72102-0

FILED
April 30, 2015
Court of Appeals
Division I
State of Washington

NO. 72102-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALAN JAMES SINCLAIR, II,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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A. ISSUE

1. The Legislature amended the Washington Privacy Act in 1967 with the express intent of preventing eavesdropping and wiretapping by barring the admission of intercepted recordings at trial unless all parties consented prior to the recording. While visiting his granddaughter, I.S., Sinclair "pocket dialed" I.S.'s mother (his daughter). Unbeknownst to I.S. or Sinclair, I.S.'s mother's voicemail recording system answered Sinclair's mistaken phone call and automatically recorded part of their conversation. Has Sinclair failed to show that the trial court erred by admitting the voicemail when it is undisputed that I.S.'s mother did not intentionally intercept or record Sinclair's conversation with I.S.?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Alan James Sinclair, II, with two counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Third Degree, and misdemeanor Communication with a Minor for Immoral Purposes. CP 1-9, 93-94. A jury found

Sinclair guilty as charged. CP 103-07; 11RP 301-02.[1] The trial court imposed an indeterminate sentence with a minimum term of 280 months of confinement. CP 142-55; 11RP 325.

2. SUBSTANTIVE FACTS

Sinclair started sexually abusing his granddaughter, I.S., when she was in the sixth grade. 9RP 57-58. The abuse began with Sinclair telling I.S. that it was time for her to "grow up" and not "be a kid anymore" like her younger sisters. 9RP 57-60. Sinclair then proceeded to kiss I.S. "tongue to tongue," and continued kissing her that way every time that they were alone together. 9RP 57-61.

After six months of tongue kissing, Sinclair insisted that I.S. "go into his pants and touch his penis." 9RP 61. Sinclair also started touching I.S.'s breasts, buttocks, and hair as he kissed her, about the time that I.S. was 12 ½ years old. 9RP 62-63. When I.S. turned 13, Sinclair told her to "suck his penis." 9RP 64. I.S. complied with Sinclair's requests because he was her grandfather and she trusted him. 9RP 65. I.S. did not tell anyone about the

[1] The Verbatim Report of Proceedings consists of 11 volumes designated as follows: 1RP (3/28/14, 4/3/14, and 4/22/14 Motions in Limine), 2RP (4/16/14), 3RP (4/22/14 Voir Dire), 4RP (5/1/14), 5RP (5/5/14), 6RP (5/6/14), 7RP (5/7/14), 8RP (5/13/14), 9RP (5/14/14), 10RP (5/15/14 and 5/19/14), 11RP (5/20/14 and 6/19/14).

abuse because Sinclair told her that she would get into "really big trouble" if she told, and that both of them could go to jail. 9RP 65. I.S. performed oral sex on Sinclair up to 20 times between the ages of 13 and 14 years old. 9RP 67.

The first time Sinclair had vaginal intercourse with I.S. was during a trip to Leavenworth to celebrate her birthday.[2] 9RP 70. Sinclair took I.S. alone in his RV with the promise that they would go white water rafting, although they never went. 9RP 70-71. Sinclair took naked photographs of I.S. in his RV, made her "suck his penis orally," and then proceeded to have vaginal intercourse with her. 9RP 72. After the Leavenworth trip, Sinclair attempted to have vaginal intercourse with I.S. another time, but could not get erect. 9RP 77. Sinclair continued to kiss I.S. with his tongue and periodically touched I.S. from her breasts to her vagina while kissing. 9RP 95-96. Additionally, Sinclair gave I.S. a dildo to insert in her vagina while he was watching. 9RP 78. Sinclair took pictures of I.S. when she was naked, and videos of I.S., including one where he asked her to show her breasts. 9RP 67-70.

[2] At trial, I.S. initially testified that the Leavenworth trip occurred after her 13th birthday, but during cross examination, she admitted that it must have happened after her 14th birthday. 9RP 70, 127-28.

Following the Leavenworth trip, I.S. had oral sex with Sinclair almost every time she saw him. 9RP 79. She stopped having oral sex with Sinclair when she turned 15 years old, and her mother had stopped working and wanted to spend more time with I.S.[3] 9RP 80. At that point, I.S. and her mother "argued all the time" because her mother did not want I.S. to spend as much time with Sinclair. 8RP 124; 9RP 80-81. I.S.'s mother had noticed that I.S. would come home from Sinclair's house upset, teary eyed, disrespectful, and unwilling to admit that anything was wrong. 8RP 136-37. Consequently, she attempted to limit I.S.'s time with Sinclair. Id.

On September 18, 2013, I.S. stayed home after school to do her homework, while her mother took I.S.'s younger sisters to Tae Kwon Do. 8RP 146, 148-49. I.S. heard Sinclair's diesel truck outside and went out front to meet him. 9RP 45-46. Inside the house, Sinclair kissed I.S. "tongue to tongue," and told her that he "really missed" her and her tongue. 9RP 50-51. Sinclair and I.S. went outside, where Sinclair told I.S. about a dream that he had had involving his late aunt or grandmother being "out to get" I.S., her mother, or her grandmother (Sinclair's wife). 9RP 47-48.

[3] I.S.'s mother is Sinclair's daughter. 8RP 124.

Unbeknownst to Sinclair and I.S. at the time, Sinclair "pocket dialed" I.S.'s mother while talking with I.S. 9RP 6. I.S.'s mother saw Sinclair calling on her cell phone, but did not answer because she was busy. 8RP 149. Sinclair left a voicemail where he can be heard saying, "I love that tongue . . . I don't know if you love mine." Ex. 19A; CP 178. I.S.'s voice is heard shortly thereafter. 8RP 53. Sinclair goes on to say, "I'll see you soon . . . Or I'll have my ancestors go after yeah [sic]." Ex. 19A; CP 178. Sinclair told I.S. that he had had a vision of his late grandmothers earlier that morning, and that "they're gonna take care a your mom. Hopefully, they won't be too mean." Ex. 19A; CP 178-79. Sinclair explained that his grandmother Mary had told him that "people break their legs. They have broken backs . . . accidents happen." Ex. 19A; CP 179. Although Sinclair told I.S. that he tried to protect her by asking them not to hurt her, he also told I.S. to keep "it"[4] quiet or, "I don't know what they'll do." Ex. 19A; CP 179. The voicemail recording ended with Sinclair telling I.S. that she was "a coward in some respects," and that if he heard that she was afraid of him "one more time," then he would "go ballistic." Ex. 19A; CP 180.

[4] Although the transcript of the voicemail does not contain the word "it," the recording of the voicemail admitted and played at trial reveals that Sinclair said, "So between me and you [let's keep it] between us because if that goes out I don't know what they'll do." Ex. 19A at 1:52-57; 9RP 8.

After threatening and berating I.S., Sinclair told her to bend over so that he could take pictures of her breasts. 9RP 48. I.S. complied. 9RP 54-57. Shortly thereafter, I.S.'s mother drove up and saw I.S. standing in the driveway with Sinclair. 8RP 150; 9RP 84. I.S.'s mother told Sinclair that I.S. needed to leave, although her ballet class did not start until later. 9RP 84. While driving away, I.S.'s mother listened to the voicemail recording that Sinclair had left on her phone, and learned for the first time that Sinclair had been abusing I.S. 9RP 5-6, 14. I.S.'s mother took I.S. to the police station to file a report that night. 9RP 15-16.

Following I.S.'s disclosure, detectives obtained a search warrant and seized multiple items from Sinclair's house, including his computer, cameras, a cell phone, camcorder, and dildo. 8RP 44-45, 86-87. A forensic examination of Sinclair's computer and cell phone revealed sexually explicit photos of I.S., and a video of her touching her breasts. 8RP 66-70; 9RP 56-57, 102-05; 10RP 138-41, 151-53, 169; Ex. 26, 33-36, and 43.[5] The photographs and video corroborated I.S.'s account of being sexually abused by

[5] Due to the sexually graphic nature of these exhibits, undersigned counsel has filed a declaration under penalty of perjury, attached as Appendix A, describing these exhibits in lieu of designating them. Counsel is concerned about protecting I.S.'s privacy, as well as limiting access to, and dissemination of, child pornography. Upon order of the Court, counsel will designate the exhibits.

Sinclair. See Ex. 26 (photo taken of I.S. showing her breasts on 9/18/2013), 33 (photo taken of I.S. exposing her breast on 4/18/13), 34 (photo taken of I.S. performing oral sex on Sinclair on 5/7/13), 35 (photo taken of I.S.'s vagina on 12/22/12), 36 (photo taken of I.S. inserting a dildo into her vagina on 12/23/12), and 43 (video taken of I.S. revealing and massaging her breasts on 4/18/13).

During motions in limine, Sinclair moved to suppress the voicemail he inadvertently left on I.S.'s mother's phone, arguing that its admission violated the state privacy act because neither Sinclair nor I.S. consented to the recording. 1RP 49-54; CP 86-88. The State opposed the motion, arguing that the privacy act did not apply because it was not a "private conversation" since it occurred "out in the open" of I.S.'s driveway, and it contained threats of harm, which are exempted from the statute. 1RP 59-61, 63-64; CP 169-80. The court ruled that the voicemail was admissible, stating:

> [T]o be candid, this scenario doesn't really fit squarely within the statute, at not least [sic] very well, because . . . It was an inadvertent recording. Nobody consented. Nobody knew it was even happening. . . .
>
> It seems to me that what RCW 9.73.030 (the privacy act) is is setting policy that we don't want to encourage people to privately record conversations and then use it against one of the participants in the conversation, particularly as evidence. It's a policy determination. I think it is important that the statute starts off saying that it shall be unlawful to do this

> because in my mind, that presupposes the existence of some mens rea, not just an accidental recording. . . .
>
> I can't believe the legislature intended to make it unlawful for somebody to inadvertently do something. And in this particular scenario, I guess it would be the recipient of the call who would allegedly be acting unlawfully by making the recording without even being there or taking any kind of volitional step to record it. And it makes no logical sense to me. . . .

1RP 66-68. Additionally, the court found that Sinclair's "veiled threats" to I.S. fell under the threat exception to the privacy act, even though neither party consented to the recording. 1RP 69. The voicemail was admitted at trial and played three times, once during the prosecutor's opening statement, and during the direct examinations of I.S. and her mother. 8RP 4; 9RP 6-8, 52-53.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED SINCLAIR'S VOICEMAIL.

Sinclair argues that the trial court erred by admitting the voicemail he inadvertently left on I.S.'s mother's phone because it violated the Washington privacy act. Sinclair's claim fails. The privacy act does not shield Sinclair from his carelessness, nor protect his threats to harm I.S. and her mother. Any error in admitting the voicemail was harmless.

a. The Privacy Act Does Not Apply.

In 1967, the Washington Legislature amended the privacy act to "keep pace with the changing nature of electronic communications and in recognition of the fact that there was no law that prevented eavesdropping." State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004); see also State v. Roden, 179 Wn.2d 893, 909-13, 321 P.3d 1183 (2014) (Wiggins, J., dissenting) (privacy act was amended against a backdrop of nationwide concerns about government agents' and private individuals' increasing use of electronic devices to eavesdrop and wiretap without legal consequence). The privacy act broadly protects individual privacy rights by requiring all-party consent prior to intercepting or recording private communications. Roden, 179 Wn.2d at 898; Christensen, 153 Wn.2d at 198; RCW 9.73.030(1). Evidence obtained in violation of the privacy act is inadmissible at trial, unless it falls under one of the statutory exceptions. RCW 9.73.050. For example, threats of bodily harm may be recorded with the consent of one party to the conversation. RCW 9.73.030(2). Any person who violates the privacy act is guilty of a gross misdemeanor. RCW 9.73.080(1).

In relevant part, the act provides that it is "unlawful for any individual, partnership, corporation, association, or the state of Washington" to intercept or record any "[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated." RCW 9.73.030(1)(b). In general, conversations between two parties are presumed to be private. Roden, 179 Wn.2d at 900. In determining whether a communication is private, courts consider the parties' subjective intent, the duration and subject matter of the communication, the location of the communication, and the presence of potential third parties. Id.

The Washington Supreme Court has repeatedly held that a third party who intentionally uses a device to eavesdrop on, or intercept, private communications violates the privacy act. See Christensen, 153 Wn.2d at 190 (mother who used the speakerphone function on a cordless telephone to surreptitiously listen in on her daughter's telephone conversation violated the privacy act); State v. Faford, 128 Wn.2d 476, 479, 910 P.2d 447 (1996) (private citizen who used a police scanner to eavesdrop on his neighbors' cordless telephone conversations violated the privacy act); Roden, 179 Wn.2d at 896 (police detective who used

an arrestee's cell phone to text the defendant and arrange a drug deal violated the privacy act); cf. State v. Corliss, 123 Wn.2d 656, 662, 870 P.2d 317 (1994) (an informant who tipped a phone receiver to allow an officer to hear a conversation regarding narcotics sales did not violate the privacy act because no device was used to record or transmit the conversation).

Here, however, there was not a third party who intentionally used a device to eavesdrop on, or intercept, a private communication. There was no evidence at trial, nor is there any argument on appeal, that the victim's mother somehow orchestrated the unusual factual scenario presented by this case.

Sinclair himself carelessly called I.S.'s mother, a third party, and in the process, professed his love for I.S.'s tongue, threatened physical harm to I.S. and her mother, and berated I.S. by calling her a coward. CP 178-80. No one "bugged" Sinclair's phone, or wore a wire to catch Sinclair in the act of bullying and threatening I.S. Instead, Sinclair himself inadvertently wore the "wire" that exposed his sexual abuse of I.S. Given the jurisprudence and the Legislature's explicit intent to prevent third parties from intentionally eavesdropping on, or wiretapping, others' private conversations, Sinclair should not receive shelter under the privacy act where his

own acts created the recording, and no third party intentionally took part.

The closest case on point to the facts presented here is State v. Smith, 85 Wn.2d 840, 540 P.2d 424 (1975). In Smith, the Washington Supreme Court held that the privacy act did not apply to a tape recording of a homicide because it did not constitute a "private conversation." Id. at 846. Unbeknownst to the defendant, the victim had concealed a microphone and tape recorder under his clothing prior to meeting the defendant. Id. at 843. The tape recorder captured the sounds and events of the homicide, including the victim identifying the defendant and begging for his life, the defendant telling the victim "you have had it," gunfire, and running. Id. at 844-45. The Smith court reasoned that the "special circumstances" and "bizarre facts" of the case compelled it to find that the privacy act did not apply, even though the recording captured a verbal exchange between the victim and defendant. Id. at 846.

This case also presents an unusual fact pattern, and similar to the recording in Smith, the recording here captured the sounds and events of Sinclair's unannounced visit to see I.S. Like the defendant in Smith, Sinclair did not know that his criminal behavior

was being recorded. The unique twist presented by this case is that Sinclair set the recording in motion, and that no one intentionally sought to record him.

Moreover, turning to the language of the statute, the trial court properly admitted the recording because an automatic voicemail recording system is not an "*individual, partnership, corporation, association, or the state of Washington.*" RCW 9.73.030(1) (emphasis added). When I.S.'s mother did not answer Sinclair's call, her voicemail recording system activated. 8RP 149. Although I.S.'s mother likely knew that not answering Sinclair's call would trigger her voicemail recording system, there is no evidence to suggest that she knew or could have known that Sinclair had mistakenly dialed her, or that he was unknowingly being recorded.

If I.S.'s mother is considered an "individual" because she possessed a cell phone with essentially a built-in answering machine[6], then she – and every other unknowing recipient of a "pocket dial" that results in an automatic recording – is guilty of a

[6] The two Washington cases addressing the legality of answering machine recordings under the privacy act shed little light here given their inapposite facts. See In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997) (holding the defendant waived his statutory privacy right by purposely leaving messages on an answering machine because "[a]n answering machine's only function is to record messages"); State v. Robinson, 38 Wn. App. 871, 884-85, 691 P.2d 213 (1984) (holding the trial court properly admitted the defendant's message on an answering machine because it fell under the threat exception).

gross misdemeanor. RCW 9.73.080(1). Construing the statute in such a way leads to absurd results: first, by creating a strict liability crime, which courts strongly disfavor, and second, by conflicting with the plain language of the statute, which requires an intentional or volitional act. See State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000) (recognizing "the strongly rooted notion that strict liability crimes are disfavored"); RCW 9.73.030(1) (providing it is "unlawful for any individual . . . *to intercept, or record*") (emphasis added). Courts generally avoid statutory constructions that lead to "unlikely, strange, or absurd consequences." State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

Nonetheless, Sinclair argues that the privacy act "strictly makes any nonconsensual recording of a private conversation unlawful, regardless of the intent of the person who first receives or hears the recorded communication." Brief of Appellant at 11. Sinclair advances this argument without any recognition of courts' disapproval of strict liability crimes, and without making any effort to apply the eight-factor test used by courts to determine whether the

Legislature created a strict liability crime.[7] See Anderson, 141 Wn.2d at 363 (setting forth the eight factors and recognizing that they must be "read in light of the principle that offenses with no mental element are generally disfavored"). The privacy act's failure to explicitly include a mental element is not dispositive of legislative intent, particularly here where the legislative intent to prevent eavesdropping and wiretapping – both intentional acts – is clear. See Anderson, 141 Wn.2d at 361-67 (holding that second-degree unlawful possession of a firearm is not a strict liability offense, despite the statute's silence on a mental intent element and the existence of an affirmative defense of unwitting conduct).

Further, Sinclair's reliance on a single sentence in Lewis v. Dep't of Licensing, 157 Wn.2d 446, 139 P.3d 1078 (2006), in support of his strict liability argument is unavailing. In Lewis, the Washington Supreme Court held that the privacy act requires officers to inform traffic stop detainees that their conversations are

[7] These eight factors are: (1) construing the statute in light of the background rules of the common law, and its conventional mens rea element, (2) whether the crime can be characterized as a "public welfare offense," (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct, (4) the harshness of the penalty, (5) the seriousness of the harm to the public, (6) the ease or difficulty of the defendant determining the true facts, (7) relieving the prosecution of proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, and (8) the number of expected prosecutions. State v. Bash, 130 Wn.2d 594, 605-06, 925 P.2d 978 (1996).

being recorded. Id. at 460. To reach this holding, the court relied on the statute's plain language, and its own prior analysis, and then reasoned: "Moreover, if a police officer accidentally recorded a truly private conversation during a traffic stop, RCW 9.73.030 would protect that private conversation." Id. at 465. Based on this single sentence, Sinclair argues that any person who violates the privacy act is strictly liable regardless of their intent.

Notably, the Lewis court did not elaborate on how it reached this conclusion, or address the fact that if the privacy act protected such a recording, then the officer's actions would be unlawful, despite the fact that they were accidental, and the officer might face strict liability for a gross misdemeanor. Regardless, the court's singular statement is dicta and non-binding, because it is not necessary to the court's holding that the statute's plain language requires officers to advise detainees that they are being recorded. See Gabelein v. Diking Dist. No. 1 of Island County, 182 Wn. App. 217, 239, 328 P.2d 1008 (2014) (defining dicta as a statement that "is not necessary to the court's decision" and "as such is not binding authority") (citation omitted).

Given the unique circumstances of this case, the language of the statute, and the legislative intent behind the privacy act, the

trial court properly admitted Sinclair's voicemail. An automatic voicemail recording system is not an "individual" for purposes of the privacy act. I.S.'s mother did not intentionally use a device to eavesdrop on or wiretap Sinclair and her daughter. Thus, the privacy act is inapplicable.[8]

b. Any Error In Admitting Sinclair's Voicemail Was Harmless.

In any event, if Sinclair's voicemail violated the privacy act and the trial court erred by admitting it, then Sinclair's convictions should be affirmed because the error was harmless. An error admitting evidence is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected. State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982), abrogated on other grounds by State v. Radcliffe, 164 Wn.2d 900, 906-07, 194 P.3d 250 (2008); see also State v. Fowler, 127 Wn. App. 676, 685, 111 P.3d 1264 (2005), aff'd, 157 Wn.2d 387, 139 P.3d 342 (2006) (holding any error in admitting two recordings was harmless given the victim's testimony about the sexual abuse, and the defendant's flight from the home when confronted).

[8] Although the trial court also found that Sinclair's threats fell under the threat exception to the privacy act, that exception applies only if one party consents to the recording. RCW 9.73.030(2); Faford, 128 Wn.2d at 488 (refusing to apply the threat exception because none of the parties consented to the recording). Here, it is undisputed that neither I.S. nor Sinclair consented to the recording.

Here, the erroneous admission of the voicemail recording would not have materially affected the outcome of the trial because the evidence against Sinclair was overwhelming. Unlike many sexual assault cases that rest solely on a victim's word, this case included sexually explicit photographs and a video seized from Sinclair's cell phone and computer that corroborated I.S.'s account of abuse. See Ex. 26 (photo taken of I.S. showing her breasts on 9/18/2013), 33 (photo taken of I.S. exposing her breast on 4/18/13), 34 (photo taken of I.S. performing oral sex on Sinclair on 5/7/13), 35 (photo taken of I.S.'s vagina on 12/22/12), 36 (photo taken of I.S. inserting a dildo into her vagina on 12/23/12), and 43 (video taken of I.S. revealing and massaging her breasts on 4/18/13).

Perhaps based on the strength of this evidence, Sinclair conceded in closing argument that he was guilty of three of the five counts: Child Molestation in the Third Degree (two counts), and Communicating with a Minor for Immoral Purposes (one count). See 11RP 282 (defense counsel urging the jury to "[D]o your duty. Convict Mr. Sinclair of the crimes the government has proven. Convict him of child molestation in the third degree. Convict him of communicating with a minor for immoral purposes.").

The charges that Sinclair disputed were the two counts of Rape of Child in the Second Degree, alleging that he had sexual intercourse with I.S. when she was 13 years old. Id.; CP 94, 133-34. The jury, however, had ample evidence from which to convict Sinclair of these charges, given I.S.'s testimony that Sinclair told her to "suck his penis" when she turned 13, and that she performed oral sex on him up to 20 times before she turned 14. 9RP 65, 67.

Moreover, the voicemail's admission was harmless in light of I.S.'s testimony about its contents at trial. Prior to playing the voicemail for the jury, the prosecutor asked I.S. about what happened when Sinclair came over on September 18, 2013. I.S. testified that Sinclair kissed her "tongue to tongue," and told her that he "really missed" her tongue. 9RP 50-51. I.S. also testified that Sinclair had told her about a dream that he had had involving his late relatives being "out to get" her, her mother, or her grandmother. 9RP 47-48. This testimony was admissible and unchallenged at trial. See ER 801(d)(2)(i) (admitting statements by a party opponent). Thus, regardless of the voicemail's admission, the jury heard about Sinclair's lustful disposition for I.S., and use of threats to gain her compliance.

Ultimately, Sinclair's claim fails because even if the voicemail was wrongly admitted, it did not materially affect the outcome of his trial in light of the overwhelming evidence against him, his concession to having committed three of the five counts, and other admissible testimony about the voicemail's contents.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Sinclair's convictions.

DATED this 30th day of April, 2015.

Respectfully submitted,

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APPENDIX
A

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, ALAN JAMES SINCLAIR, II, Petitioner.	)	No. 72102-0-I DECLARATION OF KRISTIN A. RELYEA

I, KRISTIN A. RELYEA, hereby declare as follows:

1. I have reviewed the following exhibits that were admitted at trial: Ex. 26, Ex. 33, Ex. 34, Ex. 35, Ex. 36, Ex. 43. Supp CP __ (sub 57 Exhibit List/Trial).

2. Exhibit 26 is a photo taken of I.S. showing her breasts. 9RP 56. Sinclair took the photo on 9/18/2013. 9RP 56-57.

3. Exhibit 33 is a photo taken of I.S. exposing her breasts. 9RP 102-03. Forensic examination revealed that the photo appears to have been taken on 4/18/13. 10RP 138-39.

4. Exhibit 34 is a photo taken of I.S. performing oral sex on Sinclair. 9RP 103-04. Forensic examination revealed that the photo appears to have been taken on 5/17/13. 10RP 169.

5. Exhibit 35 is a photo taken by Sinclair of I.S.'s vagina. 9RP 104. Forensic examination revealed that the photo appears to have been taken on 12/22/12. 10RP 139-40.

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6. Exhibit 36 is a photo taken of I.S. inserting a dildo into her vagina. 9RP 104-05. Forensic examination revealed that the photo appears to have been taken on 12/23/12.

7. Exhibit 43 is a video taken of I.S. revealing and massaging her breasts. See 9RP 68-70 (I.S. testifying that Sinclair took 4-6 videos of her, including a video where Sinclair asked her to show her breasts). Forensic examination revealed that the video appears to have been created on 4/18/13, and that it was stored as a deleted file on Sinclair's Blackberry cell phone. 8RP 44-45; 10RP 151-53.

8. Due to the sexually graphic nature of these exhibits, I am filing this declaration in lieu of designating them. I am concerned about protecting I.S.'s privacy, as well as limiting access to, and dissemination of, child pornography. I will designate these exhibits upon order of the Court.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 29th day of April, 2015, at Seattle, Washington.

KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Alan James Sinclair, II, Cause No. 72102-0, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 30 day of April, 2015.

Name:
Done in Seattle, Washington