

SEP 04 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____COA No. 31422-7-III consol. with
31423-5-III, 31424-3-III, 31425-1-IIICOURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BDL,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The court erred by denying BDL's motion to suppress the recorded private conversation between a victim's daughter and her friend and a suspect, DC, implicating BDL in the crimes.

Issue Pertaining to Assignment of Error

1. Did the court err by denying BDL's motion to suppress the recording of a private conversation in violation of RCW 9.73? (Assignment of Error A).

II. STATEMENT OF THE CASE

BDL was charged in four separate cases with two counts of second degree burglary, six counts of theft of a motor vehicle, two counts of theft of a firearm, and two counts of juvenile in possession of a firearm. (CP 14, 225, 344, 482).

In all the cases, he moved to suppress a recorded private conversation between the daughter of a victim and her friend and a suspect, DC, that implicated BDL in the crimes and to suppress the resulting confessions and interviews. (CP 40, 250, 370, 509).

Finding BDL had no standing to contest the recording, the court denied the motions. (CP 164, 297, 422, 564, 1/18/13 RP 71).

BDL then had a stipulated facts trial based on his statements of defendant stipulating to facts sufficient to enter guilty finding on

all charges, but reserving the right to appeal the motion to suppress and other pretrial motions not pertinent here. (CP 165, 168-80, 298, 301-03, 423, 426-41, 565, 568-90). Orders on adjudication and disposition were entered with like dispositions of 96 days with 96 days credit on each offense. (CP 191, 312, 450, 599). This appeal follows.

III. ARGUMENT

A. The court erred by denying the motion to suppress the recorded private conversation between the daughter of a victim and her friend and a suspect, DC, implicating BDL in the crimes.

Based on essentially undisputed facts, BDL moved to suppress a recorded conversation:

According to the police report case # 1209614 of Stevens County Sheriff's Department, detectives Michael George and Dwayne Ford on October 24, 2012, were investigating thefts of vehicles and firearms. [KL], daughter of a victim) and her father, Casey [L] (owner of a stolen vehicle) met with Casey [L] and informed Detective George of the following:

1. "that he does leave a key in the stolen vehicle" as well as "he also left two firearms in the vehicle" and
2. That "[KL] and [her friend] went together and contacted [DC] about the stolen equipment. The two decided to record the conversation without [DC's] knowledge." (emphasis added.) Implicated

in this recorded conversation was the co-defendant, [BDL] as an accomplice.

3. [KL] said that [CT] sent the recorded conversations to her telephone.

4. Detectives Ford and George listened and then transferred the information to a recorder/recording.

Based on this information, the detectives made contact with the Juveniles, [DC] and [BDL]. At which point, the detectives gave written Miranda Rights statements which both young men signed prior to their confessions. From this information the State knew where to retrieve the missing vehicles. (CP 43, 56).

BDL argued that Washington law prohibited the recording of any private conversation by any device, electronic or otherwise designed to record or transmit the conversation, without first obtaining the consent of all persons in the conversation. RCW 9.73.030(1). There is nothing in the record reflecting that the consent of DC was obtained by KL and/or CT before recording their conversation. The remedy for violation of RCW 9.73.030 is that any information obtained is "inadmissible in any civil or criminal case. . ." RCW 9.73.050. The recorded conversation could not have been used against DC. *Id.*

The question is whether BDL has standing to suppress the recorded private conversation between DC, CT, and KL, when he

was not a party to it. Indeed, the court denied the motion to suppress on that sole ground:

. . . [T]he court found that the juvenile lacked the requisite standing to assert a privacy interest in a conversation that he was not a party [to]. . . (CP 164, 297, 422, 564).

Because it found BDL lacked standing, the court did not reach the issue whether there was a violation of RCW 9.73.030. The State, however, did agree with the defense “that if the court finds that the conversation which occurred was ‘private’ in nature and therefore a violation of RCW 9.73.030 the proper remedy would be suppression of all evidence obtained in the conversation and any derivative information obtained.” (CP 64).

State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980), is dispositive:

[W]e must conclude on the basis of the language and history of RCW 9.73, the legislature intended to allow a defendant to object to the use in his criminal trial of evidence obtained in violation of the statute, *even though the defendant himself was not a participant in the unlawfully intercepted or recorded conversation.* (emphasis added) 94 Wn.2d at 546.

BDL certainly did have standing to challenge the unlawfully recorded conversation between KL, CT, and DC, in which he was implicated in the crimes. *Id.* Accordingly, the court erred by

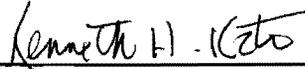
denying his motion to suppress on the ground that he lacked standing.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Loew respectfully urges this court to reverse the denial of his motion to suppress, reverse his convictions, and dismiss the charges.

DATED this 4th day of September, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 4, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Bryer D. Loew, 1436 E. 3rd, Deer Park, WA 99006, and by email, as agreed, on Timothy Rasmussen at trasmussen@co.stevens.wa.us and Lech Radzinski at lradzinski@co.stevens.wa.us.

