

FILED  
Court of Appeals  
Division III  
State of Washington  
4/30/2019 1:25 PM

#360466

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

---

STATE OF WASHINGTON,

Respondent,

v.

JAMES GEARHARD,

Appellant / Cross-Appellant

---

APPEAL FROM THE SUPERIOR COURT  
OF KLICKITAT COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00050-1

---

BRIEF OF RESPONDENT/CROSS-APPELLANT

---

DAVID QUESNEL  
PROSECUTING ATTORNEY

Klickitat County Prosecuting Attorney  
205 S. Columbus Avenue, MS-CH-18  
Goldendale, Washington 98620  
(509) 773 – 5838

**TABLE OF CONTENTS**

A. APPELLANT/CROSS-RESPONDENT’S  
ASSIGNMENTS OF ERROR .....1

B. RESPONDENT/CROSS-APPELLANT’S  
ASSIGNMENTS OF ERROR .....1

C. ISSUES PRESENTED. .....1

D. STATEMENT OF THE CASE.....1

E. ARGUMENT.....3

1. The court did not err when it denied the Defendant’s request to suppress the “pretext phone call”.....3

2. The superior court did not err in admitting testimony about the entirety of the recorded conversation, as opposed to just the portions that fall within the exception.....8

3. The trial court erred in granting the pretrial motion to dismiss the charge of Child Molestation in the Third Degree.....9

F. CONCLUSION.....11

## TABLE OF AUTHORITIES

### United States Supreme Court Decisions

*Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408,  
17 L.Ed.2d 374 (1966) .....3

*Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381,  
10 L.Ed.2d 462 (1963).....4

### Washington Cases

*Fleming v. City of Seattle*, 45 Wn.2d 477, 275 P.2d 904 (1954) .....10

*Himango v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259,  
680 P.2d 432 (1984) .....10

*Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91,  
829 P.2d 746 (1992) .....12

*Restaurant Development Inc. v. Cananwill*, 150 Wn.2d 674,  
80 P.3d 598 (2003) .....7

*Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005).....12

*State v. Ahluwalia*, 143 Wn.2d 527, 22 P.3d 1254 (2001).....10

*State v. Babcock*, 168 Wn. App. 598, 279 P.3d 890, 895 (2012).....5

*State v. Caliguri*. 99 Wn.2d 501, 664 P.2d 466 (1983) .....5, 6

*State v. Connors*, 59 Wn.2d 879, 371 P.2d 541 (1962).....9

*State v. Contreras*, 124 Wn.2d 741, 880 P.2d 1000 (1994)..... 7

*State v. Corliss*, 123 Wn.2d 656, 870 P.2d 317 (1994).....3

*State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003).....7

*State v. Evans*, 177 Wn.2d 186, 298 P.3d 724 (2013).....7

*State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010).....7

<i>State v. Jackson</i> , 82 Wn.App. 594, 918 P.2d 945 (1996).....	12
<i>State v. James-Buhl</i> , 190 Wn.2d 470, 415 P.3d 234 (2018).....	7
<i>State v. Knapstad</i> , 108 Wn.2d 346, 729 P.2d 48 (1986).....	13
<i>State v. Malone</i> , 106 Wn.2d 607, 724 P.2d 364 (1986).....	7
<i>State v. Montano</i> , 169 Wn.2d 872, 239 P.3d 360 (2010).....	13
<i>State v. Newcomb</i> , 160 Wn.App. 184, 246 P.3d 1286 (2011).....	13
<i>State v. Nightingale</i> , 62479-2-1 (2009) (COA Div. 1).....	10
<i>State v. Ritts</i> , 94 Wn. App. 784, 973 P.2d 493 (1999). ....	7
<i>State v. Sunich</i> , 76 Wn. App. 202, 884 P.2d 1 (1994).....	6
<i>State v. Williams</i> , 94 Wn.2d 531, 617 P.2d 1012 (1980).....	5, 6
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	7
<i>State v. Yancey (James Austin)</i> , No. 95992-7 (Sup. Ct. Feb. 14, 2019) ....	7
<u>Washington Statutes</u>	
RCW 4.44.340 .....	10
RCW 9.72.120.....	4, 8
RCW 9.73.030.....	2-5, 8, 9
<u>Other Authorities</u>	
CrR 8.3.....	13
15 Lewis H. Orland & Karl B. Tegland, <i>Washington Practice, Judgments</i> (4th ed.1986).....	12
RAP 2.5.....	11
Webster’s New International Dictionary (3d ed. 1966).....	5

**A. APPELLANT/CROSS-RESPONDENT'S  
ASSIGNMENTS OF ERROR**

1. The court did not err by denying the Defendant's motion to suppress all evidence associated with the pretext phone call conducted by the investigating officer.
2. The court appropriately admitted the victim's testimony about his phone call with the Defendant.

**B. RESPONDENT/CROSS-APPELLANT'S  
ASSIGNMENTS OF ERROR**

1. The court erred by granting the Defendant's Motion for Directed Verdict where a scrivener's error in the jury instruction created a physical impossibility, resulting in the charge of Child Molestation in the Third Degree being dismissed.

**C. ISSUES PRESENTED**

1. Did the court err by denying the Defendant's Motion to Suppress all evidence associated with the "pretext phone call" conducted by the investigating officer?
2. Did the court err by admitting the victim's testimony about his phone conversation with the Defendant?
3. Did the court err by granting the Defendant's Motion for Directed Verdict where a scrivener's error in the jury instruction created a physical impossibility, resulting in the charge of Child Molestation in the Third Degree being dismissed?

**D. STATEMENT OF THE CASE**

Sarah Henry called the Klickitat County Dispatch on May 5, 2016, to report that her son, JAC, had been molested by the Defendant, James Gearhard. CP 30. Sergeant Erik Anderson of the Klickitat County Sheriff's Office began investigating the case. CP 30.

After an interview with JAC, Sergeant Anderson obtained JAC's agreement to conduct a pretext call to the Defendant. CP 30. The pretext call was made on May 11, 2016, whereby a recording device was placed on a table between Sergeant Anderson and JAC, intending to record JAC's side of the conversation. CP 31. During the call Sergeant Anderson listened to the conversation and made notes. CP 31. While on the phone the Defendant told JAC not to tell the police about the incident because it could ruin his life and for JAC to "do this favor for him." CP 31. Because of the placement of the recording device, some of the Defendant's statements on the recording are audible, and some come across as muffled inaudible noise – only JAC's communications can be understood fully.

The Defendant was charged with Third Degree Child Molestation and Indecent Liberties based on the molestation alleged to have occurred on July 3, 2015. CP 1. The Defendant was charged with Tampering with a Witness stemming from the May 11, 2016 phone call. CP 2.

Prior to trial the Defendant moved to suppress the "pretext phone call" based on the allegation that it violated RCW 9.73, Washington State's Privacy Act. CP 6-49. The Court denied the Defendant's Motion and entered Findings of Fact and Conclusions of Law accordingly. CP 73-75.

Trial in this matter took place October 4-6, 2017. CP 107. The actual tape of the pre-text phone call was never played to the jury or admitted into evidence. JAC did testify about the content of the conversation. The jury

returned a verdict on October 9, 2017 of not guilty as to the Indecent Liberties and unable to reach a verdict as to the Child Molestation and Tampering charges. RP 10-9-17, p 5-6. A mistrial was declared as to the two charges for which the jury was unable to reach a verdict. RP 10-9-17, p 5-6.

On October 16, 2017, after the mistrial had been declared the Defendant moved for a directed verdict based upon an error in the “to convict” jury instruction for the Child Molestation charge. CP 51. The jury instruction at issue, Instruction 8, stated that the State needed to prove that “the defendant was at least 48 months younger than the defendant.” CP 52. The Defendant asserted that a directed verdict of not guilty was appropriate as to the Child Molestation charge based on this error. CP 55.

The matter was briefed by both the Defendant and the State. CP 51-65. On December 8, 2017, the court issued its ruling granting Defendant’s Motion. CP 66-68. The State moved for reconsideration, the issue was briefed, and the court ultimately affirmed its position. CP 69-73; 75-76.

#### **E. ARGUMENT**

##### **1. THE COURT DID NOT ERR WHEN IT DENIED TO SUPPRESS THE “PRETEXT PHONE CALL.”**

The risk that one to whom we impart private information will disclose it is a risk we “necessarily assume whenever we speak.” *Hoffa v. United States*, 385 U.S. 293, 303, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)

(quoting *Lopez v. United States*, 373 U.S. 427, 465, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963)). *See also, e.g., State v. Corliss*, 123 Wn.2d 656, 870 P.2d 317 (1994) (holding petitioner's state constitutional privacy rights were not violated when an informant consented to allow police officers to overhear his conversations with petitioner).

The Defendant maintains that the trial court erred by allowing the “pretext phone call” to be used at trial. But the trial court correctly allowed the call to be admitted under RCW 9.73.030(2). During the “pretext phone call” the Defendant “requested that JAC not tell the police of the incident, that he (the Defendant) was scared and this could ruin his life and for JAC to “do this favor for him. ” CP 74.

The Defendant further argues the admission of the “pretext phone call” was in error in that the communications made by the Defendant were not similar to the threat of extortion, blackmail, or bodily harm where the Findings of Fact and Conclusions of Law found the statements “were clearly an ‘unlawful request or demand’” when the Defendant requested JAC “not report the incident to the police which would be the crime of Tampering with a Witness as violation of RCW 9.72.120,” thereby deeming the statements admissible under RCW 9.72.030(2). CP 75.

RCW 9.73.030(2) provides, in part:

Notwithstanding subsection (1) ... 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.

Emphasis added.

There is no requirement that RCW 9.73.030(2)(b) apply only to emergency situations. *State v. Williams*, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980) (“[t]he language of the provision applies equally to emergency and nonemergency situations and the rules of statutory construction do not suggest a contrary interpretation”).

“Convey” means “to impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.” *State v. Caliguri*, 99 Wn.2d 501, 504-508, 664 P.2d 466 (1983) (“The word ‘convey’ within the exception is broadly defined...[t]o ‘convey’ is to ‘impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance’”) (citing Webster’s New International Dictionary, at 499 (3d ed. 1966)).

The trial court found, in denying the Defendant’s motion to dismiss the Tampering with a Witness charge, that the substance of the Defendant’s statements were “unlawful requests or demands” and admissible pursuant to 9.73.030(2). CP 73-75.

However a review of the current case law with regards to the phrase “unlawful requests or demands” shows that courts have held it applies to “communications that convey matters similar to ‘extortion, blackmail, [or]

bodily harm.” *State v. Babcock*, 168 Wn. App. 598, 608, 279 P.3d 890, 895 (2012), citing *State v. Williams*, 94 Wn.2d at 548 (exempting “communications or conversations ‘which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands,’ of a similar nature”); *Caliguri*, 99 Wn.2d at 507 (“unlawful requests or demands” taken to mean requests or demands of a nature similar to threats of extortion, blackmail, or bodily harm).

Limiting the “unlawful requests or demands” only to acts similar to threats of extortion, blackmail or bodily harm thwarts the plain meaning of the statute and is a misapplication of basic rules of statutory construction. Had the legislature intended to limit the exception to apply to unlawful acts similar to extortion, blackmail or bodily harm, it would have said so. It could also have, or would have, limited the exception to only acts of extortion, blackmail or bodily harm. The legislature could even have provided for “other similar” unlawful requests or demands. Instead, the legislature included the phrase “or other unlawful requests or demands” enlarging the exception rather than limiting it.

Inserting a requirement that the exception to the Privacy Act only applies to “similar” and not “other” unlawful requests or demands appears to violate basic statutory construction. Unambiguous statutory language is not subject to interpretation – the meaning is derived entirely from the subject matter and context. *State v. Sunich*, 76 Wn. App. 202, 206, 884 P.2d

1 (1994). Courts may not read unwritten language into a statute. *State v. Malone*, 106 Wn.2d 607, 610, 724 P.2d 364 (1986). Statutes are to be construed so as to avoid rendering any word or provision meaningless. *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994); *State v. Ritts*, 94 Wn. App. 784, 973 P.2d 493 (1999). Courts will not “add words where the legislature has chosen not to include them.” *State v. James-Buhl*, 190 Wn.2d 470, 474, 415 P.3d 234 (2018) (quoting *Restaurant Development Inc. v. Cananwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)); *State v. Yancey (James Austin)*, No. 95992-7 (Sup. Ct. Feb. 14, 2019). Courts will, however, “construe statutes such that all of the language is given effect.” *Id.* (quoting *Cananwill*, 150 Wn.2d at 682). “When Courts interpret a criminal statute, they should give it a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 111, 63 P.3d 792 (2003) (citing *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). Courts should determine the legislative intent of a statute solely from the plain language by considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) (citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)).

The language of the statute is clear and unambiguous and the trial court applied the clear and unambiguous language of the statute to the facts of the case when it found in the June 5, 2017 Findings of Fact and

Conclusions of Law that:

6. RCW 9.73.030 (2) provides that notwithstanding RCW 9.73.030 (1), wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, or (c) which occur anonymously or repeatedly or at an extremely inconvenient hour, or (d) which relate to communications by a hostage holder or barricaded person as defined in RCW 70.85.100, whether or not conversation ensues, may be recorded with the consent of one party to the conversation.”

7. The defendants statements in this conversation were clearly an "unlawful request or demand" when he requested JAC not report the incident to the police which would be the crime of Tampering with a Witness a violation of RCW 9.72.120.

CP 73-75.

The plain language of the statute, when considered with the oral conclusion by the trial court, does not support the Defendant’s position. In this case the unlawful request or demand was that JAC not report the incident of molestation to the police; the crime of Tampering with a Witness. The court did not err when it denied to suppress the pretext phone call.

**2. THE SUPERIOR COURT DID NOT ERR IN ADMITTING TESTIMONY ABOUT THE ENTIRETY OF THE RECORDED CONVERSATION, AS OPPOSED TO JUST THE PORTIONS THAT FALL WITHIN THE EXCEPTION.**

The Defendant argues that if this Court believes that the Tampering with a Witness charge at issue falls within the exception of RCW 9.73.030(2)(b), as it should, the Superior Court still erred by admitting all evidence about the conversation as opposed to the limited portion that falls

within the exception. This argument is without merit and without authority. RCW 9.73.020(2)(b) only address how a recording is obtained. Once the exception is found, presumably the rules of evidence would still apply. Since the trial testimony described a conversation between the Defendant and the witness it would be admissible under ER 801. Moreover, the Defendant failed to object to the testimony during the trial.

**3. THE TRIAL COURT ERRED IN GRANTING THE PRETRIAL MOTION TO DISMISS THE CHARGE OF CHILD MOLESTATION IN THE THIRD DEGREE.**

Nearly a week after trial the Defendant moved for directed verdict as to the charge of Child Molestation in the Third Degree on the basis of the error in the jury instruction which created a physical impossibility that could not be overcome. CP 101. The trial court granted the motion on the basis that “the court is unable to...sustain a finding of other than not guilty to the crime of Child Molestation in the Third Degree...” CP 118.

The granting of a directed verdict as to the charge of Child Molestation in the Third Degree was improper where the jury had been discharged and a mistrial declared. RP 10-9-17, p 5-6. After the jury was discharged there was no verdict as to the count at issue, and therefore there could be no ruling on it.

“[I]t is universally recognized that a jury which...cannot arrive at a verdict, may be discharged and the defendant tried again.” *State v. Connors*, 59 Wn.2d 879, 883, 371 P.2d 541 (1962). When a mistrial is declared and

the jury discharged, there has be “no final adjudication on the charge” and the individual can be retried. *State v. Ahluwalia*, 143 Wn.2d 527, 541, 22 P.3d 1254 (2001).

RCW 4.44.340 provides that:

Effect of discharge of jury. In all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial or after the cause is submitted to them, the action shall thereafter be for trial anew.

At the time of the Court ruling there had not been any appealable issues as they related to the remaining counts which were set for retrial. Rather, the case was back on the trial calendar set for a new trial with a new jury. In other words, the case was set for a trial anew, with a new jury and presumably new instructions which would correct an obvious scrivener’s error.

As stated in RCW 4.44.340, the trial is “anew” and therefore the instructions in the first trial are not necessarily the instructions required to be presented in the next trial. It has always been the practice of trial courts to introduce new jury instructions during a new trial, as though the original trial had never occurred. *See generally Fleming v. City of Seattle*, 45 Wn.2d 477, 480, 275 P.2d 904 (1954) (“but the trial court granted a new trial because of errors in the instructions”); *Himango v. Prime Time Broadcasting, Inc.* 37 Wn. App. 259, 261, 680 P.2d 432 (1984) (“but the verdict was set aside by the judge because of an error in the jury

instructions”); *State v. Nightingale*, 62479-2-I (2009) (COA Div. 1) (“because the State added an additional harassment charge after the mistrial.... When discussing the jury instructions for the second trial...”). At the new trial, the jury instruction error, an obvious scrivener’s error requiring the State to prove an impossibility, can be corrected.

The Defendant’s claim for relief rests upon the “Law of the Case Doctrine.” The application of “law of the case” doctrine in this matter was improper – it is an appellate review standard. The correct remedy for the error complained of in the jury instruction, found after a mistrial, is to have a new jury trial with new correct instructions.

The doctrine of the “law of the case” which the trial court relied on in its decision to dismiss Count 1 of the information derives from both RAP 2.5(c)(2) and common law. This multifaceted doctrine means different things in different circumstances and is often confused with other closely related doctrines, including collateral estoppel, res judicata, and stare decisis. In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. *Roberson v.*

*Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The law of the case doctrine generally “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand’ “or to “the principle that an appellate court will generally not make a redetermination of the rules of law which it has announced in a prior determination in the same case.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (quoting 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice, Judgments* § 380, at 55 (4th ed.1986) (footnote omitted)).

The cases the Defendant has cited all involve a challenge to the sufficiency of the evidence after a verdict has been reached by a jury. Not mentioned in the Defendant’s arguments is that the jury was given a correct instruction on the law in Instruction 7 and in the Court’s Advance Oral instruction. The Information also sets out the correct elements of the Child Molestation in the Third Degree charge against the Defendant. In the case at hand there had been no verdict in the two counts and the trial Court had already declared a mistrial. In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State’s case in chief, (c) at the end of all the evidence, (d) after the verdict, and (e) on appeal.” *State v. Jackson*, 82 Wn. App. 594, 607-08, 918 P.2d 945 (1996). None of these situations existed at this time the trial court dismissed the charge.

Even if treated as a *Knapstad* motion, the ruling of the court was incorrect. *State v. Knapstad*, 108 Wn.2d 346, 729 P.2d 48 (1986). A *Knapstad* motion allows a defendant to challenge the State's ability to prove all of the elements of the crime and move to dismiss a charge. *State v. Montano*, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). The trial court has inherent power to dismiss a charge when the undisputed facts are insufficient to support a finding of guilt on the charged crime. *Id.* The trial court must decide "whether the facts which the State relies upon, as a matter of law, establish a prima facie case of guilt." *Id.* (quoting *Knapstad*, 107 Wn.2d at 356-57). "The procedure to be followed for *Knapstad* motions is delineated by CrR 8.3(c)." *State v. Newcomb*, 160 Wn. App. 184, 188 n.1, 246 P.3d 1286 (2011). CrR 8.3(c) provides for a fact based analysis of the sufficiency of the evidence pre-trial.

In the present case, there was no objection to the sufficiency of the evidence made pre-trial or after the State had rested. Rather the Court applied a law of the case analysis to a faulty to-convict instruction after a mistrial had been declared as to that count. The sufficiency of the evidence was never at issue except tangentially as it related to the impossibility of proof caused by the faulty instruction. The information charging the Defendant and the jury instruction defining Child Molestation in the Third Degree, Instruction 7, correctly set out the appropriate elements of the crime. It was only the incorrect to-convict instruction, instruction 8, which

provided the basis of the Defendant's motion and fueled the court's analysis.

**F. CONCLUSION**

For the forgoing reasons the State respectfully requests this Court deny the Defendant's requests and reinstate the charge of Child Molestation in the Third Degree.



DAVID M. WALL  
W.S.B.A. No. 16463  
Chief Deputy Prosecuting Attorney

**KLICKITAT COUNTY PROSECUTOR'S OFFICE**

**April 30, 2019 - 1:25 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36046-6  
**Appellate Court Case Title:** State of Washington v. James Patton Gearhard  
**Superior Court Case Number:** 16-1-00050-1

**The following documents have been uploaded:**

- 360466\_Briefs\_20190430132318D3672195\_4476.pdf  
This File Contains:  
Briefs - Respondents/Cross Appellants  
*The Original File Name was 20190430Respondents Brief.pdf*

**A copy of the uploaded files will be sent to:**

- davidq@klickitatcounty.org
- davidw@klickitatcounty.org
- gillilandlawfirm@hotmail.com
- paapeals@klickitatcounty.org
- richard.gilliland@hallandgilliland.com

**Comments:**

---

Sender Name: Rebecca Sells - Email: rebeccas@klickitatcounty.org  
Address:  
205 S COLUMBUS AVE RM 106  
GOLDENDALE, WA, 98620-9054  
Phone: 509-773-5838

**Note: The Filing Id is 20190430132318D3672195**