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DIVISION II

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STATE OF WASHINGTON

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No. 39750-1-II

**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

RESPONDENT,

v.

WILLIAM KIPP,

PETITIONER

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**PETITION FOR REVIEW**

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**ALTON B. McFADDEN**  
Attorney for William Kipp, Petitioner  
WSBA No. 28861

**OLSEN & McFADDEN, INC., P. S.**  
216 Ericksen Avenue NE  
Bainbridge Island, WA 98110  
(206) 780-0240

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PETITION FOR REVIEW

**ORIGINAL**

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**A. IDENTITY OF PETITIONER**

William Kipp asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

William Kipp requests review of the decision of the Court of Appeals, Division II in *State of Washington v. William John Kipp, Jr.*, filed October 2, 2012, No. 39750-1-II regarding the suppression of evidence under the Privacy Act, 9.73 RCW. A copy of the decision is attached as Appendix 1.

**C. ISSUES PRESENTED FOR REVIEW**

1. Whether the Court of Appeals erred when, in analyzing the standard of review for a suppression motion heard by the trial court on stipulated facts, without testimony, it applied the substantial evidence standard of review, instead of reviewing de novo?
2. Whether the trial court and Court of Appeals erred when, under the Washington State Privacy Act 9.73 RCW, failed to suppress the nonconsensual recording of a highly incriminating conversation between family members who were alone for over ten minutes in the upstairs kitchen of a private residence, and instead admitted the recording into evidence?

**D. STATEMENT OF THE CASE**

William Kipp was charged by amended information filed in Kitsap County Superior Court 3 November 2008 with two counts of rape of a child in the second degree and one count of child molestation in the second degree. CP 8. The jury trial was called on July 21, 2009. RP 3.

At trial, the defense moved to suppress the surreptitious recording of a conversation between the defendant Mr. Kipp and his brother-in-law, Mr. Joseph Tan. RP 55, CP 38-39. The defense offered proof that the recording, made by Mr. Tan without Mr. Kipp's knowledge or consent, was a "private conversation"<sup>1</sup> and was therefore not admissible under the Privacy Act. RCW 9.73.030(1)(b). RP 57, CP at 38-39.

The trial court declined to conduct an evidentiary hearing. *See* RP 63-64. Judge Laurie listened to the approximately 10 minute recording. RP 57-58. The recorded tape<sup>3</sup> was transcribed to the best of the court reporter's ability. RP 207-213. The court revisited the suppression motion after the state substituted the original recording during the jury trial, because the original recording was more intelligible. RP 191-192, 199-200, 202-203.

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<sup>1</sup> The court did not grant a full evidentiary hearing and so the basis for characterization that this was a "private conversation" is somewhat fleshed out when this motion to suppress was re-visited by the court during trial; when the defense pointed out that Mr. Kipp believed that he had asked during the recorded conversation (in a portion of the recording that was unintelligible to counsel and apparently the court reporter, but apparently not to Mr. Kipp or Judge Laurie) "Are we alone". *See* RP at 56, and 202-03.

<sup>3</sup> This transcription was off a subsequent tape of better quality than what the state provided Judge Laurie or the defense before trial. *See* RP at 191-192, 199-200.

The trial court accepted the following facts, besides listening to the recording, and used them to determine the motion (RP-63-64: See also where the court re-affirmed its ruling at RP 203, with a better copy of the recording, no change in the stipulated facts):

- 1) Mr. Kipp did not know he was being recorded, RP 57
- 2) the taped conversation exceeded ten minutes, RP 62
- 3) the conversation took place in the upstairs kitchen of a private home RP 63
- 4) the conversation was between Mr. Kipp and his brother-in-law Joseph Tan, RP 63
- 5) the topic of the conversation was accusations that Mr. Kipp had molested Mr. Tan's daughters, RP 63, and
- 6) Mr. Kipp suggested towards the end of the recording that they continue the conversation in the future. RP 64.

Based upon these facts, the trial court found as a matter of law that the conversation was not private and was therefore admissible at trial. RP 64; Re-affirmed at RP 203

Mr. Kipp was convicted of the charged offenses and the trial court imposed a standard range sentence. CP 73

The Washington State Court of Appeals Division II affirmed the trial court 2 to 1. The majority held, "It is well settled that we review factual

findings on a motion to suppress for whether substantial evidence supports them, and if so, whether they support the trial court's conclusions of law." *State v. Kipp*, \_\_\_ Wn.App. \_\_\_, 286 P.3d 68, 76 (2012), citing *State v. Fowler*, 127 Wn.App. 676, 682, 111 P.3d 1264 (2005). Under this standard, the majority held that the trial court's findings of fact based upon the undisputed facts but absent an evidentiary hearing were supported by evidence and that therefore the court's subsequent decision to admit the recording was not an abuse of discretion. *Kipp*, 286 P.3 at 77.

In contrast, the dissenting justice stated:

If a conversation between two family members -- after clearing the room in a private residence in order to speak alone —about an incriminating matter does not fall within the act's scope, I fail to see how our highly-restrictive privacy act provides any meaningful protection to the privacy rights of Washington citizens.

*Id.* at 79.

Mr. Kipp argues as did the dissent that the issue of privacy as ruled upon by the trial court is a question of law, and therefore the standard of review is de novo. *Id.* at 80; *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004); *State v. Jim*, 173 Wn.2d 672, 678, 273 P.3d 434 (2012). Also, "privacy analysis turns on the facts and circumstances of each case." *Kipp*, 286 P.3d at 80, citing *State v. Clark*, 129 Wn.2d 211, 224, 227, 916 P.2d 384 (1996).

Reviewing the evidence de novo, the dissent finds that the conversation was “private” under the three prongs of review used by the trial court and generally applied to determine expectations of privacy: duration and subject matter, location and presence or potential presence of third parties, role and relationship of the parties.<sup>4</sup> *Kipp*, 286 P.3 at 80 – 83. The dissent articulates the problem clearly:

A clearer case for application of the privacy act can hardly be stated. Any other interpretation of these facts leaves all Washington citizens vulnerable to the surreptitious recording of incriminating and non incriminating conversations with a familiar party in a private home, as though the act did not exist. *Id.* at 82-83.

Mr. Kipp appeals the ruling of the appellate court.

#### **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.**

Mr. Kipp respectfully requests review of the appellate court’s decision by the Supreme Court as the decision of the lower court is, first, in conflict with a decision of the supreme court and therefore subject to review under RAP 13.4 (b)(1); and is, second, an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(2).

1) THE DECISION OF THE APPELLATE COURT APPLIES THE INCORRECT STANDARD OF REVIEW AND IS THEREFORE IN CONFLICT WITH DECISIONS OF THE SUPREME COURT

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<sup>4</sup> The dissent also notes that the trial court applies flawed reasoning to the additional factor considered by the court, that is the comment made by Kipp near the end of the recording that he wished to continue the conversation at another meeting.

In choosing to review the findings of the trial court under the “substantial evidence” test, the Appellate Court is in conflict with the Supreme Court’s recent holding in *State v. Jim* that questions of law are reviewed de novo. *State v. Jim*, 173 Wn.2d 672, 678, 273 P.3r 434 (2012).

The Appellate Court cites *State v. Fowler* in support of the Trial Court’s decision regarding the standard of review. *Kipp*, 286 P.3d at 76, *State v Fowler*, 127 Wn.App 676, 682, 111 P.3d 1264 (2005). However, the court chooses to cite only part of the *Fowler* court finding and overlooks the fact that the trial court here concluded, as a matter of law, that the recording was admissible based on undisputed facts. RP 64. *State v. Fowler* in fact supports the review of law de novo, holding, “We review a trial court’s factual findings for substantial evidence and review the suppression order’s conclusions of law de novo.” *Fowler*, 127 Wn. App. at 682, citing *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002) The appeals court reviews issues of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293, 300 (1996).

“Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law. [citations omitted] *Lewis v. Dep’t. of Licensing*, 157 Wn.2d 446, 458-459, 139 P.3d 1078 (2006) (emphasis added). Additionally, “While generally the question of whether a particular

communication is private is a question of fact, it may be decided as a question of law where the facts are undisputed.” *Christensen*, 152 Wn.2d at 192<sup>5</sup>.

Again, in this case the trial court held that the determination of privacy could be decided based on the undisputed facts before the court. RP 64; see also RP 203. If the trial court did not hear oral testimony for its findings of fact, but made the findings based solely on stipulated facts, there is no reason to defer to the judgment of the trial court, and the findings should be reviewed de novo. *State v. Rowe*, 93 Wn.2d 277, 280, 609 P.2d 1348. (1980).<sup>6</sup>

Thus, as argued by the dissent, there is no reason to defer to the trial court:

[T]he trial court made no credibility or other determinations for which its first-hand observation of the proceedings better positioned it to make. Accordingly the same facts that were before the trial court at the suppression hearing are before us now. Simply because the trial court chose to ignore many of those facts it purported to accept in making its findings does not mean we should now turn a blind eye to them.  
*Kipp*, 286 P.3d at 80.

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<sup>5</sup> In the alternative, even if the case involves mixed questions of law and fact such issues are reviewed under the error of law standard. *Korte v. Employment Sec. Dept.* 47 Wn.App. 296, 300, 734 P.2d 939, 942 - 943 (1987).

<sup>6</sup> Errors of law are reviewed de novo. *Johnson*, 128 Wn.2d at 443.

The standard of review is therefore de novo under prior decisions of the Supreme Court as argued above. A decision which applies a different standard of review is in conflict with the Supreme Court and merits review under RAP 13.4 (b).

2) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT IN THAT IT INCORRECTLY APPLIES THE FINDINGS OF PRIOR SUPREME COURT DECISIONS.

The Washington's Privacy Act, Chapter 9.73 RCW proscribes the recording of private conversations without first obtaining the consent of all participants. RCW 9.73.030(1)(b). Information obtained in violation of this statute is inadmissible in any civil or criminal case. RCW 9.73.050. It is undisputed that Joseph Tan recorded his conversation with William Kipp, without Kipp's knowledge or consent. *See* RP 63-64.

The issue under consideration, then, is whether or not the recorded conversation is considered "private" under the provisions of the Privacy Act. In determining the issue of privacy, the court looks to the "intent or reasonable expectations of the participants as manifested by the facts and the circumstances of each case." *State v. Clark*, 129 Wn.2d 211, 224, 916 P.2d 384 (1996). Courts have held that "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 193.

The reasonableness of the expectation of privacy is evaluated based upon three factors: 1) the communication's duration and subject matter, 2) the communication's location and the presence or potential presence of third parties, and 3) the nonconsenting party's role and his relationship to the consenting party. *Lewis v. Dept. of Licensing*, 157 Wn.2d at 458-459.

The application of the test by the trial court and affirmed by the appellate court is in conflict with the findings of prior Supreme Court decisions and therefore merits review as will be demonstrated in the argument below. RAP 13.4(b)(1)

**A. The communication's duration and subject matter.**

In analyzing this prong of the test, the Supreme Court has determined that conversations that are inconsequential, non-incriminating, the same conversations the defendant would have with a stranger are generally not considered to be private conversations under the Privacy Act. *State v. Faford*, 128 Wn.2d 476, 484-85, 910 P.2d 447 (1996), citing *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 191. Conversations conveying general information, for example, are considered nonincriminating and inconsequential and are not generally protected by the act. *Kadoranian* 119 Wn.2d at 191. Routine conversations, further described as "essentially the same conversations that the defendant might have had with a great many other strangers" have been determined by the

Court to not fall under the protections of the Privacy Act. *Clark*, 129 Wn.2d at 227-28. In *State v D.J.W.*, the appellate court reasoned a conversation could not have been “secret” or intended only for the ears of the individual appellants . . . because the identity of the person with whom the appellants were conversing during any given conversation was not significant. *State v. D.J.W.*, 76 Wn.App. 135, 140-142, 882 P.2d 1199 (1994).

It would therefore, follow that conversations that are incriminating, of a serious or important subject matter, and something only spoken with say a family member would be protected. The conversation at issue is dramatically different from those described above in *D.J.W.*, *Faford*, or *Kadoranian* . It is a long conversation with intimate and incriminating subject matter and stands in sharp contrast to the short and inconsequential conversations the appeals courts analyzed and found not to be protected.

In this case, the surreptitious recording is of a conversation between two brothers-in-law, Mr. Tan having a known mental illness, regarding the possible molestation of Mr. Tan’s daughters, a criminal act. Clearly this is a serious matter, intimate, highly incriminating and of great consequence, which could only have occurred between Mr. Kipp and Mr. Tan.

The trial court (RP 63), the appellate court (Majority pages 11, 15) and the State (RP 59) each refer to the possibility of a conversation “remaining

private,” and conclude that if a conversation is not assured of remaining private, then it is not a private conversation at the time it takes place.

There is no support for this position within the statute or case law. In fact, such a position results in circular reasoning for example: if someone discloses a conversation, then the conversation did not remain private as so was not assured of remaining private. Thus, any conversation which was secretly recorded and disclosed was never assured of being private. This reasoning nullifies the privacy protections entirely, surely not the intent of the legislature when enacting RCW 9.73.030. Statutes should be construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990)<sup>7</sup>.

**B) The communication’s location and the presence or potential presence of third parties.**

The conversation recorded by Mr. Tan took place in the upstairs kitchen of a private home. Private homes are “normally afforded maximum privacy protection.” *Clark*, 129 Wn.2d at 226. The conversation as recorded lasted more than ten minutes without interruption, further reinforcing the private nature of this particular kitchen

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<sup>7</sup> As noted by the dissent, “Without doubt, the person who surreptitiously records a conversation does not intend for the conversation to remain private.” *Kipp*, 286 P.3d at 81, FN 9.

and the parties' reasonable expectation of privacy during the conversation. The generalization of the kitchen as a common area, theorized by the trial court and evidently supported by the appellate court, fails to address the issue raised in *Faford* that a privacy act analysis calls for case-by-case analysis and not per-se rules of the sort engaged in here. *Faford*, 128 Wn.2d at 484. In fact, the trial court, in announcing that a kitchen is not, per se, a private area within a private home, mentions that the court would find a basement or bedroom to be private. RP 69. But, the downstairs area (perhaps basement) was where the children were gathered in front of the television. *See* RP 314. The court's reasoning, and resultant per se rule, is not supported by facts and the need for a case by case analysis is confirmed.

The trial judge gave weight to the possibility that a third person could have entered the kitchen. There is nothing in the statute or case law that requires a location to be inaccessible in order to be private. The conversation took place in the kitchen in a private home. Presumably the kitchen or any room is accessible. However, the record shows that the men were alone and Mr. Tan's son had left the area so that they could have privacy. Also, no one in fact did enter the kitchen during conversation. As noted by the court in *Townsend*, the mere possibility of interception of a communication does not make public a communication

that is otherwise private. *State v. Townsend*, 147 Wn.2d 666, 674, 57 P.3d 255 (2002) (possible to intercept the signal of a cordless phone). The same reasoning applies to this case. The possibility that a family member could have entered the kitchen does not make the conversation any less private. Also, the kitchen in this residence was upstairs, increasing the likelihood that anyone approaching the men during the conversation would have been heard on the stairs.

**C) The non-consenting party's role and his relationship to the consenting party.**

Under this prong, the Supreme Court has looked to the willingness of the non-consenting party to a conversation to impart information to a stranger. *Clark*, 129 Wn.2d at 226-227 (finding that the non-consenting parties' willingness to impart the information to an unidentified stranger evidences the non-private nature of the conversation.) Courts have also held that conversations with police officers are not protected by the statute. *See Lewis v. Dept. of Licensing*, 157 Wn.2d at 460. However, the parties at issue are far from being strangers or public officials, they are family. Mr. Kipp is married to Mr. Tan's sister. The families at times have shared a home. The children, cousins, are well-acquainted. Mr. Kipp has known Mr. Tan at least since he married into the family at age 19

and possibly before. In trial, when asked to identify Mr. Kipp, Mr. Tan said “he is my brother-in-law.” RP 205

This family connection between the parties is not altered by the subject matter of the conversation. In fact, the intimate relationship between the parties reinforces the private nature of the conversation. *See Kadoranian*, at 191.

Finally, the trial court’s surmise that Mr. Kipp’s request for a further conversation indicates he did not believe the just completed conversation to be private, is faulty logic, as noted by the dissent. *Kipp*, 286 P.3d at 82.

The Supreme Court has defined the word “private” within the context of the Act as “belong to one’s self. . . .secret. . . . intended only for the persons involved. . . .holding a confidential relationship to something. . . . a secret message: a private conversation. . . . secretly; not open or in public: *State v. Christensen*, 153 Wn. 2d 186, 192-3 102 P.3d 789 (2004). Perhaps because it was operating under the “substantial evidence” standard of review holding that only an abuse of discretion could reverse a trial court ruling, the appellate court appears to “turn a blind eye” to the facts of the present case. *Kipp*, 286 P.3d at 80.

This was a conversation between two family members regarding a highly personal, incriminating, consequential matter, and taking place in a private home with another family member vacating the area for their

privacy. The facts shout private. The conversation was recorded in secret by one of the parties and without the consent of the other. This is exactly what the privacy act is designed to protect against.

3) THE DECISION OF THE APPELLATE COURT VITIATES THE WASHINGTON STATE PRIVACY ACT AND IS THEREFORE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT. RAP 13.4(B)(4).

The Washington State privacy act is considered one of the most restrictive in the nation. *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002)<sup>9</sup>.

Further, as the *Christensen* court stated:

We must interpret the privacy act in a manner that ensures that the private conversations of this state's residents are protected in the face of an ever-changing technological landscape. . . .

While the statute itself is unambiguous, a survey of the legislative history serves only to buttress this conclusion. Since 1909, the privacy act has protected sealed messages, letters, and telegrams from being opened or read by someone other than the intended recipient. RCW 9.73.010-.020. In 1967, the legislature amended the act in order to keep pace with the changing nature of electronic communications and in recognition of the fact that there was no law that prevented eavesdropping. *See* HOUSE JOURNAL, 40th Leg., 1st Ex. Sess., at 2030-31 (Wash. 1967). In doing so, Washington's privacy statute became "one of the most restrictive in the nation." *Townsend*, 147 Wn.2d at 672.

The facts of the present case do not hinge on changing technology or interpretations of devices or methods. They rest on the simple facts as

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<sup>9</sup> Again evidence obtained in violation of the statute is inadmissible. RCW 9.73.050.

stated above: two family members in a private home discuss a highly incriminating topic without interruption for over ten minutes and one of the parties is surreptitiously recording the exchange. The recording is used in court against the non-consenting party. As noted by the dissenting Appellate Court Justice Van Deren, “A clearer case for application of the privacy act can hardly be stated.” *State v. Kipp*, 286 P.3d at 82. The court of appeals decision essentially guts the privacy act by creating “[A] per se rule that ‘a confession of child molestation’ or any other crime is not subject to a reasonable expectation of privacy. . .” *State v. Kipp*, 286 P.3 68, 81. This is not in accord with *State v. Babcock*, 168 Wn. App. 598, 606-7, 279 P.3d 890 (2012) where the court held that the defendant’s conversation about hiring a hit man dealt with a “serious matter not normally intended to be public.” But, under the rule announced in *State v. Kipp*, in theory as long as there is some admission in a recording that the State could use in prosecuting an individual, the court of appeals would interpret the privacy act is inapplicable, and no admission would be protected.

It is of great importance to the citizens of Washington, a matter of substantial public interest, that the Privacy Act is protected from nullification by the ruling of the Appellate Court.

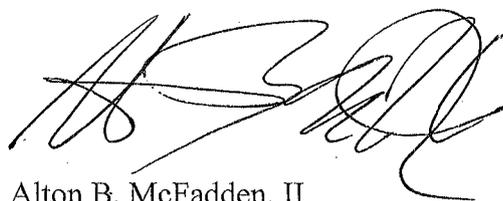
#### F. CONCLUSION

The conversation between Mr. Kipp and Mr. Tan as recorded by Mr. Tan and admitted into evidence during trial was a private conversation protected under the provisions of RCW 9.73 and Washington State case law. It may not be used as evidence. RCW 9.73.

In reviewing the trial court's decision to admit the recording, the Appellate Court applies the wrong standard of review, misinterprets prior Supreme Court rulings, and thereby eviscerates the Washington State Privacy Act.

Mr. Kipp requests that the Supreme Court suppress the surreptitious tape recording and remand the case for a new trial without the recording and without any other evidence obtained at the same time of the recording, as held under *State v. Fjermestad*, 114 Wn.2d 828 836, 791 P.2d. 897(1990).

Respectfully submitted, 31 OCT 2012



Alton B. McFadden, II  
Attorney for William Kipp, Jr. Petitioner  
WSBA#28861

## **Appendix 1**

286 P.3d 68  
Court of Appeals of Washington,  
Division 2.

STATE of Washington, Respondent,  
v.  
William John KIPP, Jr., Appellant.

No. 39750-1-II. | Oct. 2, 2012.

### Synopsis

**Background:** Defendant was convicted in the Kitsap Superior Court, Anna M. Laurie, J., of two counts of second-degree child rape and second-degree child molestation. Defendant appealed.

**Holdings:** The Court of Appeals, Worswick, C.J., held that:

- [1] testimony of child victim's older sister regarding defendant's prior, uncharged acts of sexual assault against her was admissible to demonstrate a common scheme or plan;
- [2] trial court did not abuse its discretion in failing to take oral testimony at an evidentiary hearing on defendant's motion to suppress recording of his conversation with his brother-in-law under the Privacy Act;
- [3] substantial evidence supported conclusion that conversation between defendant and his brother-in-law was not private, such as would preclude admission of recording under the Privacy Act; and
- [4] trial court did not abuse its discretion by excluding testimony of defense witness due to defendant's late disclosure of witness on first day of trial.

Affirmed.

Van Deren, J., dissented, with opinion.

### West Codenotes

#### Recognized as Unconstitutional

West's RCWA 10.58.090.

#### Attorneys and Law Firms

\*70 Alton B. McFadden II, Olsen & McFadden Inc. PS, Bainbridge Island, WA, for Appellant.

Jeremy Aaron Morris, Kitsap County Prosecutor's Office, Port Orchard, WA, for Respondent.

### Opinion

WORSWICK, C.J.

¶ 1 A jury found William Kipp guilty of two counts of second degree child rape and one count of second degree child molestation. Kipp appeals, arguing (1) the trial court erroneously admitted testimony under RCW 10.58.090<sup>1</sup> and ER 404(b) regarding prior \*71 uncharged child molestation by Kipp, (2) the trial court erroneously admitted a secretly recorded conversation between Kipp and his brother-in-law under the privacy act, and (3) the trial court erroneously excluded a defense witness due to late disclosure. Kipp also submits a statement of additional grounds (SAG), arguing that the trial judge was biased against him and that the State misstated the burden of proof at closing argument. We hold that the evidence of uncharged child molestation was properly admitted under ER 404(b). We further hold that the trial court did not err in admitting Kipp's recorded conversation or in excluding testimony of the late-disclosed witness. And we hold that the arguments raised in Kipp's SAG are without merit. Accordingly, we affirm.

## FACTS

¶ 2 Kipp was charged with two counts of second degree child rape and one count of second degree child molestation of his niece, DGT.<sup>2</sup> The incidents occurred when DGT was 12 to 14 years old. Kipp molested DGT at her grandparents' house by touching her genitals and digitally penetrating her. Kipp also digitally penetrated DGT while she was staying overnight at his house.

¶ 3 JMC, who is DGT's older sister, also alleged that Kipp had sexually assaulted her when she was 15 years old. Kipp molested JMC at his house when JMC was living there by fondling her breasts while they watched TV. Also, on one occasion, Kipp molested JMC at her grandparents' house by performing oral sex on her and rubbing his penis on her genitals. Kipp was never charged for the acts against JMC.

¶ 4 Joseph T., the father of DGT and JMC, and Kipp's brother-in-law, subsequently confronted Kipp about his daughters' allegations. Kipp confessed, and Joseph T. secretly recorded the conversation.

¶ 5 Kipp moved pretrial to suppress the recording of his conversation with Joseph T. under Washington's privacy act.<sup>3</sup> Without taking testimony, the trial court denied Kipp's motion to suppress, ruling that Kipp's conversation with Joseph T. was not a private conversation and thus not subject to suppression under the privacy act.

¶ 6 Also pretrial, the trial court ruled that JMC's testimony was admissible under RCW 10.58.090, as well as under ER 404(b) to show a common scheme or plan. Further, the trial court excluded the testimony of defense witness Alan T., Kipp's brother-in-law, who Kipp first disclosed six days before trial. At trial, the trial court admitted both JMC's testimony and the recording of Kipp's conversation with Joseph T. The jury found Kipp guilty as charged. Kipp appeals.

## ANALYSIS

### I. TESTIMONY OF JMC

¶ 7 Kipp argues that the trial court erred by admitting JMC's testimony under RCW 10.58.090 and ER 404(b). Because our Supreme Court has found RCW 10.58.090 to be unconstitutional, it was not a valid basis to admit JMC's testimony. *State v. Gresham*, 173 Wash.2d 405, 432, 269 P.3d 207 (2012). But because the trial court properly admitted JMC's testimony under ER 404(b) to show a common scheme or plan, the trial court did not err on this point and Kipp's argument fails.

¶ 8 This court reviews a trial court's rulings under ER 404(b) for abuse of discretion. *State v. Foxhoven*, 161 Wash.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion if its decision "is manifestly unreasonable or rests on untenable grounds." *State v. Griffin*, 173 Wash.2d 467, 473, 268 P.3d 924 (2012). A decision is manifestly unreasonable if the court adopted a position no reasonable person would take. *Griffin*, 173 Wash.2d at 473, 268 P.3d 924. And a decision rests on untenable grounds when the trial court applies the wrong legal standard or relies on unsupported facts. *Griffin*, 173 Wash.2d at 473, 268 P.3d 924.

\*72 ¶ 9 ER 404(b) forbids a trial court to admit evidence of a person's other crimes, wrongs, or acts to prove a person's character to show that the person acted in conformity therewith. But ER 404(b) does not forbid such "other acts" evidence admitted for other purposes, such as to show a common scheme or plan.

[1] ¶ 10 In order for "other acts" evidence to be properly admitted to show a common scheme or plan under ER 404(b), it "must be '(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.'" *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003) (quoting *State v. Lough*, 125 Wash.2d 847, 852, 889 P.2d 487 (1995)). Kipp disputes only the second element of this test, whether JMC's testimony was admitted for the purpose of proving a common scheme or plan.

[2] [3] ¶ 11 There are two types of evidence admissible to show a common scheme or plan under ER 404(b): (1) evidence of prior acts that are part of a larger, overarching criminal plan; or (2) evidence of prior acts following a single plan to commit separate but very similar crimes. *DeVincentis*, 150 Wash.2d at 19, 74 P.3d 119. The instant case deals with the second type of common scheme or plan, a single plan followed to commit separate but very similar crimes. Such a common scheme or plan "may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances." *Lough*, 125 Wash.2d at 852, 889 P.2d 487. Evidence of such a plan " 'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.' " *DeVincentis*, 150 Wash.2d at 19, 74 P.3d 119 (quoting *Lough*, 125 Wash.2d at 860, 889 P.2d 487). But such common features need not show a unique method of committing the crime. *DeVincentis*, 150 Wash.2d at 20–21, 74 P.3d 119.

[4] ¶ 12 Here, there was " 'such occurrence of common features' " between Kipp's abuse of DGT and JMC that his abuse of both victims was naturally to be explained as manifestations of a general plan, making JMC's testimony admissible under ER 404(b). *DeVincentis*, 150 Wash.2d at 19–20, 74 P.3d 119 (quoting *Lough*, 125 Wash.2d at 860, 889 P.2d 487). The victims were of similar ages, and both were Kipp's nieces. Also, Kipp molested both victims in two places: his house and their grandparents' house.

¶ 13 While Kipp performed different sex acts on each victim, the evidence shows that he had a common scheme or plan to get his nieces alone at his house or their grandparents' house and sexually abuse them, which he used on both DGT and JMC. See *Gresham*, 173 Wash.2d at 422–23, 269 P.3d 207 (evidence showed common scheme or plan when defendant took trip with young girls and fondled their genitals at night when other adults were asleep, notwithstanding some difference between sex acts performed); *Lough*, 125 Wash.2d at 849–52, 861, 889 P.2d 487 (defendant's history of drugging and raping women with whom he had a personal relationship showed common scheme or plan despite differences in details of each assault); *State v. Sexsmith*, 138 Wash.App. 497, 505, 157 P.3d 901 (2007) (evidence showed common scheme or plan where defendant was in position of authority over both victims, victims were the same age, and defendant isolated them and forced them to perform similar sex acts).

¶ 14 The trial court accordingly did not abuse its discretion in admitting JMC's testimony to show a common scheme or plan under ER 404(b). Kipp's claim to the contrary fails.

## II. PRIVACY ACT

¶ 15 Kipp further argues that the trial court erred by admitting his recorded conversation with Joseph T. under the privacy act. He first argues that the trial court erred by failing to hold an evidentiary hearing to determine whether the conversation was private. He also argues that the trial court's findings of fact on the admissibility of the recording were unsupported by substantial evidence. And he additionally argues that the trial court's findings of fact do not support its conclusion of law that the conversation was admissible. We disagree on all points.

### A. The Privacy Act

¶ 16 Washington's privacy act, chapter 9.73 RCW, proscribes the recording of private conversations without first obtaining the consent of all participants. RCW 9.73.030(1)(b). Information obtained in violation of this proscription is inadmissible in any civil or criminal case. RCW 9.73.050. It is undisputed that Joseph T. recorded his conversation with Kipp without Kipp's consent. The admissibility of the recording at issue therefore turns on whether the conversation was "private" for the purposes of the privacy act.

<sup>[5]</sup> <sup>[6]</sup> ¶ 17 The privacy of a conversation turns on the " 'intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case.' " *State v. Clark*, 129 Wash.2d 211, 224, 916 P.2d 384 (1996) (quoting *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d 178, 190, 829 P.2d 1061 (1992)). One factor in deciding whether a conversation was private is the subjective intentions of the parties. *State v. Townsend*, 147 Wash.2d 666, 673, 57 P.3d 255 (2002). We also consider other factors "bearing upon the reasonable expectations and intent of the participants [ :]" (1) the duration and subject matter of the conversation, (2) the location of the conversation and potential presence of third parties, and (3) the role of the nonconsenting party and his or her relationship to the consenting party. *Clark*, 129 Wash.2d at 225–26, 916 P.2d 384. "While each of these factors is significant in making a factual determination as to whether a conversation is private, the presence or absence of any single factor is not conclusive for the analysis." *Clark*, 129 Wash.2d at 227, 916 P.2d 384.

¶ 18 Before continuing, we address the standard of review applicable to a trial court's decision as to the admissibility of recordings under the privacy act. The oft-cited standard of review from *Clark* is "[w]hether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law." 129 Wash.2d at 225, 916 P.2d 384. But this is the wrong standard as to motions to suppress in criminal trials. Not only was it imported from a civil case, but it is inconsistent with Washington's Rules of Criminal Procedure and valid case law setting forth the correct standard of review for criminal motions to suppress.

¶ 19 *Clark* imported the above standard of review from *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061. *Clark*, 129 Wash.2d at 225, 916 P.2d 384. *Kadoranian* had filed a class action lawsuit alleging that the Bellingham Police Department violated the privacy act by inadvertently intercepting one of her private conversations and the similar conversations of those in a class she sought to certify. 119 Wash.2d at 181–83, 829 P.2d 1061. The superior court granted summary judgment to the police department. 119 Wash.2d at 183, 829 P.2d 1061.

¶ 20 Our Supreme Court affirmed summary judgment in part because *Kadoranian's* intercepted conversation was not private. 119 Wash.2d at 190–92, 829 P.2d 1061. *In the summary judgment context*, the court held, "Whether a particular communication or conversation is 'private' and thus protected from intrusion by the privacy act is a question of fact." 119 Wash.2d at 190, 829 P.2d 1061. The court further held that because the facts were undisputed and "reasonable minds could not differ on the subject," the issue could be determined as a matter of law. 119 Wash.2d at 190, 829 P.2d 1061.

¶ 21 Viewed in light of this procedural posture, it is clear that the standard of review noted in *Kadoranian* can have no application to a criminal motion to suppress. Because *Kadoranian* came before the Supreme Court on appeal from summary judgment, the standard of review was de novo review for whether there was any genuine issue of material fact and whether *Kadoranian* was entitled to judgment as a matter of law. CR 56(c); *Jackowski v. Borchelt*, 174 Wash.2d 720, 729, 278 P.3d 1100 (2012). Because the facts were undisputed, there were no genuine <sup>\*74</sup> issues of material fact, and thus it was proper for the court to determine the privacy act issue de novo as a matter of law.

¶ 22 There is no procedure analogous to summary judgment in criminal cases. But by applying the *Kadoranian* standard to a CrR 3.6 motion to suppress, courts would resolve the issue as if it came before them on cross motions for summary judgment, as in *Kadoranian*. 119 Wash.2d at 183, 829 P.2d 1061. Neither the Rules of Criminal Procedure nor the existing, valid case law of this state permits this civil standard of review in criminal cases, and we would err by perpetuating such a standard.

<sup>[7]</sup> ¶ 23 It is well settled that we review factual findings on a motion to suppress for whether substantial evidence supports them, and if so, whether they support the trial court's conclusions of law. *State v. Fowler*, 127 Wash.App. 676, 682, 111 P.3d 1264 (2005); *State v. Cole*, 122 Wash.App. 319, 322–23, 93 P.3d 209 (2004). We do not conduct the same review as the trial court—we do not substitute our own findings for those of the trial court.

¶ 24 This holding is consistent with our Supreme Court's prior rejection of de novo review of criminal motions to suppress in *State v. Hill*, 123 Wash.2d 641, 870 P.2d 313 (1994). There, our Supreme Court considered and overruled a line of cases requiring reviewing courts to “undertake an independent evaluation of the evidence” when reviewing factual findings following a motion to suppress. 123 Wash.2d at 644–45, 870 P.2d 313. The court held that such an “anomaly in Washington law” should be discarded in favor of the rule that factual findings are reviewed for substantial evidence. 123 Wash.2d at 645–47, 870 P.2d 313.

<sup>[8]</sup> ¶ 25 Just as the “independent evaluation of the evidence” standard addressed in *Hill*, the *Kadoranian* standard as applied to criminal cases is an “anomaly in Washington law” that should be discarded. There is no principled reason to depart from *Hill* and conduct a de novo review of privacy act issues as if they were brought before us in a civil case on summary judgment. We accordingly decline to perpetuate *Clark's* adoption of the *Kadoranian* standard in criminal cases, instead applying the well-settled standard of review for whether the trial court's findings of fact are supported by substantial evidence and whether those findings support the trial court's conclusions of law.

### **B. The Trial Court's Ruling**

¶ 26 The trial court ruled on Kipp's motion to suppress based on the parties' moving papers, in-court argument, and the contents of the recording. Kipp submitted a declaration in conjunction with his motion to suppress asserting: (1) Kipp feared Joseph T., (2) Kipp believed Joseph T. was armed with a knife, (3) Joseph T. secretly recorded the conversation, and (4) Kipp did not consent to being recorded. Kipp's counsel asserted in a hearing on the motion that Kipp's testimony would establish: (1) the conversation took place in a kitchen in a private residence, (2) the reasons why Kipp believed that the conversation was private in that room, and (3) a third party (Joseph T.'s son) had left the room so that Kipp and Joseph T. would be alone.

¶ 27 Rather than take testimony, the trial court accepted the facts as put forward by Kipp's counsel. The trial court also listened to the recording of Kipp's conversation with Joseph T. In the recording, Kipp admitted the allegations, offering the excuse that he was only 19 when he molested JMC, and claiming that JMC initiated the sexual contact. With regard to DGT, Kipp's only excuse was “there was a lot going on at the time.” 2 Report of Proceedings (RP) at 210. Kipp acknowledged to Joseph T. that his conduct was a crime. At the end of the conversation, Kipp asked Joseph T. to meet with him in private to discuss the matter further, saying, “[W]hen we get a chance, just you and I, we will go somewhere and we'll talk, try to ... understand everything.” 2 RP at 213.

¶ 28 The trial court issued an oral ruling finding the conversation admissible under the privacy-act.<sup>4</sup> The trial court first addressed \*75 the first *Clark* factor, the “nature and duration” of the conversation, finding that they split evenly.<sup>5</sup> The court found that the duration of the conversation was over 10 minutes long and concluded that this weighed in Kipp's favor. But the court found that Kipp made a confession of child molestation to the victim's father, concluding that that is not the sort of subject matter that remains private, weighing against Kipp.

¶ 29 The trial court next addressed the location of the conversation and the potential presence of third parties. The trial court accepted Kipp's offer of proof that the conversation took place in a kitchen and that Joseph T.'s son had left the room. But the court found that, because it was a common area, the potential presence of third parties was higher than it would have been

in a different area of the residence.

¶ 30 The trial court then considered the role of the nonconsenting party and his relationship to the consenting party. The trial court found that Kipp and Joseph T. were not speaking as brothers-in-law, but “as father of a daughter and the accused molester.” 1 RP at 64.

¶ 31 Finally, the trial court found that the analysis tipped against Kipp based on evidence of the parties’ subjective intentions. The trial court found that Kipp’s offer to meet with Joseph T. in private at the end of the conversation demonstrated that Kipp did not subjectively believe the conversation was private.<sup>6</sup>

### **C. Evidentiary Hearing Not Required**

<sup>[9]</sup> ¶ 32 Kipp contends that because there were disputed facts as to whether the recorded conversation was private, the trial court was required to take oral testimony at an evidentiary hearing on his motion to suppress. We hold that the trial court did not abuse its discretion in failing to hold an evidentiary hearing to take testimony.

<sup>[10]</sup> ¶ 33 CrR 3.6 governs motions to suppress evidence in criminal trials (aside from motions to suppress a defendant’s statements, governed by CrR 3.5). CrR 3.6(a) provides, “The court shall determine whether an evidentiary hearing is required based upon the moving papers.” The trial court has discretion whether to take oral testimony on a motion to suppress. *State v. McLaughlin*, 74 Wash.2d 301, 303, 444 P.2d 699 (1968). As noted above, a trial court abuses its discretion if its decision is manifestly unreasonable or rests on untenable grounds. *Griffin*, 173 Wash.2d at 473, 268 P.3d 924.

¶ 34 Kipp argues that the trial court was required to take testimony based on two factual disputes below: whether the conversation occurred in a private location, and whether Kipp’s confession was genuine or whether Kipp falsely confessed because he feared Joseph T. But these disputes did not render the trial court’s decision declining to take testimony an abuse of discretion.

¶ 35 As to the location of the conversation, it is undisputed that the conversation took place in a kitchen, and that this kitchen was a common area. The trial court did not abuse its discretion by addressing the issue based on the undisputed facts already before it, regardless of Kipp’s assertion that additional facts existed.

\*76 ¶ 36 Kipp’s argument that his confession was false is irrelevant to the issue of privacy under the privacy act. Whether or not Kipp’s confession was true, the subject matter of the conversation was Kipp admitting to Joseph T. that he sexually abused Joseph T.’s daughters. Whether Kipp was being truthful when he made the confession did not alter this subject matter. The trial court accordingly did not abuse its discretion by failing to hold an evidentiary hearing to decide the veracity of Kipp’s confession.

¶ 37 Because Kipp does not show that the trial court’s failure to take oral testimony was manifestly unreasonable or based on untenable grounds, his argument that the trial court abused its discretion by failing to take testimony fails.

### **D. Findings and Conclusions Valid**

¶ 38 Kipp next contends that the trial court’s oral findings as to the admissibility of his recorded conversation were unsupported by substantial evidence. And he argues that the trial court erroneously concluded from its findings that the conversation was not private. We disagree.

¶ 39 We review factual findings on a motion to suppress for substantial evidence, and if so, whether they support the trial court’s conclusions of law. *Fowler*, 127 Wash.App. at 682, 111 P.3d 1264; *Cole*, 122 Wash.App. at 322–23, 93 P.3d 209. “Substantial evidence is ‘evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.’” *State v. Levy*, 156 Wash.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999)).

We review the conclusions of law de novo. *Fowler*, 127 Wash.App. at 682, 111 P.3d 1264.

<sup>[11]</sup> ¶ 40 Kipp argues that the trial court's findings of fact as to the subject matter and duration of the conversation were unsupported by substantial evidence. But it was undisputed below that the conversation was 10 minutes long, and that the subject matter was Kipp apparently admitting to Joseph T. that Kipp had molested Joseph T.'s daughters.

¶ 41 As noted above, the fact that Kipp claimed his confession was false did not change the subject matter of the conversation—it was a confession of child molestation to the victim's father, whether it was genuine or not. That the confession may have been false goes to its evidentiary weight, not the “ ‘intent or reasonable expectations of the participants’ ” as to its privacy. *Clark*, 129 Wash.2d at 224, 916 P.2d 384 (quoting *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061). Whether the confession was true or not, Kipp and Joseph T.'s reasonable expectations as to its privacy would have been the same. The trial court's findings on this point were supported by substantial evidence.

¶ 42 Kipp next argues that the trial court's finding as to the potential presence of third parties was unsupported by substantial evidence. But the trial court's finding on this point was narrow—simply that the potential presence of third parties was greater in the kitchen, a common area, than it would have been in a private area of the house. Kipp does not dispute that the kitchen was a common area. The trial court's finding on this point was supported by substantial evidence.<sup>7</sup>

¶ 43 Kipp finally argues that the trial court's finding as to the relationship between the parties was unsupported by substantial evidence. He argues that the trial court erroneously focused on the nature of the conversation rather than the relationship between the parties when analyzing this factor. It was undisputed that Kipp and Joseph T. were brothers-in-law. But the undisputed evidence also shows that the men were not speaking merely as brothers-in-law, but also as an aggrieved father accusing a perpetrator of molesting his children, which gave them a different relationship for purposes of that conversation than simply that of in-laws. \*77 The trial court's finding on this point was accordingly supported by substantial evidence.

¶ 44 All in all, the findings that Kipp challenges were supported by substantial evidence. And these findings supported the trial court's conclusion that the conversation was not private. The facts and circumstances showed that Kipp had neither the intent nor the reasonable expectation that the conversation would remain private. Kipp's arguments that the trial court erred by admitting the conversation under the privacy act fail.

### III. TESTIMONY OF ALAN T.

¶ 45 Finally, Kipp argues that the trial court erred by excluding the testimony of Alan T. He argues that a continuance, not exclusion, was the appropriate sanction for his late disclosure of Alan T. as a witness. We hold that the trial court did not err in excluding Alan T.

<sup>[12]</sup> ¶ 46 Under CrR 4.7(b)(1), defendants must disclose the names and addresses of intended witnesses, as well as the substance of their testimony, no later than the omnibus hearing. Sanctions for violating CrR 4.7 are within the discretion of the trial court. CrR 4.7(h)(7); *State v. Hutchinson*, 135 Wash.2d 863, 882, 959 P.2d 1061 (1998). But “[e]xclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly.” *Hutchinson*, 135 Wash.2d at 882, 959 P.2d 1061. We review such decisions for manifest abuse of discretion. *State v. Gregory*, 158 Wash.2d 759, 822, 147 P.3d 1201 (2006).

<sup>[13]</sup> ¶ 47 In *Hutchinson*, our Supreme Court identified four factors a trial court should consider when deciding whether to exclude a defense witness for a discovery violation: “(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.” 135 Wash.2d at 883, 959 P.2d 1061. The appropriate remedy for late disclosure is typically to continue the trial to give the other party time to interview the new witness and prepare to address his or her testimony. *Hutchinson*, 135 Wash.2d at 881, 959 P.2d 1061.

¶ 48 Kipp first disclosed Alan T. as a defense witness on July 22, 2009, six days before trial. Part of the reason for Alan T.'s late disclosure was that he had been deployed with the Navy, although he had been home for two weeks before Kipp disclosed him as a witness. Kipp explained that he had not been in touch with Alan T. earlier because Alan T. "wanted time to himself" after getting home. RP (July 22, 2009) at 3.

¶ 49 The State argued that it would be prejudiced by Alan T.'s testimony because the substance of his testimony had not been disclosed, and there was no time to find a rebuttal witness to counter Alan T.'s testimony. The trial court excluded Alan T.'s testimony. The trial court found that the lateness of the disclosures prejudiced the State, stating, "Nobody needs to be preparing for trial any more than necessary on the eve of trial." RP (Jul. 22, 2009) at 6. The court also found that the late disclosure "could have been avoided." RP (Jul. 22, 2009) at 6.

¶ 50 Kipp did not disclose the substance of Alan T.'s testimony until the first day of trial, July 28. Kipp asserted that Alan T. had lived with both JMC and Kipp during the alleged molestation of JMC, and would testify that he had seen nothing inappropriate and that Kipp did not have a chance to be alone with JMC. Kipp also asserted that Alan T. would testify that he spent weekends in the same residence as Kipp and DGT during the period of the alleged molestation, and again had seen nothing inappropriate. This proffered testimony was similar to that of two other witnesses, Maria T.-Kipp (Kipp's wife) and Virginia T. (Joseph T.'s mother), who testified that they lived with the parties involved and that Kipp never had the opportunity to be alone with JMC or DGT during the relevant periods.

¶ 51 The State argued that it would be prejudiced by Alan T.'s testimony, asserting that it had not had an opportunity to speak with its witnesses in order to attempt to counter Alan T.'s testimony. The trial court \*78 excluded Alan T.'s testimony based on the lateness of the disclosure, the duplicative nature of the testimony, and the fact that the proceedings would need to be halted for half a day or more to allow the State to speak with its witnesses. The trial court ruled, "[Alan T.] was disclosed too late to provide an orderly trial process, and I am going to continue my ruling and disallow his testimony." 2 RP at 127.

<sup>[14]</sup> ¶ 52 The trial court's decision to exclude Alan T. was not an abuse of discretion under *Hutchinson*. As to the first *Hutchinson* factor, "the effectiveness of less severe sanctions," the court found that a continuance of a half day or more would be effective. But as to the second factor, "the impact of witness preclusion on the evidence at trial and the outcome of the case," the trial court found that the impact of excluding Alan T. would be low because Alan T.'s testimony duplicated that of other witnesses. As to the third *Hutchinson* factor, "the extent to which the prosecution will be surprised or prejudiced by the witness's testimony," the trial court found that the prosecution would be prejudiced by Alan T.'s testimony based on the extra time needed to interview the other witnesses so close to trial, or to halt trial to prepare rebuttal testimony. And as to the fourth *Hutchinson* factor, "whether the violation was willful or in bad faith," the trial court found that Kipp could have avoided the late disclosure of Alan T.

¶ 53 Under the *Hutchinson* factors, the trial court did not abuse its discretion by excluding Alan T. As Kipp points out on appeal, Alan T.'s testimony was valuable to Kipp because, despite its duplicative nature, Alan T. was potentially less vulnerable to a charge of bias than Maria T.-Kipp and Virginia T. The State argued that Maria T.-Kipp was biased because she was Kipp's wife. Evidence at trial also showed that Joseph T. was involved in property disputes with both Maria T.-Kipp and Virginia T., suggesting that they might have been biased against Joseph T. Thus, in order to rebut Alan T.'s testimony, the State would not merely have been required to rebut his factual assertions, but also to sort out Alan T.'s involvement in the ongoing intrafamily dispute and any bias that might have flowed from said involvement. Under these facts, the trial court did not abuse its discretion in ruling that the prejudice to the State outweighed the impact of excluding Alan T.'s testimony.

#### STATEMENT OF ADDITIONAL GROUNDS

## I. JUDICIAL BIAS

¶ 54 In his SAG, Kipp first asserts that the trial judge was biased against him. Kipp's arguments on this point are based on matters outside the record, are insufficiently specific for us to identify the nature and occurrence of any judicial bias, and are based on trial rulings that do not demonstrate judicial bias. Kipp's claim on this point accordingly fails.

¶ 55 Kipp bases his argument on the following assertions: (1) the trial judge allowed the trial to continue in spite of constantly shifting witness accounts; (2) the prosecutor was conducting herself "illegally;" (3) the trial judge admitted Kipp's recorded conversation with Joseph T. into evidence; (4) the trial judge did not allow Kipp's neighbor to testify in his defense; (5) the trial judge excluded Alan T.'s testimony; (6) the trial judge did not allow any character witnesses to testify on Kipp's behalf; (7) the trial judge dismissed all jurors who accepted that the State bore the burden of proof, and seated a juror who believed Kipp was guilty until proven innocent; (8) the trial judge limited what Kipp could say during his testimony; (9) the trial judge did not allow Kipp's attorney to expose the false testimony of witnesses; (10) the trial judge did not correct the State when the State argued in closing that evidence was not necessary to convict Kipp; and (11) two police officers stated to Kipp that the trial judge was biased against people in the military.

<sup>[15]</sup> <sup>[16]</sup> <sup>[17]</sup> ¶ 56 "Due process, the appearance of fairness," and the Code of Judicial Conduct "require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned." *Wolfkill Feed and Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 841, 14 P.3d 877 (2000). But a trial court is presumed to perform its \*79 functions without bias. *Wolfkill*, 103 Wash.App. at 841, 14 P.3d 877. The appearance of fairness doctrine is violated only when a reasonably prudent and disinterested observer would conclude that the parties did not obtain a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995).

<sup>[18]</sup> <sup>[19]</sup> ¶ 57 Arguments (1), (4), (7), and (11) pertain to matters outside the record. This court will not review matters outside the record on direct appeal. *State v. McFarland*, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995). The appropriate vehicle for these arguments is a personal restraint petition.<sup>8</sup> See *McFarland*, 127 Wash.2d at 338, 899 P.2d 1251.

<sup>[20]</sup> ¶ 58 Arguments (2), (8), (9), and (10) are not apparent on the record. A defendant submitting a SAG need not cite the record but must inform us of the nature and occurrence of alleged errors. RP 10.10(c). Because these arguments are insufficiently specific for us to identify any error in the record, these arguments fail.

<sup>[21]</sup> ¶ 59 And arguments (3), (5), and (6) are not evidence of bias. All of them represent legal rulings which, although contrary to Kipp, would not lead a reasonable observer to believe that the trial judge was biased.

¶ 60 Because Kipp argues matters outside the record, argues matters without adequate specificity for us to determine their nature and occurrence, and assigns error to legal rulings that do not show bias, his argument on this point fails.

## II. MISSTATING BURDEN OF PROOF

¶ 61 Kipp also argues in his SAG that the prosecutor misstated the burden of proof at closing argument by arguing that the jury could find Kipp guilty based only on the finding that he was possibly guilty. But the record reflects that the prosecutor argued the *opposite* of what Kipp claims. During closing argument rebuttal, the prosecutor argued, "Now, reasonable doubt is defined in instruction number 3. It's not a percentage, it's not any single doubt, it's *not* a mere possibility." 3 RP at 416 (emphasis added). Because it is contrary to the record, Kipp's argument on this point fails.

¶ 62 We affirm.

I concur: QUINN–BRINTNALL, J.

VAN DEREN, J. (dissenting).

¶ 63 Washington State’s privacy act, chapter 9.73 RCW, “is considered one of the most restrictive in the nation.” *State v. Townsend*, 147 Wash.2d 666, 672, 57 P.3d 255 (2002). Here, the trial court concluded and the majority holds that Kipp’s conversation with Joseph T. was not “private” within the act’s meaning. But our Supreme Court has held that term “ ‘private’ ” within the act means “ ‘belonging to one’s self ... secret ... intended only for the persons involved ( [in] a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.’ ” *State v. Christensen*, 153 Wash.2d 186, 192–93, 102 P.3d 789 (2004) (emphasis added) (internal quotation marks omitted) (quoting *Townsend*, 147 Wash.2d at 673, 57 P.3d 255).

¶ 64 If a conversation between two family members—after clearing the room in a private residence in order to speak alone—about an incriminating matter does not fall within the act’s scope, I fail to see how our highly-restrictive privacy act provides any meaningful protection to the privacy rights of Washington’s citizens. Accordingly, I respectfully dissent.

## I. STANDARD OF REVIEW

¶ 65 “Generally, the question of whether a particular communication is private is a question of fact, but may be decided as a question of law where the facts are undisputed.” *Christensen*, 153 Wash.2d at 192, 102 P.3d 789. We review questions of law de novo. *State v. Jim*, 173 Wash.2d 672, 678, 273 P.3d 434 (2012).

¶ 66 Here, as the majority observes, the trial court accepted the facts as presented by Kipp’s counsel but, nonetheless, based on those facts, concluded that the conversation \*80 was not private. Majority at 73, 75. In other words, the trial court found no disputed facts and decided the issue as a matter of law, which we should review de novo. The majority argues, however, that we should abandon this “oft-cited” standard of review. Majority at 73–74. Although the majority makes interesting observations regarding the standard’s origins, I would decline to abandon it in the absence of clear direction from our Supreme Court that *Christensen* and numerous other criminal cases employed an erroneous standard of review.

¶ 67 Furthermore, the procedural posture of this case supports de novo review. “[W]here competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate.” *Dolan v. King County*, 172 Wash.2d 299, 310, 258 P.3d 20 (2011). In contrast,

“where ... the trial court has not seen nor heard testimony requiring it to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence, then on appeal a court of review stands in the same position as the trial court in looking at the facts of the case and should review the record de novo.”

*Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wash.2d 243, 252, 884 P.2d 592 (1994) (quoting *Smith v. Skagit County*, 75 Wash.2d 715, 718, 453 P.2d 832 (1969)); see also *Dolan*, 172 Wash.2d at 310, 258 P.3d 20. Here, instead of electing to conduct a full suppression hearing, which might have included conflicting live testimony and credibility determinations, the trial court accepted the facts as represented by Kipp and his counsel. In other words, the trial court made no credibility or other determinations for which its first-hand observation of the proceedings better positioned it to make. Accordingly, the same facts that were before the trial court at the suppression hearing are before us now. Simply because the trial court chose to ignore many of those facts it purported to accept in making its findings does not mean we should now turn a blind eye to them.

¶ 68 Likewise, the same issue before the trial court is before us now: whether, as a matter of law, these undisputed facts indicated that the conversation was “private” within the privacy act’s meaning. In the absence of disputed facts, all that

remains for review is this question of law for which we are equally positioned to review as the trial court, requiring de novo review. See *Christensen*, 153 Wash.2d at 192, 102 P.3d 789; *State v. Byers*, 85 Wash.2d 783, 786, 539 P.2d 833 (1975) (“where the facts are undisputed, a determination of the presence or absence of probable cause to stop or arrest becomes a question of law, the judicial determination of which becomes a conclusion of law”). Accordingly, I would adhere to the *Christensen* court’s standard of review and review de novo the trial court’s conclusion that the conversation was not private.

## II. “PRIVATE” UNDER THE PRIVACY ACT

¶ 69 Our courts have further held that “[a] communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable.” *Christensen*, 153 Wash.2d at 193, 102 P.3d 789. In evaluating whether an expectation of privacy was reasonable, we consider (1) the communication’s duration and subject matter, (2) the communication’s location and the presence or potential presence of third parties, and (3) the nonconsenting party’s role and his relationship to the consenting party. *Lewis v. Dep’t of Licensing*, 157 Wash.2d 446, 459, 139 P.3d 1078 (2006). No one factor is determinative because the privacy analysis turns on “the facts and circumstances of each case.” *State v. Clark*, 129 Wash.2d 211, 224, 227, 916 P.2d 384 (1996) (quoting *Kadoranian v. Bellingham Police Dept.*, 119 Wash.2d 178, 190, 829 P.2d 1061 (1992)). In this case, I would hold that as matter of law, these factors compel a conclusion that Kipp’s conversation with Joseph T. was private within the act’s meaning and that the tape recording should have been suppressed.

### A. Duration and Subject Matter

¶ 70 I agree with the trial court’s conclusion that the conversation’s 10-minute duration \*81 demonstrates its private nature. But I disagree with its conclusion and the majority’s apparent agreement that under this factor, “a confession of child molestation to the victim’s father ... is not the sort of subject matter that remains private,” thus vitiating the application of our state’s privacy act. Majority at 75. Although it may be that the content of such a confession is not likely to remain private, it is certainly not reasonable to attribute intent to the perpetrator to make such a confession public or to allow it to be recorded and used against him in criminal proceedings.

¶ 71 Instead of focusing on the conversation’s subject matter and the subjective intent of the nonconsenting party, the majority’s reasoning focuses on the third factor—Kipp’s role in the conversation and his relationship to Joseph T. Furthermore, to the extent that the majority’s conclusion creates a per se rule that “a confession of child molestation” or any other crime is not subject to a reasonable expectation of privacy, it is erroneous.

¶ 72 With respect to the subject matter of communications, our Supreme Court observed that it has generally held “inconsequential, nonincriminating” conversations “lack[ ] the expectation of privacy necessary to trigger the privacy act.” *State v. Faford*, 128 Wash.2d 476, 484–85, 910 P.2d 447 (1996) (emphasis added). For example, in *Kadoranian*, the court held that a party’s recorded statement conveying “general information” that her father was not home was inconsequential, nonincriminating, not “the kind of communication that the privacy act protects.” 119 Wash.2d at 190–91, 829 P.2d 1061. Even when our Supreme Court has held that incriminating recorded conversations were not private, it observed that the recorded conversations were “routine conversations” concerning “routine illegal drug sales” and, thus, “were essentially the same conversations that the defendants might have had with a great many other strangers who approached asking for cocaine.” *Clark*, 129 Wash.2d at 227–28, 916 P.2d 384.

¶ 73 Thus, it follows that a defendant’s nonroutine, incriminating statements are a type of conversation that the privacy act protects. *Accord State v. Babcock*, 168 Wash.App. 598, 606, 279 P.3d 890 (2012) (defendant’s conversation about hiring a hit man “covered a serious matter not normally intended to be public” and was subject to reasonable expectation of privacy). Here, Kipp incriminated himself in discussing molestation of Joseph T.’s daughters, a type of conversation certainly not involving routine subject matter or matters normally intended to be public. I would hold that the conversation’s subject matter demonstrates both Kipp’s subjective intent and his reasonable expectation of privacy<sup>9</sup> concerning the conversation that

Joseph T. surreptitiously recorded.

### B. Location and Presence of Third Parties

¶ 74 Likewise, Kipp's subjective intent and reasonable expectation of the conversation's privacy is demonstrated by its location: a private home. Private homes are "normally afforded maximum privacy protection." *Clark*, 129 Wash.2d at 226, 916 P.2d 384. Yet the trial court and the majority find dispositive the generalization that kitchens are "common area[s]" with increased potential for the presence of third parties. Majority at 75. Because this generalization resembles a per se rule contrary to the required case-by-case analysis of privacy act claims \*82 and is divorced from the specific facts of this case, I disagree. See *Faford*, 128 Wash.2d at 484, 910 P.2d 447 (privacy act analysis calls for case-by-case factual analysis, not per se rules).

¶ 75 In this case, the scant facts adduced by the trial court demonstrate Kipp's subjective intent and reasonable expectation that the conversation in the house's kitchen was private. The conversation was held in one room of a private residence. In a private residence, unlike a public meeting place such as a street or cafe that is potentially occupied by numerous unknown passersby, one ordinarily and reasonably expects the presence of only a limited class of other people, such as family members and guests. Here, in fact, one such family member, Joseph T.'s son, left the kitchen so that only Kipp and Joseph T. were there to converse. And there was no evidence at the suppression hearing that anyone else was in the residence who they expected to or who might intrude on or overhear their conversation. These facts demonstrate Kipp's reasonable expectation of the conversation's privacy.

### C. Kipp's Role and Relationship to Joseph T.

¶ 76 Kipp's reasonable privacy expectations are also demonstrated by his role in the conversation and his relationship to Joseph T. In evaluating this factor, Washington courts have repeatedly held that "[t]he nonconsenting party's apparent willingness to impart the information to an unidentified stranger evidences the non-private nature of the conversation." *Clark*, 129 Wash.2d at 226–27, 916 P.2d 384; see also *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061.

¶ 77 But here, Joseph T. was Kipp's brother-in-law and, thus, a familiar family member, not a stranger. The trial court and the majority reason that this relationship was irrelevant, as Joseph T. and Kipp were speaking "as father of a daughter and the accused molester." Majority at 75 (quoting Report of Proceedings (RP) at 64). But the majority's focus on Kipp's role as "the accused" eviscerates the privacy act's protections for any person accused of a crime who speaks to a relative of a crime victim or any other person. Under this rationale, being suspected of or accused of a crime would always weigh against any accused person who makes an incriminating statement, yet incriminating statements are the very type of communications usually triggering the privacy act's protections. See *Faford*, 128 Wash.2d at 484–85, 910 P.2d 447; *Kadoranian*, 119 Wash.2d at 190–91, 829 P.2d 1061; *Babcock*, 168 Wash.App. at 608, 279 P.3d 890. Moreover, such an interpretation of the privacy act encourages relatives of crime victims to surreptitiously record conversations with those they suspect of the crime, hoping to capture an incriminating statement from an unsuspecting, nonconsenting person, contrary to the act's intent.

### D. Other Factor Considered by Trial Court

¶ 78 The trial court also reasoned that Kipp's offer to have another private meeting with Joseph T. "tip[ped]" the analysis against Kipp because it demonstrated Kipp's subjective belief that the surreptitiously recorded conversation was not private. RP at 64. But the trial court's reasoning is flawed. To me, Kipp's comment demonstrates only that he desired a subsequent private conversation. It more clearly demonstrates Kipp's desire to continue to handle the matter privately.

¶ 79 I would hold that the facts before the trial court at the suppression hearing demonstrate Kipp's subjective intent and reasonable expectation of privacy sufficient to trigger the privacy act's protections. He engaged in a conversation with Joseph T., a family member, in one room of a private residence after the only known third party left the room for the purpose of leaving Kipp and Joseph T. alone. After the other person left them alone, Joseph T. confronted Kipp with accusations of crimes against his daughters while secretly recording the conversation. Kipp then admitted to the criminal conduct while being secretly recorded and later asked for a further private meeting with Joseph T.

¶ 80 A clearer case for application of the privacy act can hardly be stated. Any other interpretation of these facts leaves all Washington citizens vulnerable to the surreptitious \*83 recording of incriminating and nonincriminating conversations with a familiar party in a private home, as though the act did not exist.

¶ 81 Because I would hold that the conversation was private, I would suppress the nonconsensual recording. Thus, I dissent from the majority's holding that this was not a private conversation protected by our privacy act and that the secret recording was admissible against Kipp at trial.

#### Footnotes

<sup>1</sup> RCW 10.58.090, found unconstitutional in *State v. Gresham*, 173 Wash.2d 405, 432, 269 P.3d 207 (2012), provided for the admissibility of a defendant's prior sex offenses when charged with a current sex offense, notwithstanding ER 404(b).

<sup>2</sup> We refer to DGT and JMC by their initials to protect their identities as the victims of sexual assault. We refer to their family's last name by initial for the same reason.

<sup>3</sup> Ch. 9.73 RCW.

<sup>4</sup> Under CrR 3.6(a), if the trial court determines that no evidentiary hearing is required on a motion to suppress, "the court shall enter a written order setting forth its reasons." Although the trial court failed to enter such an order, Kipp does not assign error on this basis. A party's failure to assign error or argue an issue precludes appellate consideration. RAP 10.3(g); *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wash.App. 183, 190 n. 4, 69 P.3d 895 (2003).

<sup>5</sup> Although "nature" was not the correct term under *Clark*, it appears that the trial court used the term to mean "subject matter." 129 Wash.2d at 225, 916 P.2d 384.

<sup>6</sup> The dissent would replace this finding with a contrary finding apparently based on its own evaluation of the evidence. Dissent at 82–83. But our standard of review calls not for an independent evaluation of the evidence, but rather review of the trial court's findings for substantial evidence. *Hill*, 123 Wash.2d at 645–47, 870 P.2d 313. The question is not whether we would have made a different finding under the evidence here, but whether substantial evidence exists to support the finding that the trial court actually made. And Kipp does not challenge this finding, instead arguing only that it could have "as easily be[en] argued in favor of Mr. Kipp." Br. of Appellant at 25. Given that Kipp admits this finding is arguable, there is no basis for us to conclude that it was unsupported by substantial evidence.

<sup>7</sup> The dissent argues that the trial court should have ignored the fact that the location was a kitchen and instead focused solely on the evidence that the conversation took place in a private residence. Dissent at 81–82. But the presence of Joseph T.'s son immediately before the conversation shows that third parties had access to the kitchen. This supports the trial court's finding that there was the potential presence of third parties. We hold that the trial court based this finding on substantial evidence.

<sup>8</sup> RAP 16.3.

<sup>9</sup> I recognize that we normally consider the subjective intent and reasonable privacy expectations of all parties to a communication, as opposed to considering only the defendant's expectations. See *Christensen*, 153 Wash.2d at 193, 102 P.3d 789. But our Supreme Court has indicated that the pertinent analysis under the privacy act focuses on the intent and reasonable privacy expectations of a nonconsenting participant in the recording. See *Christensen*, 153 Wash.2d at 194, 102 P.3d 789 ("Furthermore, since it is Christensen's expectation of privacy with which we are concerned, ... it cannot reasonably be said that Christensen's expectation was similarly lowered."); *Townsend*, 147 Wash.2d at 674, 57 P.3d 255 (analyzing only defendant's subjective intention and reasonable expectation that communications were private). Without doubt, the person who surreptitiously records a conversation does not intend for the conversation to remain private. Thus, I focus only on Kipp's subjective intent and reasonable expectations

regarding privacy.

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## **Appendix 2**

Rev. Code Wash. (ARCW) § 9.73.030

Statutes current through 2012 Regular and First and Second Special Sessions.

Annotated Revised Code of Washington > TITLE 9. > CHAPTER 9.73.

**§ 9.73.030. Intercepting, recording, or divulging private communication -- Consent required -- Exceptions**

- (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
  - (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;
  - (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.
- (2) Notwithstanding subsection (1) of this section, 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.
- (3) Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.
- (4) An employee of any regularly published newspaper, magazine, wire service, radio station, or television station acting in the course of bona fide news gathering duties on a full-time or contractual or part-time basis, shall be deemed to have consent to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers. Withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service, or radio or television station from divulging the communication or conversation.

**History**

## **Appendix 3**

**Rev. Code Wash. (ARCW) § 9.73.050**

Statutes current through 2012 Regular and First and Second Special Sessions.

Annotated Revised Code of Washington > TITLE 9. > CHAPTER 9.73.

**§ 9.73.050. Admissibility of intercepted communication in evidence**

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

**History**

## Appendix 4

**Wash. RAP 13.4**

Rules current through September 14, 2012

Washington Court Rules > STATE RULES > PART III. > RULES OF APPELLATE PROCEDURE (RAP) > TITLE 13.

**Rule 13.4. Discretionary review of decision terminating review**

- (a) *How to Seek Review.* A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.
- (b) *Considerations Governing Acceptance of Review.* A petition for review will be accepted by the Supreme Court only:
- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
  - (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
  - (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
  - (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.
- (c) *Content and Style of Petition.* The petition for review should contain under appropriate headings and in the order here indicated:
- (1) *Cover.* A title page, which is the cover.
  - (2) *Tables.* A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where cited.

## Wash. RAP 13.4

- (3) *Identity of Petitioner.* A statement of the name and designation of the person filing the petition.
  - (4) *Citation to Court of Appeals Decision.* A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.
  - (5) *Issues Presented for Review.* A concise statement of the issues presented for review.
  - (6) *Statement of the Case.* A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.
  - (7) *Argument.* A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.
  - (8) *Conclusion.* A short conclusion stating the precise relief sought.
  - (9) *Appendix.* An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.
- (d) *Answer and Reply.* A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.
  - (e) *Form of Petition, Answer, and Reply.* The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.
  - (f) *Length.* The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices.
  - (g) *Reproduction of Petition, Answer, and Reply.* The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.
  - (h) *Amicus Curiae Memoranda.* The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.
  - (i) *No Oral Argument.* The Supreme Court will decide the petition without oral argument.

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COURT OF APPEALS  
DIVISION II

2012 OCT 31 PM 2:45

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

WASHINGTON STATE COURT OF APPEALS

DIVISION II

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NO. 39750-1-II

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STATE OF WASHINGTON,

RESPONDENT,

Vs.

WILLIAM J. KIPP, JR.,

APPELLANT

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DECLARATION OF SERVICE

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ALTON B. McFADDEN  
Attorney for Appellant  
WSBA No. 28861

OLSEN & McFADDEN, INC., P. S.  
216 Ericksen Avenue NE  
Bainbridge Island, WA 98110  
(206) 780-0240

DECLARATION OF SERVICE – Page 1

OLSEN & McFADDEN, INC., P. S.  
Attorneys at Law  
216 Ericksen Avenue, NE  
Bainbridge Island, WA 98110  
(206) 780-0240  
(206) 780-0318

**ORIGINAL**

I, AMANDA LEONE, declare the following:

1. I am over the age of 18 years old, and I am not a party to this action.
2. On **OCTOBER 31**, 2012, I placed one copy of the following document:

1) Petition for Review for Supreme Court

FOR the following party:

Russ Hauge, Prosecuting Attorney  
**KITSAP COUNTY PROSECUTORS OFFICE**  
DPA for Appeals  
614 Division Street, MS-35  
Port Orchard, WA 98366-4681

3. Service was made pursuant to Ch. 21 L 2000 Section 6:

**by delivery to the person named in paragraph 2, given personally to a staff member in his office on his behalf.**

by delivery to Lori Vogel, a person of suitable age and discretion residing at the usual abode of the person named in paragraph 2.

by mailing a copy to the person named in paragraph 2, by any form of mail requiring a return receipt.

4. Other:

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

Signed at Port Orchard, on October 31, 2012.  
(City and State) (Date)

Amanda Leone  
AMANDA LEONE