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STATE OF WASHINGTON

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NO. 64127-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONALD HUMPHREY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Did the trial court err in finding exigent circumstances and admitting an audio recording of post-arrest statements made by defendant when Seattle Police officers were attempting to remove the defendant from a small apartment that the victim was still inside when the officers failed to immediately warn the defendant he was being recorded?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant in this case, Donald Humphrey, hereinafter "Humphrey," was charged by way of amended information in the King County Superior Court with two counts of Felony Violation of a Court Order. CP 5-6. Pretrial motions took place on July 15 and 16 of 2009 and trial testimony was taken on July 20 and 21, 2009, after which a jury found Humphrey guilty as charged. CP 71-72. On August 7, 2009, the trial court sentenced Humphrey to the maximum sentence of 60 months as his standard range exceeded the maximum penalty for these crimes. CP 76.

2. SUBSTANTIVE FACTS

On May 25, 2008, someone called 911 from Crystal Chatman's apartment and the caller abandoned the call before being connected to a 911 call taker. RP 181-84. When a call taker attempted to call back, no one answered. RP 184. Seattle Police Officers James Yorio and Patrick Nolting were dispatched to Ms. Chatman's address and arrived around 7am. RP 207-08. Because Officer Yorio had his overhead emergency lights on in his patrol car, his patrol car video automatically began recording. RP 104. As Officer Yorio had a microphone attached to his uniform, a recording was made of the ensuing events. Id. As the video portion was mounted on the officer's patrol car facing forward, some audio from the following events was picked up by the recording device. RP 104-05.

When the officers knocked on the door of the apartment to which they were dispatched, a woman, later identified as Crystal Chatman, answered the door. Id. Ms. Chatman appeared to have been crying, had a blackened left eye and acted timid and reluctant to answer questions. RP 209. She also acted hesitant and spoke quietly as if she did not want to be heard by anyone other than the officers. RP 211. When Ms. Chatman opened the door she stated

“he punched me.” RP 210. When Officer Yorio asked if he was still there, Ms. Chatman nodded in the affirmative. Id. Officer Yorio then asked if they could come in and Ms. Chatman nodded in the affirmative. RP 211.

The officers then entered the apartment and began to search it slowly, as the assailant did not appear to be in plain sight and because this was a rather small apartment. RP 211. Humphrey was found hiding behind the bathroom door. RP 212. Humphrey was immediately arrested for assault and placed into handcuffs. Id. As the officers were trying to take Humphrey out of the apartment they encountered Ms. Chatman in the living room. RP 212, 214. Humphrey and Ms. Chatman engaged in a loud but brief conversation that was picked up by Officer Yorio's microphone as the officers were taking Humphrey out of the home. RP 212-13, 217-19. While processing the defendant at the West Precinct, the officers discovered the defendant was the prohibited party of a no contact order protecting Ms. Chatman. RP 219-20. The defendant was then booked into the King County Jail. Id.

The defendant was in the King County Jail from May 25, 2008 through June 12, 2008. RP 192. On May 29, 2008, the defendant called Ms. Chatman's home phone number from one of

the phones in the receiving area. RP 192. The two had a brief conversation and talked about how the defendant could not make the \$50,000 bail that had been set in this case. Trial Exhibits 4, 8.

C. ARGUMENT

1. THE TRIAL COURT'S ADMISSION OF THE AUDIO RECORDING BASED ON A FINDING OF EXIGENT CIRCUMSTANCES IS SUPPORTED BY THE PRE-TRIAL RECORD

An appellate court must review the trial court's admission of evidence for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997) (quoting Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). The court may affirm on any ground the record supports. See State v. Carter, 127 Wn.2d 836, 841, 904 P.2d 290 (1995).

Appellant claims that this court must review the trial court's decision to admit this evidence de novo as it asserts that this case involves interpretation of the Privacy Act. AB 8. However, appellant fails to make any argument or cite any case law that

indicates that Judge Cahan misinterpreted the Privacy Act. Instead, appellant's argument rests on a disagreement with the court's factual finding that exigent circumstances did exist.

The Privacy Act prohibits the recording of private conversations without obtaining consent of the parties. RCW 9.73.030. However, police may make sound or video recordings during an investigation with the use of an in car video camera. RCW 9.73.090(1)(c). The law enforcement officer must inform the person being recorded that the recording is taking place unless exigent circumstances exist. Id.

The Washington Supreme Court held that a police officer's conversation with the subject of a traffic stop is not a private conversation covered by RCW 9.73.030. Lewis v. Dept. of Licensing, 157 Wn.2d 446, 139 P.3d 1078 (2006). The court held that because the conversation between the officer and the subject was recorded by the officer's in car video, RCW 9.73.090(1)(c) as the applicable law. Id. As the facts of the Lewis case involved a routine traffic stop and no emergency situation, the court did not reach what would constitute "exigent circumstances" under this statute.

It seems apparent by appellant's failure to cite a single case on this analysis that this is an issue of first impression for this court. The plain language of "exigent circumstances" suggests that the standard relies on an ongoing emergency or a situation where officers are expected to react quickly. In State v. Patterson, the Washington Supreme Court held that an automobile could be searched without a warrant when exigent circumstances existed. While Washington courts had previously used a case-by-case approach to determine whether the totality of circumstances supported a finding of exigent circumstances, the court determined that a bright lined rule was more appropriate. The court in Patterson adopted a per se exigency rule because it provided the clearest guidelines for police. The court noted that "exigencies should not be determined on a case-by-case basis. Police need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts regarding the time, location and manner of highway stops." State v. Patterson, 112 Wn.2d 731, 747, 774 P.2d 10 (1989).

The court held that "cases of exigent circumstances include...the imminent escape of a suspect involv[ing] danger to the

public, danger to the officers involved or the imminent loss of evidence and any other circumstance which necessitates quick action on the part of the police in the performance of their duties. These cases are characterized by the need to act almost reflexively, on the officer's judgment, rather than on complex legal standards. They are also often characterized by an absence of complete information and a need, accordingly, to assume and act on a worst case scenario." State v. Patterson, 112 Wn.2d 731, 750, 774 P.2d 10 (1989). The facts of this case fit squarely within the parameters of the Supreme Court's descriptions of exigency.

Here, the officers encountered a woman with a black eye who they had reason to believe was scared and had just been assaulted by an unknown subject who was still inside the home. RP 99. This information put the officers in a situation where they needed to act quickly to apprehend the subject to eliminate an ongoing danger to the woman and to the officers. Officer Nolting stated in his testimony that he was also concerned about a potential ambush. RP 117. After the officers entered the small apartment, they found appellant, the only other occupant of the apartment, hiding in the bathroom. The officers immediately placed appellant into handcuffs and proceeded to escort him out of the

apartment as the woman they encountered was still inside.

RP 102-03.

The primary concern of the officers at this point was their safety and the safety of the woman with the black eye. RP 99. This concern is evident by the fact that the officers did not attempt to question appellant or the woman at this time. RP 99-117. Rather, the woman and appellant chose to engage in conversation while the defendant was being escorted out by the officers thus increasing the likelihood of a dangerous encounter and increasing the concern for officer and community safety. RP 103. Thus, rather than being concerned with analyzing complex legal standards, the officers were concerned with getting the parties separated from one another.

The dangerous or emergency situation that Officer Yorio and Officer Nolting encountered is exactly the type of circumstance that falls within the exigent circumstances contemplated by the Privacy Act. RCW 9.73.090(1)(c). As appellant cites no legal authority that facts of this case fail to support the trial court's finding of exigency, this court must defer to the discretion of the trial court. As the trial court did not abuse its discretion by finding exigency when the

officer's primary concerns were regarding safety, this court must affirm that conclusion.

2. EVEN IF ADMISSION OF THE VIDEO WAS IMPROPER, IT WAS HARMLESS ERROR AS THERE WAS SUBSTANTIAL OTHER EVIDENCE

Because the erroneous admission of evidence is not of constitutional magnitude, the standard of proving "harmless error beyond a reasonable doubt" is inapplicable. State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). Instead, the error is harmless if there is a reasonable probability that the outcome of the trial would not have been materially different had the error not occurred. Id., State v. Brown, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). Here, it is clear that the outcome of the trial would not have been different even if the trial court had excluded the video.

Two Seattle Police Department officers witnessed appellant inside Ms. Chatman's home in violation of a court order. Appellant was then arrested and booked into King County Jail where he remained pending trial. At trial, the officers were able to identify the defendant in person and Ms. Chatman through her Department of Licensing identification. Thus without the audio of their voices, there would still have been overwhelming evidence of the

defendant's guilt as to count one. Further, Sgt. Barclay Pierson testified that the defendant was in jail on May 29, 2008 and was in the receiving area where two phones are located. RP 192-93. On that day, a phone call was made to 206-283-6658 from one of those two phones. Id. Sergeant Pierson testified that only 10-25 inmates are housed in that location at a time. Id. 206-283-6658 is clearly Ms. Chatman's home phone number as it is the same number 911 received a hang up call from and therefore dispatched Officers Yorio and Nolting to for the original incident. RP 183-84. Officer Yorio, who spoke to Ms. Chatman and appellant, also testified that the voices on the jail call sounded like the voices of Mr. Humphrey and Ms. Chatman. RP 225. Officer Yorio's testimony was also strengthened by the fact that he indicated that the content of the call, specifically the discussion of the defendant's bail, confirmed the voice recognition. Id. Thus, even without the audio of their voices, there would still have been overwhelming evidence of the defendant's guilt as to count two given the defendant's location, the phone number called, and Officer Yorio's testimony regarding identification and content. Therefore, even if the admission of the video was error, such error was harmless.

3. APPELLANT'S ASSIGNMENT OF ERROR TO THE COURT'S RULING UNDER CrR 3.5 MUST BE UPHeld AS NO ARGUMENT IS MADE BY APPELLANT REGARDING SUCH ASSIGNMENT

To assign error to a claim on appeal, a litigant must raise a specific reason for the objection in the lower court. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Parties' briefs should contain legal authority and citation to the relevant parts of the record to support the issues presented. RAP 10.3(a)(5). Where a party fails to follow RAP 10.3(a)(5), this court need not consider its unsupported arguments. Idahosa v. King County, 113 Wn. App. 930, 938, 55 P.3d 657 (2002) (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)), review denied, 149 Wn.2d 1011 (2003). As appellant fails to cite any fact or legal authority as to why this court should reverse the trial court's ruling under CrR 3.5, respondent is unable to adequately respond to the assignment of error as to Conclusion of Law 1. AB 7. Thus, this court must defer to the trial court's ruling under CrR 3.5.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to uphold the admission of the patrol car video and affirm Humphrey's convictions.

DATED this 2 day of April, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kari Dady and David Koch, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DONALD HUMPHREY, Cause No. 64127-1-I, 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.

Wenita Schwantes

Name

Done in Seattle, Washington

4/2/10

Date