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Court of Appeals
Division III
State of Washington
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NO. 36230-2-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JASON LEE BORSETH, aka FISHEL,

Defendant/Appellant.

REPLY BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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RULES AND REGULATIONS

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ARGUMENT

The State's brief urges the court to rely upon RAP 2.5 (a) which states, in part:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) ..., (2) ..., and (3) manifest error affecting a constitutional right. ...

As with all rules, there are exceptions. The appellate courts have determined that the language of RAP 2.5 (a) is discretionary as opposed to mandatory. *See: Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

Additionally, an appellate court may review a decision on the basis of issues not raised or previously argued. However, courts usually decline to do so. *See: Powers v. Hastings*, 93 Wn.2d 709, 712-13, 612 P.2d 371 (1980).

In Mr. Borseth's case the State argues that he has failed to establish that he was prejudiced by a manifest error involving a constitutional issue. If an individual is denied due process of law, the error is manifest. He/she has not received a fair trial. Manifest error in a criminal trial resulting in a conviction and incarceration is *per se* prejudicial.

Mr. Borseth raised the issue and appropriately argued it in his initial brief.

The State's reliance upon *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996); *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002) and *State v. Racus*, 7 Wn. App. 2d 287, 433 P.3d 830 (2019) point out the somewhat murky implications of recording e-mails, text messages, and telephone calls without prior authorization.

The more recent cases of *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014) and *State v. Roden*, 179 Wn.2d 893, 321 P.3d 1183 (2014) help to clarify Mr. Borseth's position. The *Kipp* and *Roden* decisions recognize that Washington's Privacy Act provides more protection than either the state or federal constitutions. Text messages and emails are granted full protection as afforded by the Privacy Act.

The State's reliance upon the *Clark* decision is misplaced. As the *Clark* Court noted at 231-32:

We emphasize that our ruling is limited to these 16 conversations where the defendants approached a stranger for brief, routine conversations on the street about drug sales. ... [T]here are many commercial and/or illegal transactions that may involve private conversations. These conversations may involve relationships and transactions wholly unlike the anonymous and spontaneous street-level transactions here. We also make no suggestion in this opinion that law enforcement officials should electronically intercept or record *private* conversations without complying with the requirements in the Privacy Act. ...

The Privacy Act, (RCW 9.73), is designed to protect private conversations from governmental intrusion. . . . We are unprepared to rule that the Legislature intended to provide privacy protection to street-level illegal narcotics sellers under these marketplace circumstances.

In addition, the *Clark* court noted that there were passerby on the street(s) who could overhear the conversations and that there were third parties involved with some of the conversations.

The State claims an implied waiver of the Privacy Act protections occurs when the officer who is impersonating a fictitious person shares a defendant's conversation with another officer who is portraying the fictitious person's daughter. The argument is disingenuous.

The conversation alluded to was a private conversation between Mr. Borseth and the officers portraying the mother and the daughter. The conversation was shared because the mother wanted the daughter to be aware of her potential involvement.

The fact that the mother conveyed information provided by Mr. Borseth to the daughter does not indicate that his expectations of a private conversation were impliedly waived. Neither does his separate conversation with the daughter.

The State fails to fully explicate what was involved in the *Townsend* case. Both *Townsend* and *Racus* are distinguishable.

In the *Townsend* case a software program known as ICQ was involved. The Court noted at 670-71: “ICQ is an internet discussion software program that allows users to communicate ‘across the Internet to chat freely almost as if you were talking on the phone or typing on the keyboard.’”

ICQ software appears to be similar to what is more commonly known as a chatroom. If a chatroom was involved in Mr. Borseth’s case he would not have an argument. Chatrooms are indicative of any number of people having access to the particular discussion being conducted. The *Townsend* Court went on to find that:

ICQ technology does not require that messages be recorded for later use. Rather, it functions with both communicators on-line at the same time. In other words, each party talks in "real time" by sending their message on to the computer monitor of the other party who may respond with an answering message. Necessarily, the computer message is saved long enough to allow the person to whom the communication is addressed to answer. Whether the ICQ communication is saved for a longer period of time depends on the computer software used by the recipient.

State v. Townsend, supra, 676-77.

More significantly, Townsend was the one to request that the recipient (unknown to him a law enforcement officer) use the ICQ software program. The *Townsend* Court inferred that because Mr. Townsend was so familiar with the ICQ technology that he impliedly consented to the recording of the conversations.

No such information exists in the record as to Mr. Borseth's knowledge concerning technology being utilized by law enforcement.

QUERY: How many people who own cell phones and computers have read the accompanying policy statements to know of the warnings concerning recordings, if any?

The State also ignores that portion of the *Racus* decision applicable to Mr. Borseth's case. The *Racus* Court stated at 298:

Here, *Racus* thought he was texting "Kristl." He manifested his subjective intent that the text messages would remain private by not using a group texting function, or indicating in any other manner that he intended to expose his communications to anyone other than "Kristl." *See Townsend*, 147 Wn.2d at 673. The expectation that these were private communications was reasonable given that *Racus* was only texting with "Kristl" and "Kristl" was texting him back. Because he intended that the communications be kept private, and his expectation that they were private communications was reasonable, the communications were private under the WPA.

The *Racus* Court also determined that the conversations were recorded. The recordings were made by law enforcement during a sting operation similar to "Operation Net Nanny." In fact, the same supervising detective was involved.

The *Racus* Court departs from the protections afforded by the Privacy Act by relying on *Townsend* and determining that Mr. Racus impliedly consented to the recording.

Again, *Racus* is distinguishable on the fact that *Racus* had created a Gmail account to use Craigslist when he responded to the advertisement. There was testimony by Racus at trial that he was aware that his text messages would be preserved. *See: State v. Racus, supra* 300.

Mr. Borseth concedes that his argument concerning attempted commercial abuse of a minor being an alternative means crime is moot at this point. Instruction 13 did limit the jury's consideration to a single charged alternative as opposed to the two alternatives set forth in the Information.

Nevertheless, this does not preclude the Court from considering Mr. Borseth's sufficiency of the evidence argument concerning RCW 9.68A.100 (1)(c). The "in return for a fee" language is critical.

As argued in his initial brief, Mr. Borseth contends that subparagraph (c) of the statute would be applicable if he was requesting a fee to engage in sexual contact with a minor.

The State, in a footnote in its brief on p.29, discusses *State v. Wilbur*, 110 Wn.2d 16, 749 P.2d 1295 (1988). The *Wilbur* case involved a charge of prostitution. The *Wilbur* decision indicates that it is the prostitute who is offering to engage in the sexual act "in return for a fee." It is not the customer.

Mr. Borseth wishes to address two other matters raised by the State.

The “same criminal conduct” analysis, as argued on appeal, does not include Mr. Borseth’s guilty plea to possession of methamphetamine. It only pertains to counts I and II. He relies upon the argument contained in his original brief as to his contention that the two offenses are the “same criminal conduct.”

Insofar as the ineffective assistance of counsel argument is concerned, any attorney in the State of Washington, no matter how experienced, may, in certain instances, be ineffective. The State’s reference to defense counsel’s longevity in WSBA has little or no merit as to whether or not he was ineffective under the facts and circumstances of Mr. Borseth’s case.

Recent appellant briefs from the Spokane Prosecutor’s Office seem to imply that the longer an attorney has been practicing the less likely the attorney is to be ineffective. Mr. Borseth fails to see any correlation as to this issue.

Mr. Borseth otherwise relies upon the arguments contained in his original brief as to all issues raised.

DATED this 25th day of June, 2019.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99166

(509) 775-0777

(509) 775-0776

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 16 1 02613 4
Respondent,)	
)	
v.)	CERTIFICATE OF
)	SERVICE
)	
JASON LEE BORSETH,)	
AKA FISHEL,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 25th day of June, 2019, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

CERTIFICATE OF SERVICE

GRETCHEN EILEEN VERHOEF
Spokane County Prosecutor's Office
1100 W Mallon Ave
Spokane, Washington 99260-0270
gverhoef@spokanecounty.org

E-FILE

JASON LEE BORSETH, aka FISHEL #408650 U.S. Mail
Coyote Ridge Correction Center
PO Box 769
Connell, Washington 99326

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

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Address:
PO BOX 1019
REPUBLIC, WA, 99166-1019
Phone: 509-775-0777

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