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No. 35884-4-III

(Spokane County Superior Court No. 16-1-03914-7)

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

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STATE OF WASHINGTON

Respondent,

v.

JOSEPH DEAN CLAYTON

Appellant.

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APPELLANT'S OPENING BRIEF

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DEREK REID, WSBA #34186  
Roberts | Freebourn, PLLC  
1325 W. 1<sup>st</sup> Ave., Ste. 303  
Spokane, Washington 99201  
(509) 381-5262  
Appellate Counsel for Petitioner  
JOSEPH D. CLAYTON

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## I. INTRODUCTION

Mr. Clayton was at his home in Spokane County on October 7, 2016. Law enforcement responded to Mr. Clayton's home at the request of Robin Clayton, Mr. Clayton's brother who had concerns about the safety of Sandra Grape, Mr. Clayton's mother. Additionally, when law enforcement responded they were aware that a gun had been fired in the home. When law enforcement arrived, four of the officers activated their body cameras and entered the Clayton home. None of the four law enforcement officers advised anyone when they entered the home that they had activated their body cameras. After some point, law enforcement found 2 purported firearms in the dresser belonging to Mr. Clayton's mother, Sandra Grape.

During the investigation by law enforcement probable cause was developed to arrest Mr. Clayton for Assault in the 2<sup>nd</sup> Degree and Unlawful Possession of a firearm. The time frame for when the alleged gunshot hole through the wall occurred varied from it occurring the day before to months before. While the matter was pending, Mr. Clayton through his counsel, sought a Bill of Particulars. The State attempted to alleviate the need to respond to the Bill of Particulars by seeking an amendment of the information to add two additional counts of Unlawful Possession of a Firearm, and a stipulation that the State could not establish that any of the firearms were the firearm that had been used to shoot a hole in the wall. Subsequent to the amendment of the information, Mr. Clayton through his counsel moved to Sever the offenses. During the Pretrial and the trial, the court denied the motion.

Mr. Clayton testified on his own behalf at trial and testified that he had momentary possession of a firearm when he took it from someone who was in the home intoxicated and had displayed the weapon in a manner Mr. Clayton thought necessitated his intervening at which point

the firearm discharged. Mr. Clayton sought a ‘necessity’ jury instruction but was denied by the trial court.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Clayton’s request for Severance of the charges.
2. The trial court erred when it failed to exclude the evidence obtained during the surreptitious recording of Mr. Clayton in his home.
3. The trial court erred by denying Mr. Clayton’s request for a ‘Necessity’ instruction for the jury.

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

On October 7, 2016 law enforcement, including Officer Brown-Bieber responded to 2112 N. Astor in Spokane, Washington. RP Sanchez, Vol. 1, 327-28. Law enforcement’s response was to a reported landlord/tenant dispute and the allegation of a firearm being used inside the residence. RP Sanchez, Vol. 1, 327-28. Responding with Officer Brown-Bieber were Officers Guzzo, Howard, and Henderson. RP Sanchez, Vol. 1, 328. Four of the officers were wearing body cameras, including Officer Brown Bieber and Officer Howard. RP Cochran, Vol 1, 4. None of the officers wearing body cameras advised anyone, including Mr. Clayton, that they were audio and visually recording everything in the house. CP 203. Upon entering the home, Officer Brown-Bieber made contact with Mr. Clayton and discovered a hole in the couch and wall consistent with a gunshot. RP Sanchez, Vol. 1, 328. While in the home Officer Brown-Bieber observed Mr. Clayton’s mother, Sandra Grape, remove firearms from a dresser that belonged to her. RP Sanchez, Vol. 1, 330. Mr. Clayton asserted the firearm was a replica. RP Sanchez, Vol. 1, 330. When Mr.

Clayton was testifying about the events of October 7, 2016, he recalled specifically telling law enforcement there were no firearms in the house. RP Sanchez, Vol. 3, 488.

While investigating the gun shot hole in the wall law enforcement spoke with Barb Lawley who was residing at 2112 Astor on October 7, 2017. RP Sanchez, Vol. 2, 342. Ms. Lawley testified that she believed one of the firearms belonged to Mr. Clayton. RP Sanchez, Vol. 2, 343. Ms. Lawley further described a situation, about a month prior, where she and Mr. Clayton were arguing he pointed a firearm at her and shot the wall beside her. RP Sanchez, Vol. 2, 344. Ms. Lawley was not able to recall what the argument was about. RP Sanchez, Vol. 2, 344. Ms. Lawley was not able to describe the firearm. RP Sanchez, Vol. 2, 344. Finally, Ms. Lawley was presented with the firearms that the State had entered as evidence and definitively stated those firearms were NOT the firearm that was used to shoot the wall beside here. RP Sanchez, Vol. 2, 344.

Mr. Clayton testified on his own behalf and admitted that he had paid for the guns on behalf of his mother. RP Sanchez, Vol. 3, 475. Mr. Clayton testified about the presence of a gunshot hole in the wall of the home. RP Sanchez, Vol. 3, 480. Mr. Clayton explained that the gun shot had occurred around June or July of 2016. RP Sanchez, Vol. 3, 481. Mr. Clayton had been out drinking and playing pool when he ran into an acquaintance 'Jeff.' RP Sanchez, Vol. 3, 481. In June of 2016 Jeff and Mr. Clayton returned to the 2112 Astor address because Jeff thought he may know Barb Lawley who was also at the address. RP Sanchez, Vol. 3, 481. When Mr. Clayton arrived home he and Barb got into an argument, and while that argument was happening Mr. Clayton heard a gunshot. RP Sanchez, Vol. 3, 482. Mr. Clayton investigated the gun shot and discovered Jeff, who Mr. Clayton described as intoxicated, holding the firearm. RP Sanchez, Vol. 3, 482. Mr. Clayton took the firearm from Jeff and escorted him to the front door where, after Jeff was on the

porch, Mr. Clayton returned the firearm to Jeff and told him to never return to his home again. RP Sanchez, Vol. 3, 483.

Mr. Clayton was taken into custody and was charged by information with Assault in the Second Degree armed with a firearm and Unlawful Possession of a Firearm in the first degree. CP 7<sup>1</sup> Subsequent to Motions to Amend and for Joinder Mr. Clayton entered pleas of not guilty to two additional counts of Unlawful Possession of a Firearm. RP Sanchez Vol. 1, 102.<sup>2</sup> Mr. Clayton objected to the amendment of the information and joinder. CP 319-20. Mr. Clayton, through counsel raised the separate issue of Severance at the February 16, 2017 hearing, and at trial November 14, 2017. RP Gibson, Vol 1., and RP Sanchez, Vol. 1.

Prior to trial, Mr. Clayton moved the court to suppress any evidence obtained in violation of The Privacy Act, *RCW* 9.73.090 when law enforcement entered the home at 2112 Astor and activated their body cameras without advising anyone in the home, including Mr. Clayton. CP 82-105. After hearing the argument of counsel, the court entered findings of fact and conclusions of law. CP 232-34. The court engaged in an analysis of whether Mr. Clayton was under arrest, and when law enforcement was required to advise that the contact was being audio and visually recorded. CP 200-03. Ultimately, the court concluded that all the recordings that occurred after Mr. Clayton was formally arrested would be suppressed. CP 234.

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<sup>1</sup> The Clerks Papers in this case is two volumes, volume 1 is pages 1-435, and volume 2 is pages 436-868 and both will be referenced as CP.

<sup>2</sup> The Verbatim Report of Proceedings (RP) consist of FOUR separate Court Reporters and will be identified by the reporter (Heather GIPSON, Terri COCHRAN, Crystal HICKS, Mark, SANCHEZ), the volume number, and the page.

- February 9 and 16, 2017 RP Gipson, Vol. 1, 1-29.
- March 2, 2017, RP Gibson, Vol. 2, 1-11
- March 2 (Motion to Suppress) and April 7(Presentment), 2017 RP Cochran (1-53)
- August 17 and November 14, 2017 RP Sanchez, Vol. 1-2, 1-381
- November 15, 2017 RP Hicks, Vol. 3, 382-450
- November 16-17, 2017 and February 2, 2018, RP Sanchez, Vol. 4, 451-621.

Prior to instructing the jury, Mr. Clayton, through his counsel requested a ‘Necessity’ instruction pursuant to WPIC 18.02. CP 767-68. On November 20, 2017 the jury returned a verdict of not-guilty to count 1, Assault in the Second Degree. CP 708. The jury convicted Mr. Clayton of counts 2, 3, and 4. CP 709, 710, 711. Mr. Clayton appeals.

#### IV. LAW AND ARGUMENT

##### 1. **The Trial court erred when it failed to fully address, and eventually denied, Mr. Clayton’s motion to Sever the charges.**

Severance is required where it is necessary to promote a fair determination of guilt or innocence. *CrR* 4.3(a) authorizes joinder of multiple counts of the same or similar character. However, “joinder must not be utilized in such a way as to prejudice a defendant.” *State v. Harris*, 36 Wn.App. 746, 749-50, 677 P.2d 202 (1984) (citing *State v. Smith*, 74 Wn.2d 744, 466 P.2d 571 (1968), vacated in part, 408 U.S. 934 (1972)). Offenses properly joined under *CrR* 4.3(a), however, may be severed if “the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.” *CrR* 4.4(b). The failure of the trial court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 P.2d 154 (1990) (footnotes omitted).

Washington courts have recognized that joinder of offenses is “inherently prejudicial.” *State v. Ramirez*, 46 Wn.App. 223, 226, 730 P.2d 98 (1986) (citing *Smith*). The principle underlying severance is “that the defendant receive a fair trial untainted by undue prejudice.” *State v. Bryant*, 89 Wn.App. 857, 865, 950 P.2d 1004 (1998). Even where joinder is legally permissible, the trial court should not join offenses for prosecution in a single trial where joinder prejudices the accused. *Id.* Prejudice will result if a single trial invites the jury to cumulate evidence to find guilt or to otherwise infer criminal disposition. *State v. Watkins*, 53 Wn.App. 264, 268, 766 P.2d 484

(1989) (*citing Smith*, 74 Wn.2d at 754-55). “A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.” *Harris*, 36 Wn.App. at 750.

Here, the record is somewhat ambiguous in relation to the issue of Severance. The original information was filed October 12, 2016. CP 7. On January 31, 2017 Mr. Clayton through counsel filed a Memorandum in Support of Bill of Particulars. CP 36. The premise of Mr. Clayton’s request for a Bill of Particulars was the lack of information relating to the firearm that was used in the alleged assault. CP 37. In response, the State filed a proposed amended information in order to ‘clarify these matters.’ CP 49. The State filed a memorandum in support of the amendment or in the alternative for joinder. CP 54. Mr. Clayton, through counsel, again objected to the amendment and opposed joinder. CP. 58. Absent from any of these pleadings is the issue of Severance.

The trial court considered the issue of the Bill of Particulars and the amendment of the information over the course of two hearings; February 9 and 16, 2017. RP Gipson. Mr. Clayton again objected to the Amended Information and Joinder. RP Gipson 3. Much of the dispute in relation to the Amendment and Joinder issue was the inability of the State to identify what firearm was used in the alleged assault. RP Gipson 10-11. In the February 16, 2017 hearing the State seems to concede that these alleged events occurred on separate dates; the alleged assault in September of 2016 and the Unlawful Possession of Firearms 2016. RP Gipson 14. Despite the issue of Severance not being briefed, the trial court does seem to allude to Severance stating,

“Would the Court separate them just because you have different defenses on both of the them? It’s one trial. The Court would favor the going to trial and not severing them based on same witnesses, same officers that responded.” RP Gipson 18. The trial court goes further in its finding, ‘The Court does find it is under judicial economy, same witnesses, same evidence that will be

coming in, and so the court is not going to separate them. RP Gipson 18-19. An order reflecting the trial court's ruling was entered September 22, 2017. CP 319-20 Here, the trial court seemed to grant the motion to amend, grant joinder and deny severance all at once.

Subsequent to the February 16 hearing, at a presentment hearing, the court again denied the motion. RP Gipson 'Presentment' 6. Defense Counsel sought severance prior to trial, supplying the court with supplemental authority. CP 277. This request was denied by the trial court. RP Sanchez Vol. 1, 94, 470.

**a. The trial court abused its discretion by granting the motion to amend, joinder, and denying severance because the grounds for the ruling is based on untenable grounds.**

A trial court abuses its discretion when it exercises that discretion on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). When assessing whether undue prejudice results from joining separate offenses, a court must consider several factors: (1) the strength of the prosecution's evidence with respect to each charge, (2) the clarity of the defenses regarding each count; (3) the court's instructions to the jury to consider the evidence separately; and (4) the cross-admissibility of the offenses had they not been tried together. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). Finally, any "residual prejudice" must be weighed against the need for judicial economy. *Id.* at 63 (citing *State v. Kalakosky*, 121 Wn.2d 525, 539, 852 P.2d 1064 (1993)).

**b. The trial court failed to consider that the relative strengths of the charges favored severance.**

Where the evidence is not uniformly strong, severance may be necessary to ensure a fair trial. *State v. Hernandez*, 58 Wn.App. 793, 800, 794 P.2d 1327 (1990) (overruled on other grounds by *State v. Kjorsvik*, 117 Wn.2d 93, 99, 812 P.2d 86 (1991)). In *Hernandez*, the defendant was charged with three robberies of three different businesses on three different dates. *Id.* at 795. Each

charge was based on the testimony of eyewitnesses whose identifications varied as to reliability. *Id.* at 800. The evidence on one count was quite strong, mitigating any prejudice caused by joinder, while the evidence on the other two counts “was somewhat weak,” creating a likelihood of “significant” prejudice. *Id.* 7 The *Hernandez* Court held, “it is apparent to us that where the prosecution tries a weak case or cases, together with a relatively strong one, a jury is likely to be influenced in its determination of guilt or innocence in the weak cases by evidence in the strong case.” *Id.* at 801. The *Hernandez* Court therefore affirmed the conviction on the stronger count but reversed on the two weaker counts. *Id.* In contrast, the trial court in *Kalakosky* denied the defendant’s motion to sever five counts of rape. *Kalakosky*, 121 Wn.2d at 529. The Supreme Court found the State’s case strong for each of the five counts, as significant corroborating evidence supported each conviction. *Id.* at 538-39. The Court concluded, Given that the crimes were not particularly difficult to “compartmentalize”, that the State’s evidence on each count was strong, and that the trial court instructed the jury to consider the crimes separately, we conclude that the trial court was well within its broad discretion in finding that the potential prejudice did not outweigh the concern for judicial economy. *Id.* at 539.

In this case, the trial court states ‘The fact that there’s some holes in their case, you can point that out to the jury that the description of firearms from the one on September 7 versus October 7. Those are big holes in the State’s case that the jury may hear, hear from witnesses.’ RP Gipson 18. This analysis seems opposite to what Severance requires. In fact, the Court concludes that the very fact the evidence in one incident is weak is a strength for the Mr. Clayton at trial. While the trial court does give this factor a passing analysis, the analysis is inaccurate.

**c. The “clarity of defenses” weighed in favor of severance.**

“The likelihood that joinder will cause a jury to be confused as to the accused's defenses is very small where the defense is identical on each charge.” *State v. Russell*, 125 Wn.2d at 64, quoting *Hernandez*, 58 Wn.App. at 799; see also *State v. Sutherby*, 165 Wn.2d 870, 885, 204 P.3d 916 (2009) (defense counsel ineffective for failing to move to sever possession of child pornography from child rape and molestation charges, where defense to pornography charge was unwitting possession and defense to rape and molestation charges was mistake or accident). For example, in both *Russell* and *Hernandez*, for example, the defense to both charges was general denial. 125 Wn.2d at 65; 58 Wn.App. at 799. Finding *Russell*'s defenses to both counts identical, the Supreme Court quoted the trial court's observation: “It isn't as though there will be a self-defense argument on one and a different type of defense on another one, or that there will be an admission of one or denial of another.” *Russell*, 125 Wn.2d at 65.

While the court instructed the jury to consider each charge separately, that instruction did not mitigate the prejudice. In the instant case, the jury was instructed: A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. CP 687. Mr. Clayton acknowledges this instruction has been approved of by appellate courts in the context of severability determinations. *Bythrow*, 114 Wn.2d 723; *State v. Cotten*, 75 Wn.App. 669, 688, 879 P.2d 971 (1994), rev. denied, 126 Wn.2d 1004 (1995). This factor is not dispositive, however. See e.g. *Harris*, 36 Wn.App. at 750 (“despite an instruction to consider the counts separately, there was extreme danger that the defendants would be prejudiced”).

**d. The charged conduct with regard to each individual count was not cross-admissible, supporting severance of the counts.**

Cross-admissibility considerations involve evaluating whether the evidence of various offenses would be admissible to prove the other charges if each offense was tried separately. *Ramirez*, 46 Wn.App. at 226. “In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence.” *Sutherby*, 165 Wn.2d at 887 (internal citations omitted). In *Ramirez*, the Court of Appeals considered a trial court’s decision to join two counts of indecent liberties. 46 Wn.App. at 224. The State argued the evidence would be cross-admissible to prove intent and absence of mistake or accident. *Id.* at 227. The Court was not persuaded, recognizing the defendant denied touching either complainant and such proof would be relevant only if he admitted touching but denied it was for the purpose of sexual gratification or argued it was a mistake or accident. *Id.* at 227-28. *Cf. Sutherby*, 165 Wn.2d at 885-87 (although defendant did argue mistake or accident in defense to child rape and molestation counts, Supreme Court found evidence of possession of child pornography charge would still not be admissible in sexual assault trial; such evidence would not show absence of mistake but only propensity for molesting children and would therefore be inadmissible).

The *Ramirez* Court held that because the evidence would not have been cross-admissible in separate trials, “the jury may well have cumulated the evidence of the crimes charged and found guilt, when if the evidence had been considered separately, it may not have so found.” *Ramirez* 46 Wn.App. at 226, 228. In *Harris*, the Court rejected the State’s argument that the evidence would be cross-admissible to prove a common scheme or plan, pointing out that “the State has fallen into the common error of equating facts and circumstances which are merely similar in nature with the more narrow common scheme or plan.” *Harris*, 36 Wn.App. at 751, citing *State v. Saltarelli*, 98

Wn.2d 358, 655 P.2d 697 (1982). Instead, the *Harris* Court held the evidence could “[a]t 13 most... show only only a propensity” prohibited by *ER* 404(b). *Harris*, 36 Wn.App. at 751.

Because the evidence was not cross-admissible, the joint trial of these separate offenses created an improper impression of a “general propensity” toward criminal acts and specifically toward violation of this particular court order, supporting severance of the trials. *Ramirez*, 46 Wn.App. at 227. In addition, the court here abused its discretion by refusing to consider this factor in the pre-trial ruling on the severance motion, concluding, “‘The fact that there’s some holes in their case, you can point that out to the jury that the description of firearms from the one on September 7 versus October 7. Those are big holes in the State’s case that the jury may hear, hear from witnesses.’ RP Gipson 18. This is incorrect. The correct inquiry is whether, if the charges were severed, the evidence would be cross-admissible. *Russell*, 125 Wn.2d at 63.

The trial court here did not consider the incidents standing alone and what evidence of the first incident would be used to prove the second incident. Defense counsel here raised multiple times the concern that the State could not identify the firearm used to commit the Second Degree Assault. This was finally resolved when the state stipulated that it could not specifically point to the firearm used to commit the Second Degree Assault. RP Gipson ‘Presentment’ 2. The court was required to answer that hypothetical question; because it failed to do so its decision was based on untenable grounds, amounting to a manifest abuse of discretion.

**e. The prejudice created exceeds concerns for judicial economy and reversal is required.**

The prejudice engendered by joining Mr. Clayton’s charges far exceeded any concerns for judicial economy. Interests of judicial economy will be balanced against the accused’s interest in receiving a fair trial free of improper taint from unrelated charges. *State v. Russell*, 125 Wn.2d 24,

68, 882 P.2d 747 (1994). The primary concern underlying review of a severance decision is whether evidence of one crime taints the jury's considerations of another charge. *State v. Bythrow*, 114 Wn.2d at 721. A trial court's failure to grant severance requires reversal when the danger of prejudice from the evidence of the various counts deprives the accused of a fair trial. *State v. Harris*, 36 Wn.App. at 752. In *Ramirez*, even though the jury acquitted on one count, the Court did not find the erroneous joinder harmless, but reversed the remaining conviction and remanded for a new trial. *Ramirez*, 46 Wn.App. at 228.

Here, because of the circumstances of the two allegations, it was highly likely the jury cumulated the evidence against Mr. Clayton to convict him of both counts, resulting in undue prejudice. The State's inability to identify the weapon left the jury with the impression that despite the fact they cannot produce the weapon that was allegedly used to shoot a hole in the wall, Mr. Clayton had guns available to him. There was minimal evidence that Mr. Clayton was in possession of a weapon other than his testimony relating to transitory or momentary possession. Without the gunshot incident, the separate allegations of Unlawful Possession of a Firearm (what would be count 3 and 4) become very thin. The 'replica' firearms were discovered in the dresser of Mr. Clayton's mother and there was no indication that Mr. Clayton ever used or accessed the 'replica' firearms. RP Hicks Vol. 3, 476. It is hard to see how the State proceeds on Counts 3 and 4, if the court required the State to try these counts separately. The trial court abused its discretion in denying the motions to sever, and reversal is required.

**2. The Trial court erred in by failing to exclude all evidence obtained after law enforcement violated The Privacy Act.**

"Washington's privacy act broadly protects individuals' privacy rights." *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). Indeed, "[i]t is one of the most restrictive electronic

surveillance laws ever promulgated.” Id.

The Privacy Act makes it unlawful for any individual, partnership, corporation, [or] association . . . to intercept, or record any . . . (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)(b)*. The Privacy Act, Chapter 9.73 *RCW*, is “one of the most restrictive in the nation.” *State v. Christensen*, 153 Wn.2d 186, 198, 102 P.3d 789 (2004); accord *State v. O’Neill*, 103 Wn.2d 853, 878, 700 P.2d 711 (1985) (Dore, J., concurring in part, dissenting part) Excepted from this prohibition are conversations that “convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands.” *RCW 9.73.030(2)(b)*. “Any information obtained in violation of *RCW 9.73.030* . . . **shall be inadmissible** in any...criminal case in all courts of general... jurisdiction in this state” unless the crime jeopardizes national security. *RCW 9.73.050*. (Emphasis added)

The Privacy Act does not define the term “private.” The Washington Supreme Court has adopted a dictionary definition of the term “private,” which, for the purposes of the privacy act means, “““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.””” *Kardoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992) (quoting *State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1979) (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY (1969))). To determine whether a conversation is private, courts “consider the subjective intention of the parties and may also consider other factors that bear on the reasonableness of the participants’ expectations, such as the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties.” *Roden*, 179 Wn.2d at 900. Thus,

courts have 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.”” *State v. Christensen*, 153 Wn.2d at 192-93 (quoting Webster’s Third New International Dictionary (1969)). Where, as here, the facts are not in dispute, the determination of whether a communication is private is a question of law. *State v. Christensen*, 153 Wn.2d at 192; *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002). A communication is private when 1) the parties to the communication manifest a subjective intention that it be private, and 2) that expectation is reasonable. *State v. Christensen*, 153 Wn.2d at 193. The first criterion focuses on whether the parties subjectively intended the information conveyed in the conversation to remain confidential. *State v. Faford*, 128 Wn.2d 476, 484, 910 P.2d 447 (1996). In analyzing the second criterion, courts look to such factors as the duration and subject. *Id.*

In *Lewis*, the court considered whether conversations recorded by police during traffic stops without the drivers’ consent violated the privacy act. *Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 452-57, 139 P.3d 1078 (2006). The court rejected the drivers’ claims under *RCW 9.73.030* because it determined that citizens’ conversations with officers during traffic stops were not private. *Id.* at 460. Nonetheless, the court concluded that the officers violated *RCW 9.73.090(1)*, which unequivocally requires law enforcement officers to advise persons they are being recorded. *Id.* at 465-66. In analyzing the statutes, the court stated, “if a police officer accidentally recorded a truly private conversation during a traffic stop, *RCW 9.73.030* would protect that private conversation.” *Id.* at 465. This statement reveals our Supreme Court’s clear belief that *RCW 9.73.030* makes even accidental or inadvertent recordings unlawful.

What the court here failed to address was the fact that no one was aware, or consented, to

the recording by law enforcement officers. In the findings of fact and conclusions of law the court parsed the ruling into two parts before formal arrest, and after formal arrest. The court suppressed the use of the recordings after formal arrest. This ruling is fashioned more like a *Miranda* violation, but this diminishes the broad application of the The Privacy Act in all cases. The trial court noted in its letter to counsel that there were ‘I counted at least six civilians in the home and a dog.’ CP 200. While the argument focuses on when Mr. Clayton was formally arrested no one in the home was aware they were being surreptitiously recorded by law enforcement. If there is not a violation of The Privacy Act related to Mr. Clayton individually, how is there not a violation of the Privacy Act when law enforcement enters a home and audio and visually recording everything for an extended period of time, but doesn’t tell anyone? Defense counsel at trial here states the problem created, “...a strange statutory dichotomy where a person who is being recorded during a traffic stop must be informed of the recording, but someone being recorded in their home somehow has less of a privacy interest.”

Washington courts consider four prongs of analysis to determine whether a violation of the privacy act has occurred: “There must have been (1) a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of *all parties* to the private communication.” *Roden*, 179 Wn.2d at 899 (citing *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004)). In light of these factors, the record before this court reveals a violation of the privacy act necessitating reversal.

Here, the recording of almost every conversation in the home that day, without consent, violated *RCW* 9.73.030(1). This violation rendered the recording inadmissible under *RCW* 9.73.050. The trial court erred in concluding otherwise. *RCW* 9.73.030(1) unambiguously states that it is unlawful to record a private conversation unless all parties consent to the recording. “If

[statutory] language is unambiguous, [courts] give effect to that language and that language alone because [courts] presume that the legislature says what it means and means what it says.” *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). This court should give effect to the unambiguous language of *RCW 9.73.030(1)* by holding that the recording of the conversation without consent was unlawful. The trial court ignored the plain language of *RCW 9.73.030(1)* by focusing on the fact of when the recording was made and Mr. Clayton’s status as under arrest or not.

The trial court erred in grounding its admissibility determination on the time when Mr. Clayton was under formal arrest rather than on *RCW 9.73.030(1)*’s plain text. Under the statute, when the subject of an investigation is under arrest is not the critical question. *RCW 9.73.030(1)*’s focus is on the unlawfulness of a nonconsensual recording, not on the intention of the person or entity who records, or when the subject of an investigation is arrested. Moreover, the trial court here did not discuss or distinguish the location of a recording from any of the other cases. *Lewis* deals with a traffic stop presumably in a public setting. No case deals with law enforcement entering a home and surreptitiously recording, audio and visually, virtually everything the camera can see. *RCW 9.73.030(1)* strictly makes any nonconsensual recording of a private conversation unlawful, regardless of the intent of the person who first receives or hears the recorded communication. It is hard to believe that when The Privacy Act was enacted the drafters envisioned a situation where FOUR law enforcement officers would be able to enter the home of a citizen turn on an audio and video recording device and not tell anyone in the home, including a suspect that they were being recorded. This court should reject the trial court’s misconstruction of *RCW 9.73.030*.

When a trial court errs in admitting evidence, reversal is required where, within reasonable

probabilities, the admission of the evidence materially affected the outcome of trial. *State v. Ashurst*, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). In this case, it is reasonably probable the admission of the recording affected the jury's verdict. The failure to suppress evidence obtained in violation of the Privacy Act "is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004). Here, the evidence obtained should have been excluded and a failure to exclude prejudiced Mr. Clayton to the extent that reversal is required.

**3. The trial court erred when it denied Mr. Clayton request for a 'Necessity' instruction despite there being a legal and factual basis to give the instruction.**

Appellate courts review a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. Ponce*, 166 Wn. App. 409,412, 269 P.3d 408 (2012) (citing to *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007)); *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 101 2 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and when read as a whole, they properly inform the jury of the applicable law. *State v. Clausinq*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Here Mr. Clayton proposed a necessity instruction. CP 768.

Necessity" is a common law defense. *State v Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995); 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 63 (2d ed. pocket part 1998) (WPIC). "Necessity" is available "when circumstances cause the [defendant] to take unlawful action in order to avoid a greater injury." *State v. Jeffrey*, 77 Wn.App. at 224. The

affirmative defense of necessity is available to defend against a charge of unlawful possession of a firearm in the first degree. *State v. Stockton*, 91 Wn.App. 35, 44, 955 P.2d 805 (1998); WPIC 18.02. For the “necessity” defense to be available, the defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. *State v. Jeffrey*, 77 Wn.App. at 225; WPIC 18.02. The defendant must prove the defense by a preponderance of the evidence. *State v. Jeffrey*, 77 Wn.App. 5 at 225; WPIC 18.02.

To prevail on a necessity defense, a defendant charged with unlawful possession of a firearm must demonstrate by a preponderance of the evidence that: (1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *State v. Jeffrey*, 77 Wn. App. At 225. A defendant who establishes the necessity defense is relieved of culpability for the crime committed because social policy dictates that result. *State v. Diana*, 24 Wn.App. 908, 913-14, 604 P.2d 1312 (1979). The necessity defense relieves a defendant of legal liability “when the physical forces of nature or the pressure of circumstances [have caused] the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.” *Diana*, 24 Wn.App. at 913-14.

Here, the court denied Mr. Clayton’s request for a ‘necessity’ instruction. RP Hicks Vol. 3, 521-22. The court agreed that Mr. Clayton met the 1<sup>st</sup> factor described in *Jeffrey* but could not see that the 2<sup>nd</sup> and 3<sup>rd</sup> factors were satisfied. The court noted in relation to the second factor, ‘the defendant recklessly placed himself in that situation, and it is quite possible he by inviting this individual, he knew nothing about, home to his residence.’ RP Hicks Vol. 3, 522. Additionally, in relation to the third factor, the court noted, “Under the facts he testified to, based upon what he

saw, I do believe that he potentially could have taken alternative actions, such as calling the police to get a gentleman who fired a gun out of his home.” RP Hicks Vol. 3, 522.

Mr. Clayton met all of the criteria set forth in *State v. Jeffrey*, and the trial court should have instructed the jury on ‘Necessity.’ First, the individual Mr. Clayton identified was intoxicated and brandished a firearm. RP Sanchez Vol. 2, 482-83. Second, Mr. Clayton did not recklessly place himself in a situation where he would have to engage in criminal conduct, he testified that he wanted to remove the firearm and the drunk person from his home; RP Sanchez Vol. 2, 483. Third, Mr. Clayton had no alternative but to grab the gun to keep from being shot. RP Sanchez Vol. 2, 483. It is difficult to understand how any sober individual would allow an intoxicated person to remain in their home and wait for the police to arrive. Fourth, there was a direct causal connection between grabbing the gun and the threatened harm. *State v. Jeffrey*, 77 Wn. App. at 225. In *Stockton* the Court held that the trial court properly gave a necessity instruction “where the evidence showed that he [Stockton] grabbed an assailant's gun while being beaten, pointed it at his attackers, and ran away. *State v. Stockton*, 91 Wn.App. at 43-45 (citing, *State v. Parker*, 127 Wn.App. 352, 355, 110 P.3d 1152 (2005)).

Here, while the trial court believed that Mr. Clayton may have put himself in this situation and potentially had alternative legal means to deal with the situation. The analysis of the trial court is flawed because it assesses qualitatively the evidence presented to the court, not whether Mr. Clayton by a preponderance of the evidence established the elements sufficient to give the ‘Necessity’ instruction. The trial courts analysis does not view the evidence in a light most favorable to Mr. Clayton. A defendant is entitled to present jury instructions regarding his or her theory of the case, so long as there is some evidentiary support. *State v. Fisher*, 185 Wn.2d 836, 848-49, 374 P.3d 1185 (2016). Here, the court viewed the evidence in the light of what was

possible or even what the court thought Mr. Clayton should have done. This prejudiced Mr. Clayton. Viewing evidence in a light most favorable to Mr. Clayton, there was sufficient evidence presented to instruct the jury on necessity. This error requires reversal.

V. **CONCLUSION**

The trial court erred when denied the motion to sever and made a ruling on untenable grounds. The trial court erred when it failed to suppress all of the evidence obtained in violation of the ‘The Privacy Act.’ The trial court erred when it failed to instruct the jury on ‘Necessity,’ despite Mr. Clayton proving by a preponderance of the evidence that the necessity instruction was appropriate. Mr. Clayton respectfully requests the court reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of March 2019.

ROBERTS | FREEBOURN, PLLC

s/ Derek Reid  
Derek Reid, WSBA #34186  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury of the laws of the state of Washington that on the 11<sup>th</sup> day of March 2019, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

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Spokane, WA 99260-2043	Email	<input type="checkbox"/>
Email: <a href="mailto:bobrien@spokanecounty.org">bobrien@spokanecounty.org</a>		
Joseph Clayton	COA Notification	<input type="checkbox"/>
P.O. Box 2019	U.S. Mail	<input checked="" type="checkbox"/>
Airway Heights, WA 99001	Facsimile	<input type="checkbox"/>
	Email	<input type="checkbox"/>

DATED this 11th day of March 2019 at Spokane, Washington.

s/ Derek Reid  
Derek Reid, WSBA #34186

# ROBERTS FREEBOURN

March 11, 2019 - 2:12 PM

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