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NO. 64127-1-I

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

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MAY 03 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DONALD HUMPHREY,

Appellant.

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Washington Appellate Project

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

The Honorable Regina Cahan, Judge

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
MAY 13 2010

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THERE ARE NO FACTUAL FINDINGS TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT EXIGENT CIRCUMSTANCES EXCUSED THE OFFICERS FROM INFORMING HUMPHREY THAT HE WAS BEING RECORDED.	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Lewis v. State, Dept. of Licensing
157 Wn.2d 446, 139 P.3d 1078 (2006) 3

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5 3

A. ARGUMENT IN REPLY

THERE ARE NO FACTUAL FINDINGS TO SUPPORT THE TRIAL COURT'S CONCLUSION THAT EXIGENT CIRCUMSTANCES EXCUSED THE OFFICERS FROM INFORMING HUMPHREY THAT HE WAS BEING RECORDED.

The State focuses largely on events that occurred before Humphrey was taken into custody to demonstrate that exigent circumstances existed. Br. of Resp't at 7. There is no dispute that prior to locating Humphrey in the apartment and placing him in custody, the exigent circumstance of finding and apprehending the alleged assailant existed. But after two uniformed police officers with handguns handcuffed the lone, unarmed Humphrey, the exigent circumstances no longer existed.

The State contends that the conversation between Humphrey and Chatman as Humphrey was being escorted out of the apartment constituted an exigent circumstance because their interaction "increas[ed] the likelihood of a dangerous encounter and increas[ed] the concern for officer and community safety." Br. of Resp't 8. This vague and generalized assertion could be said about any post-arrest communication. The State has failed to cite any authority that characterizes such a conversation as an exigent circumstance.

Once handcuffed, there was no longer a threat that Humphrey could harm Chatman as officers were escorting Humphrey out of the apartment. The conversation did not create an additional safety risk to officers. There was no testimony that Humphrey ceased to cooperate with police or became agitated as he spoke briefly with Chatman. The risk that an arrested person may become uncooperative as police escort that person to the patrol car is an inherent part of police work and does not constitute an exigent circumstance.

There is no evidence in the record to support Officer Nolting's statement that he was concerned about an ambush. Chatman's statements to police were that one person was involved in the assault. The State acknowledges that upon finding Humphrey hiding, police had found "the only other occupant of the apartment." Br. of Resp't at 7. Absent any specific facts, Officer Nolting's general and unsupported belief about an ambush does not amount to continued exigent circumstances.

The State also characterizes the simple act of informing Humphrey that he was being recorded as requiring police to "analyz[e] complex legal standards" while the officers were concerned with "getting the parties separated from one another."

Br. of Resp't at 8. One primary reason the Supreme Court declared that police must "strictly comply" with the notice provision when recording conversations is that the burden on police is so minimal. Lewis v. State, Dept. of Licensing, 157 Wn.2d 446, 467, 139 P.3d 1078 (2006). Simply interjecting "you are being recorded" as an officer handcuffs a suspect does not involve analyzing complex legal standards and would satisfy the notice requirement.

Lastly, the State contends that Humphrey failed to cite any fact or legal authority as to why this Court should review the assignment of error to conclusion of law 1. Br. of Resp't at 11. Conclusion of law 1 states: "ADMISSIBLE IN THE STATE'S CASE-IN-CHIEF. Under CrR 3.5 the statement(s) of the defendant made in the patrol car video under Finding of Fact 12 are admissible in the State's case-in-chief." CP 85.

The statements listed in finding of fact 12 are the conversation between Humphrey and Chatman that took place in the apartment. In an abundance of caution, Humphrey assigned error to each conclusion that related to the admissibility of the statements. While there were two assignments of error because the trial court ruled on the admissibility of the statements in two separate conclusions of law, there was only one issue for this Court

to consider. The entire opening brief contains specific facts and legal authority explaining how the trial court erred by ruling that the recording was admissible even though the officers did not inform Humphrey they were recording him.

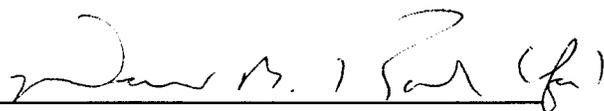
B. CONCLUSION

In violation of the privacy act, police failed to inform Humphrey that they were creating a recording when they arrested him. The trial court erred in admitting the recording, and this error prejudicially impacted the outcome of Humphrey's trial. This Court should reverse Humphrey's convictions for Domestic Violence Felony Violation of a Court Order.

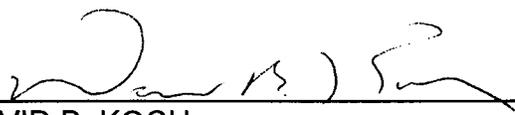
DATED this 3^d day of May 2010.

Respectfully submitted,

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Respondent,)	
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v.)	COA NO. 64127-1-1
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DONALD HUMPHREY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONALD HUMPHREY
DOC NO. 976669
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF MAY, 2010.

x *Patrick Mayovsky*

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