SUPREME COURT NO. 102716-8

NO. 84473-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MORRIS KAMARA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Matthew Williams, Judge

PETITION FOR REVIEW

CHRISTOPHER H. GIBSON
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER

Petitioner Morris Kamara, appellant below, asks this Court to review the Court of Appeals decision referenced below.

B. COURT OF APPEALS DECISION

Kamara seeks review of the court of appeals published decision in State v. Kamara, __ Wn. App. 2d __, 539 P.3d 48, No. 84473-3-I, 2023 WL 8366514 (Slip Op filed Dec. 4, 2023). A copy of the slip opinion is attached as an appendix.

C. REASON WHY REVIEW SHOULD BE GRANTED

Review is warranted under RAP 13.4(b)(4) because the Court of Appeals decision involves an issue of substantial public interest that should be determined by this Court, to wit; does Washington's Privacy Act require exclusion of an audio recording of a conversation between a dating couple when neither party consented and for which no exception applies?

D. STATEMENT OF THE CASE

1. Procedural Facts

Kamara was charged with second degree rape. CP 1. The prosecutor alleged that on or about August 30-31, 2019, Kamara raped B.T., an acquaintance, by forcible compulsion in his apartment. CP 2.

Following a trial before the Honorable Judge Matthew Williams, a jury convicted Kamara as charged. CP 61; RP 1512-14.[1] Kamara received a minimum term sentence of 84 months. CP 87-99; RP 1545-49. Kamara appealed. CP 100.

On appeal, Kamara argued the trial court erred in admitting B.T.'s inadvertent cell phone audio recording of her time at Kamara's apartment because it was a private conversation made without any consent and therefore violated Washington's privacy act, RCW 9.73.030. Relying almost exclusively on this

[1] There are four consecutively paginated volumes of verbatim report of proceedings referenced herein as "RP" followed by the appropriate page cite.

Court's prior decisions in State v. David Smith, 85 Wn.2d 840, 540 P.2d 424 (1975) (David Smith) and State v. John Smith, 189 Wn.2d 655, 405 P.3d 997 (2017) (John Smith), the Court of Appeals rejected Kamara's claim and affirmed his judgment and sentence. Appendix.

2. Substantive Facts

(a) *The Alleged Rape*

Kamara and B.T. met in late July 2019 at a social gathering. RP 1056-57, 1064. About a week later B.T. accepted Kamara's "friend request" Facebook. RP 1071. Kamara contacted B.T. through Facebook messenger about dating him. She initially declined, but eventually agreed to meet with him on August 30, 2019. RP 1076-78, 1083-84.

Kamara picked B.T. up in his car at about 11 pm. RP 1085, 1202. B.T. had already dressed for bed, so when she got in his car she was dressed in sleepwear. RP 1088-89. On the ride to Kamara's apartment B.T. told him she needed to be home in time for work the next day. RP 1080, 1100.

Once inside Kamara offered B.T. a drink, which she claims she declined, but Kamara brought her a glass of red wine anyway as she sat on his couch. RP 1108-10. Kamara poured himself a glass of "Fireball" liquor, of which he gave her a taste. RP 1113. Kamara eventually sat on the couch next to her as they watched and talked about the television show they were viewing, which was about exotic dancers and contained "a lot of nudity." RP 1110, 1114-15.

B.T. recalled that as they discussed the show Kamara started touching her arm and at one point tried to "hold [her] boob." RP 1115. She had been at Kamara's place for 60-90 minutes at this point. RP 1206. B.T. said this made her uncomfortable, so she went to use the bathroom. RP 1116.

After relieving herself, B.T. remained in the bathroom for about 10-15 minutes looking through her social media apps. RP 1117, 1207. She eventually stumbled onto an audio recording app she had downloaded a couple of days before and activated it to see if it worked, which it did. RP 1117-19. When she switched

to see a notification on one of her other phone apps, she did not realize she left the recording app on record mode. RP 1119-20, 1207, 1214. She did not discover the recording until the following day. RP 1121-22, 1209.

B.T. recalled that when she returned from the bathroom, she sat at a different place on the couch away from Kamara and focused on her social media apps. RP 1128-30. Kamara moved closer and asked why she was on her phone instead of paying attention to him. RP 1131. B.T. replied she had nothing to say, after which Kamara started complimenting her on her looks, making "advances" towards her, and touching her. RP 1131-32.

B.T. claimed she then told Kamara she needed to go home. RP 1132. Kamara convinced her to stay longer, but she agreed only to nap on the couch until he took her home at 2 a.m. RP 1134-35. She claimed Kamara said she needed to nap in his bedroom and eventually forced her onto his bed. RP 1136-38, 1142. Kamara lay down next to her. B.T. told him that she was only going to nap and that he needed to take her home at 2 a.m.

RP 1143-44. B.T. recalled that when she went to set her alarm, Kamara tried to kiss her on her lips and "bust," but she resisted. RP 1145.

B.T. claims Kamara eventually got on top of her, pinned her arms to the bed and tried to kiss her, which she claimed muffled her screams. RP 1147. She thought he was initiating "foreplay before anything is going to happen." RP 1148. She claimed she tried to resist physically and verbally but failed and Kamara removed her leggings and underwear and penetrated her vagina with his penis. RP 1154-57.

When Kamara left the room, B.T. remained on the bed. RP 1161. She claimed she briefly considered stabbing Kamara with a kitchen knife, but instead decided to allow Kamara to have sex with her again in an attempt to collect a DNA sample from him before he took her home, both of which he did. RP 1164-66, 1168.

(b) *The Reporting of the Alleged Rape and Evidence Collection and Processing.*

Once at home B.T. tested a friend that she had been raped. RP 1169-70. She removed her clothes and put them in a dirty clothes hamper, where they remained until recovered by law enforcement. RP 1171.

Later that morning B.T. got up, showered, and went to work. She texted another friend about being raped. RP 1172. After returning home from work, she changed clothes and showered again and went to a community BBQ. RP 1173-74. After B.T. told her friend more details about the incident, the friend convinced her to "go get tested," which she did after the BBQ. 1RP 1174-75. She recalled being examined at a clinic and not leaving until 4 or 5 a.m. RP 1175.

While at the clinic, B.T. was interviewed by Officer Loobai Hong at 12:52 a.m. RP 718, 721-22, 724, 1205-06. The interview was recorded and transcribed. RP 723; Ex.2.[2] She

[2] Exhibit 2 was not admitted into evidence.

admitted at trial to telling Hong a lie, which was that she had intentionally started the recording app when she first entered Kamara's apartment. RP 1206. She claimed she told the lie in order for her "defense to sound strong." RP 1207.

B.T. also admitted she did not initially tell Hong she had consensual sex with Kamara shortly after the alleged rape, but claimed it was because she did not remember at the time. RP 1167, 1210-11. She also admitted she feared she would not be believed if she had. RP 1168.

At the clinic, B.T. was seen by Sexual Assault Nurse Examiner Chelsea Reed. RP 1240, 1262. Reed documented verbatim what B.T. told her about the alleged rape. RP 1250; Ex. 21. She read B.T.'s statement into the record at trial. RP 1279-81. In that statement B.T. told Reed she activated the audio recording app on her phone as she was "walking through the door" to Kamara's apartment. RP 1280. She explained how they watched TV, had conversations, and had some laughs. Id. She explained how Kamara got more and more sexually

aggressive, eventually forcing her into his bedroom and raping her before taking her home. RP 1281. B.T. never told Reed about the consensual intercourse. RP 1290. Reed also processed a sexual assault evidence kit when examining B.T., which included gathering swabs from her internal and external genitalia, her breasts, and her fingernails. RP 1283-85.

Reed's exam of B.T. revealed no injuries to her body. RP 1287. B.T. never stated she was in physical pain, she denied alcohol or drugs were involved, denied passing out, vomiting or that weapons or strangulation were involved, and denied being held, grabbed, restrained, bitten, burned, or being subjected to intimidating threats. RP 1288-89. Reed opined any bruising as a result of the alleged rape would most likely showed up by the time of the examined. RP 1293.

B.T. subsequently sent Officer Hong a copy of the audio recording of the incident from her phone before deleting it. RP 760, 1122-23, 1215; Ex. 19.

The lead detective in the case, Melanie Robinson and another detective went to Kamara's residence and found him outside, he agreed to talk and invited them in. RP 922, 937-38. He also agreed to a recorded interview, which was played for the jury. RP 938, 962; Exs. 13 & 14.[3]

Kamara initially denied knowing B.T., but later admitted "seein' her around." Ex. 14 at 3, 5. Kamara denied picking up B.T. on September 1, 2019,[4] and bringing her to his house that evening. Id. at 6. He also denied drinking that night. Id. Kamara denied anyone was at his home on September 1, 2019. Id. at 7. When Robinson asked if he was willing to provide a DNA sample, he agreed, but then asked to speak to an attorney first. Id. at 8.

---

[3] The actual recording played for the jury is Exhibit 13. Exhibit 14, which was not admitted at trial, is a transcript of that recording. Citations herein about the recording are to the page numbers of Exhibit 14.

[4] Robinson admitted that when she first spoke to Kamara she was asking him about September 1, 2019, not August 30-31, 2019. RP 856.

The swabs collected from B.T. at the clinic on September 1, 2019 and a DNA sample obtained from Kamara were submitted to the Washington State Patrol Crime Lab for testing. RP 1045. DNA was recovered from saliva on B.T.'s underwear, from which the lab isolated a mixture of three DNA contributors. RP 1322, 1325. Kamara could not be excluded as a potential contributor. RP 1331.

(c) *Litigation regarding the admissibility of B.T.'s inadvertent recording.*

Pretrial, the defense moved to suppress B.T.'s inadvertent recording (Ex. 19) of her time at Kamara's apartment, arguing it was obtained in violation of the Privacy Act because it was made without Kamara's consent. CP 7-12. The prosecution filed a response. CP 111-27. It argued that while some portions of the recording violate the Privacy Act, others do not because they are not recording conversations between B.T. and Kamara, but instead the sounds made as Kamara allegedly raped B.T. CP 112, 122-24.

At the motion hearing, the defense noted B.T. provided conflicting claims about the recording, from it being an inadvertent recording to claiming she purposefully made the recording for "evidentiary purposes." RP 175. Regardless of how the recording was made, the defense argued its production violated the Privacy Act because Kamara was never made aware his private conversation with B.T. was being recorded. RP 175-76.

The prosecution conceded the recording fails to indicate Kamara or B.T. ever consented to being recorded. RP 178. It claimed, however, that under the most recent appellate court interpretations of the Privacy Act, it was appropriate to parse through the recording to determine what parts record "conversation" and what parts do not, claiming that those that do not, should not be excluded under the Act. RP 178-83.

The prosecution also conceded the first 20 minutes of the recording involve a "private discussion" between B.T. and Kamara for which no exception applies and therefore was made

in violation of the Privacy Act and subject to exclusions as a result. RP 185-86.

The prosecution claimed, however, that the last approximately 9 minutes of the recording did not record a "conversation," but instead "primarily the sounds of violent sexual assault being committed." RP 183. The prosecution noted this part of the recording reflects B.T. crying and pleading for Kamara to stop, telling him "it hurts" and asking him "Why are you doing this?" RP 184. The prosecution argued that although B.T. is making statements during the last approximately 9 minutes of the recording, Kamara's failure to respond verbally means this did not constitute a "conversation" for purposes of the Act because it does not involve a "normal discourse or exchange of ideas." RP 184-85.

In reply, the defense argued Kamara's failure to respond verbally to B.T.'s comments during the last approximately 9 minutes of the recording does not mean it was not part of the 'conversation' that was occurring during the first approximately

20 minutes of the recording. RP 189. The defense urged the court to exclude the entire recording because it violates the Privacy Act. RP 190.

In its oral ruling, the trial court began by agreeing with both parties that the recording was of conversations between B.T. and Kamara and that neither of them expressly consented to the recording. RP 191-92. It next concluded "the issue of consent is not really an issue," opining that "whether it was done deliberately or whether it was inadvertent, under the evolution of our case law is while relevant is not material to the ultimate analysis here." RP 192. The court then set forth by timestamp its documentation of what it heard while listening to the recording. RP 195-99. It then categorized various sections of the recording as either recording a "conversation" or not as follows:

> - The first portion of the recording while B.T. is in the bathroom, about 3 minutes, is not a "conversation." RP 199-200;

- the next approximately 6 minutes is a "conversation." RP 200;

- the next approximately 3.5 minutes of "somebody apparently looking for a playlist" is not a "conversation." Id;

- the next approximately 8 minutes is "conversation," RP 200-01; and

- the final approximately 9 minutes is not a conversation because it does not involve an "exchange of information," and instead records "an act of sexual assault occurring," to which the Privacy Act does not apply RP 201-02.

Although the court found the last part of the recording was of a sexual assault instead of a conversation, it also found that to the extent it was a "conversation," it was still not excluded under the Privacy Act because it falls under the exception that references "the definition of a person that is restraining someone." RP 202-03 (referring to RCW 9.73.030(2)(d), an exception "which relates to communications by a hostage holder

or barricaded person as defined in RCW 70.85.100,[5] whether or not conversation ensues," which can be recorded with a single party's consent).

The court specifically found that Kamara did not threaten B.T., including no threats of bodily harm, that he never attempted to extort B.T., and that he never made an unlawful request of B.T. RP 202-03 (referring to the other exceptions under RCW 9.73.030(2)).

Defense counsel objected to the court's reliance on the exception under RCW 9.73.030(2)(d), arguing the circumstances did not give rise to kidnapping or unlawful imprisonment. RP 205-06.

After the trial court's ruling, defense counsel asked that the entire recording be played to the jury instead of just the last portion while preserving the defense objection to court's ruling

---

[5] RCW 70.85.100(2)(a) defines a "hostage holder" as someone who commits or attempts to commit kidnapping or unlawful imprisonment. The reference to a "barricaded person" is not relevant to this case. See RCW 70.85.100(2)(b).

regarding the Privacy Act. RP 1027. The trial court agreed that the defense Privacy Act-based objection was still preserved. RP 1028. The prosecution did not object.

The court subsequently entered written findings of fact and conclusion of law as required by CrR 3.6(b). CP 56-60.

E. ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS DECISION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.

"Washington State's privacy act is considered one of the most restrictive in the nation." State v. Kipp, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014) (citing State v. Townsend, 147 Wn.2d 666, 672, 57 P.3d 255 (2002)). The act includes RCW 9.73.030(1)(b), which prohibits the recording of a "[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all the persons engaged in the conversation."

Recordings obtained in violation of the Privacy Act are inadmissible in most[6] civil and criminal cases. RCW 9.73.050. Appellate courts review alleged violations of the Privacy Act de novo. State v. Bilgi, 19 Wn. App. 2d 845, 855, 496 P.3d 1230 (2021), review denied, 199 Wn.2d 1002, 504 P.3d 827 (2022).

Because the Privacy Act does not define "conversation," courts may use a dictionary to discern the plain meaning of that term. Newton v. State, 192 Wn. App. 931, 937, 369 P.3d 511, review denied, 186 Wn.2d 1003, 380 P.3d 446 (2016). Webster's Third New International Dictionary 498 (2002), defines "conversation" in pertinent part as an "oral exchange of sentiments, observations, opinions, ideas: colloquial discourse."

The dictionary definition, as well as the Washington Supreme Court's decisions in State v. David Smith, 85 Wn.2d 840, 540 P.2d 424 (1975) (David Smith) and State v. John Smith, 189 Wn.2d 655, 405 P.3d 997 (2017) (John Smith), are

[6] There are exceptions, but they do not apply here. See RCW 9.73.050.

instructive as to whether the recording at issue here was of a "private conversation" and whether there was "consent" to the recording such that an exception to the Privacy Act applied and allowed its admission into evidence. They do not, however, resolve the issue in this case.

In David Smith, the victim received a phone call to meet a person in an alley. 85 Wn.2d at 842. Before the meeting he purchased a tape recorder, concealed it under his clothing, and attached the microphone to his shirt. Id. at 843. The victim's neighbor accompanied him. Id. The victim parked his car near the alley, got out and walked towards the alley while his neighbor remained nearby. Id. The victim met the defendant, David Smith, who was in the alley parked in a truck. Id.

The tape recording of the events was found on the dead victim's body. 85 Wn.2d at 843. The recording contradicted David Smith's statement and testimony. Id. at 843-44. After some introductory remarks and discussion between the victim and his neighbor, all of which was admitted into evidence, the

recording contain some sporadic remarks between them before a gunshot is heard along with screaming, someone begging for their life and then more shots fired. Id. at 844-45.

In David Smith this Court held the recording was not of a "private conversation" under the Privacy Act, stating "[w]e are convinced that the events here involved do not comprise 'private conversation'[7] within the meaning of the statute. Gunfire, running, shouting, and [the victim's] screams do not constitute 'conversation' within that term's ordinary connotation of oral exchange, discourse, or discussion." Id. at 846. This holding was reached despite the fact the recording contained some "unmistakably verbal exchanges" between the defendant and victim. State v. Smith, 196 Wn. App. 224, 234, 382 P.3d 721 (2016), rev'd, 189 Wn.2d 655, 405 P.3d 997 (2017). Notably, however, this Court did not attempt to define "private

[7] Although not discussed in the decision, the presence of the victim's friend in the alley, who presumably heard and witnessed the exchange between Smith and his victim, would remove that exchange from the common definition of 'private conversation.'

conversation" and did note that its holding was based on the "bizarre facts" of the case. Id. at 847.

In John Smith the Privacy Act issue arose in the context of a "recording on a cell phone voice mail of a domestic assault" during which the defendant, John Smith, assaulted his wife. 189 Wn.2d at 657-58. During the assault, John Smith used his landline to call his cell phone in an attempt to locate it. The call eventually triggered the cell phone's voicemail, which recorded the incident because John Smith left the landline call open during the assault. Id. at 658. The voicemail recording "contained sounds of a woman screaming, a male claiming the woman brought the assault on herself, more screams from the female, name calling by the male" and a threat to kill by the male. Id.

At trial, John Smith moved to suppress the voicemail arguing it was obtained in violation of the Privacy Act. Id. at 659-60. The motion was denied because the court found John Smith's wife's "conduct did not constitute an interception" and because the recording was made inadvertently. Id. at 660.

Following a bench trial, John Smith was found guilty of attempted second degree murder and second degree assault. Id.

The Court of Appeals reversed John Smith's attempted murder conviction, holding the trial court erred in denying the motion to suppress because the voicemail recording was of a "private conversation" and because John Smith had unlawfully recorded the conversation, even though it was inadvertent. Id.

This Court reversed in a plurality decision. The lead opinion by Justice Madsen was joined by Johnson, J., Owens, J. and Wiggins, J. Id. at 667. It concluded the recorded exchange between John Smith and his wife was similar to the recording at issue in David Smith, in that it did not constitute a "conversation" for purposes of the Act because it;

> contains shouting, screaming, and other sounds, but it also contains brief oral exchanges between Mr. and Mrs. Smith in which Mr. Smith tells his wife that he is going to kill her, and she responds, "I know." CP at 78. Because the voice mail recording primarily contains the sounds of a violent assault being committed, we hold that based on David Smith, the content of the voice mail recording here

> is not of a "conversation" as contemplated by the privacy act.

Id. at 663.

The same four justices concluded that Smith initiated the recording by calling his cell phone from the landline, and therefore he implicitly consented. Id. at 664-66.

Justice Gonzalez and Justice Gordon McCloud filed concurrences. Id. at 667-74. Justice Gordon McCloud's concurrence was joined by Justice Yu, Chief Justice Fairhurst and Justice Stephens. Id. at 674.

According to Justice Gonzalez, although others might be able to challenge the recording as obtained in violation of the Privacy Act, John Smith could not because he was responsible for and consented to its making. Id. at 667-69.

According to Justices Gordon-McCloud, Yu, Fairhurst and Stephens, they agreed with that portion of Justice Madsen's lead decision that holds "screams do not constitute a 'conversation'" because they "do not constitute 'oral exchange,

discourse, or discussion.'" Id. at 669 (citing Id. at 663-64). As to the substantive exchanges between John Smith and his wife, however, they concluded:

> The portion of the recording containing the statement "No [w]ay .... I will kill you" and related verbal statements, however, is very different. Clerk's Papers (CP) at 78. That portion of the recording is a highly communicative and discursive oral exchange; in fact, it constitutes an explicit verbal admission of the element of intent to kill. It therefore constitutes "conversation" within the meaning of Washington's privacy act, RCW 9.73.030. Further, under our precedent, it constitutes a conversation that we must consider "private."

Id. at 669.

As to the lead opinion's reliance on David Smith, Justice Gordon McCloud's concurrence notes it "stretches . . . it beyond its 'bizarre facts' to a 'conversation' where its analysis was never intended to apply." Id. at 671 (citing that portion of David Smith which noted its decision was limited to the "bizarre facts" presented. See 85 Wn.2d at 846-47).

But Justice Gordon McCloud agreed that because Smith caused the recording to be made, he consented to its making. And because he consented to its making, the exception to exclusion under the Act applied because it records a conversation that conveys threats of bodily harm, which only requires one-party consent, which Smith implicitly provided. Id. at 673-74.

In summary, the majority holding from John Smith is that the verbal exchange between husband and wife was a "conversation," but that it contained threats of bodily harm. And because the husband implicitly "consented" to the recording, the one-party consent for the 'threats of bodily harm' exception applied and made the recording admissible.

The facts here regarding how the recording was made and what was captured are legally and factually distinguishable from David Smith and John Smith. The recording at issue here recorded a "private conversation" between B.T. and Kamara that was protected by the Privacy Act and should have been excluded at trial. It does not involve the "bizarre facts" at issue in David

Smith, there was no consent given by at least one party as in both David Smith and John Smith, and therefore there is no applicable statutory exception. David Smith and John Smith do not resolve the issue here, which is whether an inadvertent, secret, and unconsented to recording of a couple on a date in which "conversation" occurs throughout the recording is protected by Washington's strict privacy act. The Court of Appeals erred in concluding it was not.

1. The entire recording is of a conversation.

The Privacy Act prohibits the recording of "[p]rivate conversations," which is not defined by statute. RCW 9.73.030(1)(b); State v. Kipp, 179 Wn.2d 718, 724, 317 P.3d 1029, 1031 (2014). The common meaning of "Private conversation" is:

> a conversation carried on in circumstances that may reasonably be taken to indicate the parties to the conversation desire it to be listened to only by themselves, but does not include a conversation carried on in circumstances in which the parties to the conversation ought reasonably to expect the conversation may be overheard by someone else[.]

https://www.lawinsider.com/dictionary/private-conversation [8]

There is no indication B.T. and Kamara were not alone in Kamara's home on the evening of August 30-31, 2019. Therefore, both could reasonably believe their conversation that evening was private.

It is also apparent from B.T.'s testimony, her inadvertent recording, and the trial court's description of what the recording depicts that they conversed throughout the evening on a number of topics including drinking, exotic dancers, how people get into exotic dancing, why B.T. was on her phone so much, B.T.s' looks, when B.T. should go home, whether it was appropriate for Kamara to touch B.T., where to sleep, whether to set an alarm and eventually about whether being intimate was appropriate. RP 1115, 1131-36; Ex. 19; CP 57-58.

Under both David Smith and John Smith, the discourse between Kamara and B.T. constituted a private conversation

[8] Last visited on December 22, 2023.

under the privacy act because there were "unmistakably verbal exchanges" between Kamara and B.T. captured in that part of the recording absent an applicable exception. John Smith, 196 Wn. App. at 234.

2. No Exceptions to the Privacy Act Apply.

As discussed in the Brief of Appellant (BOA) filed in the court of appeal, because there was no consent by either Kamara or B.T., none of the various exceptions to Washington's privacy act applied to the inadvertent recording by B.T. BOA at 40-47.

3. Review is Warranted.

As the Court of Appeals decision reveals, harmonizing the decisions in David Smith and John Smith is no easy task. David Smith is purportedly limited to its "bizarre facts." 85 Wn.2d at 846-47. John Smith resulted in a plurality of conclusions. The only majority conclusions from John Smith are that the recorded verbal exchange between husband and wife was a "conversation," but that it contained threats of bodily harm, and because the husband implicitly "consented" to the recording, the

one-party consent for the 'threats of bodily harm' exception applied. 189 Wn.2d at 663-69, 673-74.

Neither decision considered the situation here, where there was a private conversation on a range of topics, approximately 29 minutes of which was inadvertently recorded without the consent of either party, where the last 9 minutes of the recording *might* be of a sexual assault in progress, but *might* instead be a couple engaged in consensual activities, and where no exception to the privacy act applies.

This Court should grant review to address whether Washington's privacy act should protect against the use of a recording of a private conversation under the unique circumstance at play here. Whether Washington's privacy act is as strict as this Court previously indicated remains an issue of substantial public interest that should be decided by this Court. As such, review is warranted under RAP 13.4(b)(4).

F. CONCLUSION

For the reasons set forth above, Kamara asks this Court to grant review of the court of appeals published decision in his case.

I certify that this document was prepared using word processing software and contains 4,830 words in 14 point font excluding those portions exempt under RAP 18.17.

DATED this 3rd day of January, 2024

Respectfully submitted,

NIELSEN KOCH & GRANNIS PLLC

CHRISTOPHER H. GIBSON
WSBA No. 25097

Attorneys for Petitioner

NIELSEN KOCH & GRANNIS P.L.L.C.

January 04, 2024 - 10:36 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84473-3
Appellate Court Case Title:	State of Washington, Respondent v. Morris Kamara, Appellant

The following documents have been uploaded:

- 844733_Petition_for_Review_20240104103552D1552059_2024.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Morris Kamara 84473-3-I.CorrectedPFR.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- jennifer.joseph@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Correcting Cover Page

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Christopher Gibson - Email: gibsonc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20240104103552D1552059

FILED
12/4/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MORRIS KAMARA, Appellant.	No. 84473-3-I DIVISION ONE PUBLISHED OPINION

MANN, J. — Under Washington's privacy act, RCW 9.73.030, it is generally unlawful to record a private conversation without first obtaining consent of all persons engaged in the conversation. And evidence obtained in violation of the privacy act is inadmissible at trial. Morris Kamara appeals his conviction for rape in the second degree. Kamara argues that the trial court erred in admitting the victim's cell phone audio recording of the rape because it was a private conversation made without his consent and violated the privacy act. Because the portion of the recording at issue was not a private conversation but a recording of a sexual assault, the trial court did not err in admitting the audio recording at trial. We affirm.

I

A

Kamara and B.T. met at a mutual friend's birthday party in July 2019. B.T. had seen Kamara before at various events with members of the Liberian community. B.T. knew Kamara as JR. After the party, Kamara sent B.T. a friend request on Facebook. They began messaging each other on Facebook. Kamara asked B.T. out but she declined because she was in a relationship. Kamara was persistent and asked several more times.

Because Kamara kept pushing, on August 30, 2019, B.T. agreed to meet with him. B.T. texted Kamara her address and later that night he arrived outside of her apartment. B.T. testified at trial to the events that occurred that evening. Once B.T. got in Kamara's car, he immediately drove off. B.T. asked where they were going and Kamara responded that they were going to his place to smoke hookah and watch movies. B.T. repeatedly told Kamara that she had to be home soon in order to sleep before her 8:30 a.m. shift the next day.

Once at Kamara's apartment, Kamara offered B.T. a drink. B.T. declined, but Kamara poured her some wine. They watched a program on TV. After some time, Kamara sat next to B.T. on the couch and then he began putting his hands on her, stroking down her arm, and leaning against her. B.T. got up to use his bathroom and give herself some time to think.

While in the bathroom, B.T. activated a recording app on her phone. At first, she just played with it, recording sounds and then listening. The next time she activated it,

she got a notification and switched to a different app on her phone without stopping the recording.[1]

When she returned to the living room, B.T. sat farther away from Kamara on the couch and continued scrolling through her social media to distract herself. Kamara moved closer and began making sexual remarks and advances toward B.T. B.T. told him she had to go, since she had work the next morning, but Kamara insisted she stay until 2:00 a.m. B.T. told Kamara "no" multiple times and told Kamara not to touch her. B.T. told Kamara she would just nap on the couch until he took her home at 2:00 a.m., but he wanted her to go to his room.

Kamara forced B.T. into his bedroom by pulling her off the couch and pushing her back until she was pushed onto his bed. He pinned her arms to the bed and then used his full body weight on her so she couldn't move. He pulled her pants down and raped her while she cried and repeatedly told him "no, don't, and I don't want to do this." B.T. tried to fight him off, but did not succeed. After B.T. continued to cry and beg Kamara to stop, he finally got off of her and walked out of the room. B.T. testified that she felt defeated. When Kamara returned and started touching her again, B.T. didn't fight, she "just let him do what he had to do."

Kamara then offered to take her home. Once home, B.T. plugged her phone, which had died at some point while at Kamara's home, into its charger. When the phone turned on, she texted her best friend about what had happened. The next

[1] When first interviewed by Kent Police Officer Loobai Hong, B.T. told him she started the recording when she first got to Kamara's house.

morning, she showered and went to work. She also texted another friend what had happened at Kamara's home.

That evening, B.T.'s friend took her to Auburn Regional Medical Center where B.T. underwent a sexual assault examination. She was interviewed by Officer Hong, briefly, while in the emergency room.

The next day, B.T. discovered the audio recording on her cell phone. She e-mailed the recording to Officer Hong.

Kamara was arrested and charged with rape in the second degree.

B

Before trial, Kamara moved under CrR 3.6 to suppress the audio recording as inadmissible under Washington's privacy act, RCW 9.73.030. The State sought only to admit the portion of the recording that captured the rape.

After analyzing the audio recording in open court, the trial court issued detailed findings of the contents, breaking down the 28 minutes, 50 seconds long recording into discrete segments from beginning to end. At various points, two voices can be heard, one male and one female. The voices were identified at trial to be Kamara and B.T. The trial court's findings included that from the start of the recording to minute 20:45, the recording captures music, noises, TV, laughter, and some unintelligible discussion. At the 14-minute mark, B.T. says, "don't touch me." "At 17:20 – the female voice states, 'I don't want to drink anymore' and at 18:50 – she states 'don't, I can walk.'" The court's findings continue:

> At 20:45 – there is conversation that goes "let me sleep" and the female voice says "no – don't." The recording captures the sound of a female crying.

> The male voice responds "no you're good[.]"
>
> From that point forward, the remainder of the recording is primarily statements that are interspersed with crying, requests to stop, male laughter, statements from the female to stop, statements from the female of "leave me alone, I'm scared, I don't want to do this, JR stop it, it hurts," and additional laughter from the male voice.
>
> This continues to the end of the tape.
>
> The recording also includes the female voice saying "what are you doing, I'm begging you please stop. Get off me please."

The trial court concluded:

> From 20:45 to the end of the recording – the court finds that the contents of the recording do not capture a conversation. What is recorded is not an exchange of information. Instead, what it captures is an act of sexual assault.
>
> Pursuant to State v. (David) Smith, 85 Wn.2d 840, 540 P.2d 424 (1975), the contents of the recording from 20:45 through the end of the recording is not a conversation and RCW 9.73.030 does not apply."[2]

At trial, Kamara maintained his objection to the admissibility of the recording but argued that, if the court admitted the excerpt proposed by the State, the entire recording should come in under the rule of completeness. As a result, following B.T.'s testimony,[3] the entire recording was played for the jury.

The jury found Kamara guilty of rape in the second degree.

Kamara appeals.

---

[2] Alternatively, the trial court held that if the last nine minutes of the recording were construed as a conversation, they fell within the privacy act exception for communications by a hostage holder. RCW 9.73.030(2)(d). Because we affirm the trial court's determination that the last nine minutes of the recording were not a conversation, we do not address the trial court's alternate holding that an exception to the privacy act applied.

[3] Kamara did not object to or attempt to exclude B.T.'s testimony at trial.

II

Kamara argues that the trial court erred when it admitted the audio recording because the recording was a private conversation under RCW 9.73.030 and therefore inadmissible under RCW 9.73.050. We disagree.

This court reviews alleged violations of the privacy act de novo. State v. Bilgi, 19 Wn. App. 2d 845, 855, 496 P.3d 1230 (2021). "[S]ince whether the 'facts' are encompassed by the statutory protections presents a question regarding statutory interpretation, de novo review is the appropriate standard of review." State v. Kipp, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014).

"Washington's privacy act is considered one of the most restrictive in the nation." Kipp, 179 Wn.2d at 724. Under the privacy act, it is generally unlawful to record a private conversation without first obtaining consent of all persons engaged in the conversation. RCW 9.73.030(1)(b). Information obtained in violation of the act is inadmissible in any civil or criminal case. RCW 9.73.050.

A

Kamara argues in his brief that the entire recording is a conversation and it was error for the trial court to parse the recording and then divide it into parts that were conversation and parts that were not conversation. Kamara offers no authority for this argument. At oral argument, counsel for Kamara conceded that in this case it was acceptable to segregate the last nine minutes of the recording.[4] We accept Kamara's concession.

[4] Wash. Ct. of Appeals oral argument, State v. Kamara, No. 84473-3-I (Sept. 20, 2023) at 2 min., 24 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023091198/?eventID=2023091198.

Cases considering the privacy act appear to routinely determine whether a part of a recording constitutes conversation. For example, in State v. Williams, 94 Wn.2d 531, 549, 617 P.2d 1012 (1980), our Supreme Court held that under the privacy act, the trial court "properly suppressed the recordings and testimony concerning the conversations with Williams and his alleged co-conspirator, and correctly ruled admissible those parts of the conversations relating to threats of extortion, blackmail, bodily harm or other unlawful requests of a similar nature" (emphasis added). See also State v. John Smith, 189 Wn.2d 655, 669, 405 P.3d 997 (2017) (Gordon McCloud, J., concurring) ("I agree that the portion of the recording containing screams does not constitute a 'conversation'") (emphasis added).

The trial court appropriately reviewed the entire recording, determined that portions were conversation and portions were not conversation. Following this review, the court determined that the last nine minutes of the recording were not conversation and thus admissible under the privacy act. The trial court did not err by considering the recording in parts.

B

In determining whether a communication between individuals constitutes a "conversation" under the privacy act, courts use the ordinary meaning of the term: "oral exchange, discourse, or discussion." State v. David Smith, 85 Wn.2d 840, 846, 540 P.2d 424 (1975). Recordings of sounds that do not constitute a "conversation" do not implicate the privacy act. David Smith, 85 Wn.2d 846. In particular, sounds of an assaultive act are not a conversation protected by the privacy act; a recording of such noise is admissible. John Smith, 189 Wn.2d at 663-64.

In David Smith, a shooting victim, Nicholas Kyreacos, carried a tape recorder to a meeting where he suspected potential foul play. 85 Wn.2d at 842-43. The recording starts with remarks from Kyreacos and a companion about their destination and arrangements, and, when they arrive, Kyreacos narrates the scene as he walks. David Smith, 85 Wn.2d at 844. "Then, suddenly are heard the sounds of running footsteps and shouting, the words 'Hey!' and 'Hold it!', Kyreacos saying 'Dave Smith,' and a sound resembling a gunshot." David Smith, 85 Wn.2d at 844. Several more words are exchanged between Smith and Kyreacos, another shot is heard, then Kyreacos screaming and begging for his life, followed by more shots, and silence. David Smith, 85 Wn.2d at 844-45. Then voices are heard saying, "We've already called the police" and "Hey, I think this guy's dead man." David Smith, 85 Wn.2d at 845.

The Supreme Court held, "We are convinced that the events here do not comprise 'private conversation' within the meaning of the statute. Gunfire, running, shouting, and Kyreacos's screams do not constitute 'conversation' within that term's ordinary connotation of oral exchange, discourse, or discussion." David Smith, 85 Wn.2d at 846. Thus, the recording did not fall within the prohibition of RCW 9.73.030 and its admission was not prohibited under RCW 9.73.050. David Smith, 85 Wn.2d at 846. In doing so, the Supreme Court confined its holding to the "bizarre facts" of the case and declined to adopt a definitive definition of "private conversation" applicable to all cases. David Smith, 85 Wn.2d at 846.

In John Smith, during a violent assault of his wife, Smith used the home's landline to dial his cell phone to help locate it. 189 Wn.2d at 657-58. The cell phone's voice mail system recorded the incident. John Smith, 189 Wn.2d at 658. The recording

contained "sounds of a woman screaming, a male claiming the woman brought the assault on herself, more screams from the female, name calling by the male," and a verbal exchange between the two. John Smith, 189 Wn.2d at 658. The recording was admitted at trial and Smith was found guilty of attempted second degree murder. John Smith, 189 Wn.2d at 660. The Court of Appeals reversed, holding the trial court erred in denying the motion to suppress because the recording was of a "private conversation" and Smith had unlawfully recorded it. John Smith, 189 Wn.2d at 660.

The Supreme Court, in an opinion signed by four justices, reviewed the recording and found it like the recording in David Smith, "[t]he recording contains shouting, screaming, and other sounds, but it also contains brief oral exchanges between Mr. and Mrs. Smith in which Mr. Smith tells his wife that he is going to kill her, and she responds, 'I know.'" John Smith, 189 Wn.2d at 664. The Supreme Court held "[b]ecause the voice mail recording primarily contains the sounds of a violent assault being committed, we hold that based on David Smith, the content of the voice mail recording here is not of a 'conversation' as contemplated by the privacy act." John Smith, 189 Wn.2d at 664. Thus, the recording did not fall within the prohibitions of the privacy act and its admission was not prohibited. John Smith, 189 Wn.2d at 664.

Four justices concurred, but would have held that because the recording contained not just sounds but also "conversation" the privacy act applied.[5] John Smith, 189 Wn.2d at 674 (Gordon McCloud, J., concurring). But the conversation fell within the

[5] In a separate concurrence, Justice Gonzáles would have held that John Smith had no right to challenge the admissibility of the recording because he made the recording. John Smith, 189 Wn.2d at 669.

threat exception to the privacy act and thus was admissible. John Smith, 189 Wn.2d at 674 (Gordon McCloud, J., concurring).[6]

Kamara argues that we should not rely on David Smith because the Supreme Court declined to definitively define a "private conversation" under the privacy act because of the bizarre circumstances of the case. While true, David Smith remains binding precedent. And nothing in John Smith overruled or abrogated David Smith. Indeed, in John Smith, eight justices agreed that under David Smith certain sounds do not constitute conversation. John Smith,189 Wn.2d. at 664 ("the sounds of a violent assault" is not a conversation), and 189 Wn.2d at 669 (Gordon McCloud, J., concurring) ("I agree that the portion of the recording containing screams does not constitute a 'conversation'") (emphasis added).

And even if not fully binding, the lead opinion of John Smith is "highly persuasive." Koenig v. Pierce County, 151 Wn. App. 221, 231, 211 P.3d 423 (2009) (citing Texas v. Brown, 460 U.S. 730, 737, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1993)).[7]

---

[6] In response, Justice Madsen, lead opinion author, noted:

> Justice Gordon McCloud's concurrence contends that the presence of verbal exchanges in the recording at issue here distinguishes this case from David Smith and that we improperly "stretch[ ]" the analysis in the David Smith case by applying it here. Concurrence (Gordon McCloud, J.) at 1005. But, as noted, verbal exchanges were also present in David Smith in the recording between the victim and the assailant . . . The recording in David Smith and the voice mail recording here contain the sounds of a violent assault being committed. Application of David Smith is appropriate here.

John Smith, 189 Wn.2d at 664 n.4.

[7] While not binding, we note that we have relied on the lead opinion in John Smith in at least one unpublished opinion. In State v. Tayler, No. 81001-4-I slip op. at 13 (Wash. Ct. App. Jan. 3, 2022), this court cited John Smith and held "the recording is peppered with non-conversational sounds of physical assaults, screaming, and general violence, all falling outside the scope of the Privacy Act."

C

Based on our de novo review of the recording, we agree with the trial court's conclusion that the last nine minutes of the recording do not constitute a conversation, and instead record an assault.

The audio recording is 28 minutes and 50 seconds long.[8] At various points, two voices can be heard, one male and one female.[9] From the start of the recording to 20 min., 45 sec., the recording captures music, noises, TV, laughter, and some unintelligible discussion. At the 14-minute mark, B.T. says, "stop touching me . . . can you do me a favor and not touch me." At 14 min., 10 sec., Kamara responds, "I can't, I'm sorry, I can't." At 14 min., 33 sec., B.T. asks, "what happened to you're safe with me?" At 16 min., 47 sec., Kamara tells B.T. to "put that damn phone down, focus on me." At 18 min., 37 sec., there are muffled noises and B.T. says, "don't, I can walk . . . I can sleep on the couch."

At 20 min., 45 sec., the recording captures B.T. saying, "no, no, no let me sleep," "no, don't," "JR stop" and then captures the sounds of B.T. crying. At 21 min., 20 sec. and 21 min. 56 sec., Kamara tells B.T., "no you're good." At 22 min.,14 sec., B.T. is then heard crying, repeatedly saying "no," "please stop," "I'm not doing this." At 22 min. 30 sec., Kamara says where B.T.'s phone is. B.T. says, "I'm scared," "JR, JR stop it hurts," and "wait, why are you doing this, I'm begging you please stop, no, get off me, get off me please." 23 min., 38 sec.; 24 min., 10 sec.; 26 min., 02 sec. While B.T. sobs

[8] The audio recording is available as exhibit 19. All times and quotes from these two paragraphs come from this exhibit.

[9] There are two rough transcripts of the audio recording in the record. One prepared by the State and one prepared by the trial judge.

and begs Kamara to stop, Kamara laughs. From 26 min., 56 sec., to the end of the recording, B.T. is heard crying with music in the background.

At oral argument, Kamara's counsel repeatedly asserted that to be a conversation there must be "an exchange of ideas and words."[10] We don't disagree with this characterization of a conversation. But there is no "exchange of ideas and words" in the last nine minutes of the recording. And unlike in both Smith cases, the recording did not capture brief oral exchanges between B.T. and Kamara. We agree with the trial court that the last nine minutes of the recording contains the sounds of a sexual assault being committed. This portion of the recording is not a private conversation as contemplated by the privacy act.

The trial court did not err in admitting the recording.[11]

We affirm.

Mann, J.

WE CONCUR:

Feldman, J.

Díaz, J.

[10] Wash. Ct. of Appeals oral argument, supra, at 2 min., 48 sec. ("an exchange of words and ideas verbally constitutes conversation"); 8 min., 18 sec. ("if there is an exchange of ideas and words, it's a conversation"); 17 min., 05 sec. ("laughter alone isn't" an exchange of words and ideas).

[11] Finally, the invited error doctrine prohibits the defendant from setting up an error at trial and then complaining of it on appeal. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). To the extent there was error in admitting portions of the recording that preceded the last non-conversational nine minutes, Kamara invited this error.