where the inmate side of the visiting room was recorded, but fairly represents the conditions for all three meetings between Floyd and the defendant.

defendant in the visiting room, including the written conversations. Indeed, Sgt. Hunziker watched all three meetings via the live video feed.

The defendant argues that the possibility that the authorities might intercept a conversation should not eliminate the reasonableness of his subjective expectation of privacy. App. Br. at 15 (citing *State v. Christensen*, 153 Wn.2d at 192-93, and *State v. Myrick*, 102 Wn.2d 506, 513-14, 688 P.2d 151 (1984)). Defendant mischaracterizes the law. *Myrick* involved police aerial surveillance of private property; *Christensen* involved police interception of a wireless phone call. Both cases held that the fact that there was a possibility that authorities might view private property or intercept a private conversation due to technological development did not eliminate a reasonable expectation of privacy. However, neither case addressed a scenario where the participants to a conversation were actually told beforehand that the conversation was subject to recording.

Here, jail staff actually monitored the inmate visiting room with video surveillance equipment and so advised the inmates. The likelihood that inmate conversations with visitors would be recorded exceeded a bare chance or probability. As far as the inmates knew, it was a certainty that jail staff would record their conversations.

The defendant exposed the contents of his conversations with SA Floyd to third parties by holding the conversations inside the jail, in the presence of others and with full knowledge that the conversations were subject to recording. The defendant had no reasonable expectation that his conversations with SA Floyd would remain private. The trial court properly admitted the defendant's conversations with SA Floyd.

3. The defendant had no reasonable expectation that illicit conversations with a stranger would remain private.

A person communicating with a stranger has no reasonable expectation that the communication will remain private. *State v. Goucher*, 124 Wn.2d 778, 786-87, 881 P.2d 210 (1994). In *Goucher*, the defendant telephoned his drug dealer's house in order to buy cocaine. *Goucher*, 124 Wn.2d at 780-81. The dealer that Goucher was accustomed to talking to did not answer the phone; but a stranger who answered the phone agreed to sell Goucher cocaine. *Id.* at 780-81. Unfortunately for Goucher, the person on the other end of the telephone was a police officer who had answered the phone while serving a search warrant at the drug dealer's home. *Id.* at 780. Goucher arrived at the home and bought cocaine from an undercover police officer, after which he was arrested and charged. *Id.* at 781. Goucher moved to suppress his telephone conversation with the police officer and all subsequent evidence gathered on grounds that the

police violated his reasonable expectation of privacy in his telephone calls. *Id.* The Washington Supreme Court evaluated Goucher's privacy claims under both the Washington Constitution and RCW 9.73. The court concluded that Goucher accepted the risk that the conversation would not remain private by conducting illegal business with a stranger. *Id.* at 786-87. Therefore, Goucher had no reasonable expectation of privacy in the conversation. *Id.* at 787.

Like *Goucher*, "Eric Schmidt" was a complete stranger to the defendant. The defendant admitted at trial that he had "no idea" who SA Floyd was when he met him. RP 531. Like *Goucher*, the defendant chose to discuss illegal business with a stranger. Like *Goucher*, the stranger was an undercover police officer. Like *Goucher*, the defendant assumed the risk that the stranger would expose the contents of the conversations. Like *Goucher*, the defendant had no reasonable expectation of privacy in his illicit conversations with an undercover police officer.

B. The trial court properly admitted evidence of the conversations under RCW 9.73.030(2)(b) because the conversations conveyed threats of bodily harm.

Conversations conveying threats of bodily harm or other unlawful requests are exempt from the statutory requirement that all parties consent to a recording of the conversation:

Notwithstanding subsection (1) of this section, wire communications or conversations ... (b) which convey threats of extortion, blackmail, 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). Recording such conversations requires the consent of only one party. RCW 9.73.030(2)(b). The one-party consent exception for threats of bodily harm “broadly” encompasses all conversations that hint at bodily harm. *State v. Caliguri*, 99 Wn.2d 501, 507-08, 664 P.2d 466 (1983).

In *Caliguri*, the defendant met with an undercover federal agent and conspired to commit murder and arson. At trial, the State introduced recordings of Caliguri speaking with the undercover federal agent. *Caliguri*, 99 Wn.2d at 504. Caliguri was recorded plotting with the undercover agent to burn down a tavern and acknowledging that he knew people would die in the fire. *Id.* at 504. The recordings were admitted at trial even though Caliguri did not consent to the recording and there was no court order authorizing the recording. The trial court ruled that the conversations at issue included “threats of bodily harm” and therefore only the consent of the federal agent was required to record the conversations pursuant to RCW 9.73.030(2)(b). *Id.* On appeal, Caliguri argued that the trial court erred by admitting those parts of the conversations that did not include explicit threats to commit violence. *Caliguri*, 99 Wn.2d at 507.

The Supreme Court rejected the defendant's argument that only those portions of the conversation relating explicit acts of violence should have been admitted:

this argument construes the word "convey" too narrowly. That word is broadly defined as "to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance."

Id. at 507-08 (quoting Webster's Third New International Dictionary 499 (1971)). The Court held that "[s]ince the conspiracy and underlying request were to commit murder, a crime involving great bodily harm, any conversation 'convey[ing]' the request is squarely within the scope of RCW 9.73.030(2)(b)." *Caliguri*, 99 Wn.2d at 507.

The defendant herein argues that the threats of bodily harm were not clearly recorded by the recording equipment, and therefore the trial court should have excluded all evidence of the conversations. App. Br. at 15-17. The fact that portions of the recordings are inaudible, or do not capture all of the written notes, is irrelevant. The statute provides that the "conversation" may be recorded if the "conversation" includes threats of bodily harm. RCW 9.73.030(2)(b). There is no statutory requirement that the ensuing recording audibly captures the threat of bodily harm; nor does the defendant provide authority for such a rule. SA Floyd testified to the entirety of all three conversations, much of which was corroborated by his

notes and the audio and video recordings. SA Floyd's testimony, in addition to the audio and visual evidence, was more than sufficient for the court to find that "threats of bodily harm" and/or an "unlawful request" were part of the conversations.

For example, the defendant conveyed his desire to "have a couple of people killed" during his first meeting with SA Floyd. RP 57. During the second conversation, defendant responded "10-4" when Floyd asked him if he wanted Turner "done." RP 68. SA Floyd further told the defendant that Turner was "dead" if they made the agreement. RP 71. At their final meeting, the defendant wrote "THANK YOU" after Floyd showed him the pictures of Turner's mock execution. RP 79. The defendant and SA Floyd discussed the payment for Turner's murder at the third meeting. RP 79. SA Floyd's testimony was ample evidence for the court to conclude that the conversations involved "threats of bodily harm" or "unlawful requests."

Defendant's own trial testimony further nullifies his claim on appeal. The defendant admitted at trial that SA Floyd wrote, "When I leave here, we have a deal. Harley is fucking dead!" RP 562. Defendant conceded at trial that he understood this to mean that, at the very least, SA Floyd's interaction with Turner would involve "some pretty heavy violence." RP 562. The defendant later testified that he understood the

word “dead” to mean that SA Floyd would “hurt” Turner or administer “a pretty severe beating.” RP 565-66. Even if the defendant’s implausible testimony that he understood “kill” or “dead” to mean “heavy violence,” “severe beating,” or “hurt” is accepted at face value, the defendant’s own testimony acknowledged that the conversations involved a request for Schmidt to inflict bodily harm on Turner.

SA Floyd’s consent⁵ to record allowed Floyd and Sgt. Hunziker to record the conversations without the defendant’s consent because the conversations “convey[ed]” unlawful requests and threats of bodily harm under RCW 9.73.030(2)(b). Like *Caliguri*, the conversations captured SA Floyd and the defendant working out the logistical details for accomplishing the bodily harm, such as methods of payment for the act; and further provided context for the conversations about the threats of bodily harm. The trial court explicitly cited *Caliguri* in finding that the murder-for-hire plot fell squarely within the exception. RP 167-68.

The trial court’s ruling was correct. Each conversation served to “impart or communicate either directly by clear statement or indirectly by suggestion” or “implication” that the defendant wanted Turner and Lt. Bartkowski dead, satisfying the broad meaning of “convey” adopted by

⁵ SA Floyd obviously consented to the recordings. SA Floyd signed the wire intercept applications, he wore a recording device, and he was acutely aware that the conversations were being recorded.

the Washington Supreme Court in *Caliguri*. The conversations were properly admitted at trial.

C. The trial court properly admitted evidence of the conversations because SA Floyd and Sgt. Hunziker had court authorization to record the conversations pursuant to RCW 9.73.090(2).

Law enforcement officers may record private conversation without the consent of all parties if the officers receive judicial authorization to do so:

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 nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.

RCW 9.73.090(2). Additionally, the statutory scheme requires 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." RCW 9.73.130(3)(f).

Here, the defendant argues that Sgt. Hunziker's intercept applications were "legally insufficient" because Sgt. Hunziker did not adequately explain why other investigatory methods were inadequate. App. Br. at 17-18. This is the sole basis for the defendant's challenge to the sufficiency of the wire intercept orders. *Id.*

The police are not required to exhaust all possible investigatory techniques in order to satisfy the requirements of RCW 9.73.130(3)(f). *State v. Cisneros*, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992). The requirement is satisfied if police seriously consider other alternatives and inform the court why they deem the unused techniques "inadequate." *Cisneros*, 63 Wn. App. at 729.

Appellate review of an intercept order is highly deferential. *Cisneros* at 729. The reviewing court's "role is not to review the application's sufficiency *de novo*, but 'to decide if the facts set forth in the application were minimally adequate to support the determination that was made.'" *Id.* (quoting *State v. Knight*, 54 Wn. App. 143, 150-51, 772 P.2d 1042 (1989)). An issuing judge has "considerable discretion to determine whether the statutory safeguards have been satisfied." *Cisneros* at 728-29. The fact that both the issuing judge and a trial judge have considered the supporting information sufficient is "significant" in the determination that

the statutory requirements were satisfied. *State v. Platz*, 33 Wn. App. 345, 351, 655 P.2d 710 (1982).

The requirements of RCW 9.73.130 are satisfied when the police state the need to record the defendant's exact words because of the nature of the crime(s) under investigation. *State v. Knight*, 54 Wn. App. 143, 151, 772 P.2d 1042 (1989). Intercept order applications stating the need to record the defendant's exact words generally satisfy the requirements of RCW 9.73.130(f). *Platz*, 33 Wn. App. at 348-51.

In *Platz*, the police sought an intercept order to record conversations with a man who bragged to an undercover officer that he had killed two people. *Platz*, 33 Wn. App. at 346. Police tried other investigatory means, but noted the need to record Platz's exact words in order to avoid forcing the jury to decide the trial based solely on determining whether Platz or the officer possessed more credibility. *Id.* at 350. The court held that such a declaration satisfied the requirements of RCW 9.73.130. *Id.* at 350-51.

Similarly, in *Knight* the police sought an intercept order to record the defendant selling stolen property. *Knight*, 54 Wn. App. at 145. The police declared their need to record the defendant's exact words in order to prove the defendant knew he was selling stolen property. *Knight*, 54 Wn. App. at 151. The court noted that the issuing judge could "take note of the

crime alleged and the nature of the investigation,” including “proof difficulties in the crime alleged” when determining whether to authorize an intercept order. *Knight*, 54 Wn. App. at 151 (citing *United States v. Vento*, 533 F.2d 838, 850 (3d Cir. 1978) and *United States v. Santarpio*, 560 F.2d 448, 452 (1st Cir. 1977)). Considering the type of crime, the court held that the need to record the defendant’s exact words satisfied the requirement that other investigatory techniques would not work. *Knight*, 54 Wn. App. at 151.

Defendant erroneously asserts that all crimes require proof of some sort of verbal exchange and that authorizing intercept orders on this ground renders RCW 9.73.130(3)(f) superfluous. To the contrary, proving most crimes does not require proof of any verbal conduct at all. Murder, robbery, assault, forcible rape, etc., only require the State to prove the use of unlawful violence. Crimes such as trespass or vandalism only require the State to prove malicious damage to, or unlawful use of, property. Possession of contraband such as drugs, child pornography, or stolen property requires proof that the defendant knowingly possessed the contraband, which can be done without verbal statements from the defendant.

By contrast, the nature of the crimes under investigation in the present case required the exact words that the defendant would use during

his conversations with SA Floyd. All three crimes under investigation, and subsequently charged, involved unlawful verbal conduct: an agreement (conspiracy), a solicitation, and a threat (felony harassment). The words the defendant used were critical to prove each crime. Using an inmate to do police work was both impractical, unsafe, and unlikely to succeed. Testimony from an inmate informant alone would very likely be insufficient to prove the crimes under investigation beyond a reasonable doubt due to inherent credibility issues. Wiring a jail inmate or the defendant's cell was impractical and would put the life of the inmate in danger.

The defendant acknowledges that there was no other way for the police to collect evidence of the defendant's exact words and intent:

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.

App. Br. at 15. The defendant is correct: there was no other reliable, safe way to collect evidence of the crimes the defendant was suspected of committing and/or plotting. Sgt. Hunziker's first wire intercept application explained to the court why other investigative methods were "unlikely to succeed if tried or . . . too dangerous to employ":

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.

CP 87-91 (emphasis in the original). Sgt. Hunziker repeated this language in the second wire intercept application. CP 94-98. Two judges, the issuing judge and the trial court, determined that the application satisfied the requirements of RCW 9.73.130.

This Court's deferential review should not disturb the determinations by the judges below. The defendant was under investigation for crimes where the words he spoke critically mattered. Like *Platz* and *Knight*, the police needed to record the defendant's exact words in order to prove the crimes under investigation and avoid later sufficiency and credibility issues. The Court should "take note of the crime alleged" and hold that Sgt. Hunziker's applications stating the need to record the defendant's exact words satisfied RCW 9.73.130(f).

////

////

D. The trial court properly admitted evidence of the defendant's conversations with SA Floyd because the defendant consented to the recording of the conversations.

A trial court's ruling on a motion to suppress evidence may be affirmed for any reason supported by the trial record, even if the trial court did not arrive at the conclusion reached by the appellate court. *State v. Avery*, 103 Wn. App. 527, 537, 13 P.3d 226 (2000). Here, the trial court did not rule that the defendant gave implied consent to have his conversations with SA Floyd recorded. But the record supports this conclusion.

The Privacy Act does not forbid the recording of a conversation when all parties consent to the recording. RCW 9.73.030(1)(b). A party gives implied consent to record a conversation if the party participates in the conversation knowing beforehand that the conversation will be recorded. *State v. Townsend*, 147 Wn.2d 666, 675, 57 P.3d 255 (2002); *State v. Modica*, 136 Wn. App. at 449, *aff'd*, 164 Wn.2d 83 (2008); *State v. Archie*, 148 Wn. App. at 202-03.

In *Modica*, Division One of the Court of Appeals held that an inmate gave implied consent for the jail to record his conversations with his grandmother by having the conversation after being advised that it would be recorded. *Modica*, 136 Wn. App. at 450. In *Modica*, the county jail's telephone system recorded outgoing calls from inmates. *Id.* at 438-

39. Modica called his grandmother numerous times from the jail and expressed his desire that his grandmother convince his wife not to testify against him at his trial for domestic violence. *Id.* The State used the recordings to convict Modica of witness tampering. *Id.* at 439. Modica argued on appeal that the conversations were recorded in violation of the Privacy Act. *Id.* at 440. The court noted that the record supported the conclusion that Modica and his grandmother knew that the authorities would record their conversations. *Id.* at 439. The court held that Modica and his grandmother gave implied consent for the authorities to record their conversations by holding the conversations despite being warned the conversation would be recorded. *Modica*, 136 Wn. App. at 449-50. The Washington Supreme Court affirmed on grounds that the conversations were not “private.” The Court declined to decide the “implied consent” issue, but noted “that such facts may also be relevant to the issue of implied consent.” *State v. Modica*, 164 Wn.2d 83, 89 n.1, 186 P.3d 1062 (2008).

Here, like *Modica*, the defendant conversed with SA Floyd knowing that the Jail was monitoring and recording all communications inside the jail. The defendant was incarcerated at the jail for approximately five months and he knew the jail visiting procedures before SA Floyd began visiting him in February 2009. Posted signs declared that

all conversations were subject to audio and video recording. RP 9-10. Defense witness Schilling testified that it was “common knowledge” among inmates that all parts of the jail were monitored and recorded. RP 513. The defendant conversed with SA Floyd about killing Turner and Lt. Bartkowski despite knowing that the authorities could record the conversation. Like *Modica*, the defendant gave implied consent to record his conversations with SA Floyd by holding the conversation in the jail after being advised that it would be recorded. Like *Modica*, the defendant gambled that the authorities would not discover the illegality within the recorded conversations. Like *Modica*, the defendant lost his gamble. The trial court properly admitted evidence of the defendant’s conversations with SA Floyd.

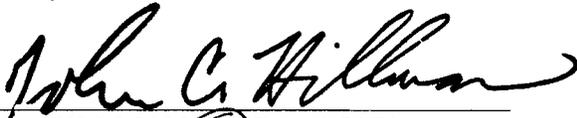
IV. CONCLUSION

This Court should affirm the trial court’s admission of the defendant’s three conversations with SA Floyd. The defendant had no reasonable expectation of privacy in illicit conversations he had with a stranger in the middle of the Klickitat County Jail. The conversations were exempt from the two-party consent rule because the conversations involved “threats of bodily harm.” The police properly obtained court orders authorizing the recording of the defendant’s conversations with SA Floyd. Finally, the defendant gave implied consent for the recording

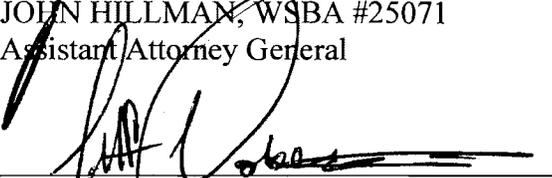
of the conversations. The defendant's illicit conversations with SA Floyd were properly admitted at trial. The judgment and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of July, 2011.

ROBERT M. MCKENNA
Attorney General



JOHN HILLMAN, WSBA #25071
Assistant Attorney General



JEFF ROBERSON
Law Clerk

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUL 21 2011

NO. 41123-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

DONALD RAY BABCOCK,

Petitioner.

DECLARATION
SERVICE

FILED
COURT OF APPEALS
DIVISION II
11 JUL 25 AM 9:35
STATE OF WASHINGTON
DEPUTY

VICTORIA L. ROBBEN declares as follows:

On Thursday, July 21, 2011, I deposited into the United States

Mail, first-class postage prepaid and addressed as follows:

LISA TABBUT
P.O. BOX 1396
LONGVIEW, WA 98632-7822

Copies of the following documents:

- 1) Brief of Respondent
- 2) Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 21st day of July, 2011.

Victoria L. Robben
VICTORIA L. ROBBEN

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 21 PM 4:05