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NO. 88083-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM JOHN KIPP, JR.,

Appellant.

ON DISCRETIOANRY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 39750-1-II
Superior Court No. 08-1-01272-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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SERVICE	Alton B. Mcfadden 216 Ericksen Avenue Ne Bainbridge Island, Wa 98110	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 2, 2013, Port Orchard, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Court of Appeals erred in applying the long standing standard of review for the denial of suppression motions: namely, that findings entered at a suppression hearing are reviewed for substantial evidence?

2. Whether Kipp's claim that the trial court abused its discretion in admitting his taped statement must fail when the conversation was not "private" as the term is used in the Privacy Act because Kipp could not have reasonably expected that his conversation with the father of his victim would remain private?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

William John Kipp, Jr. was charged by information filed in Kitsap County Superior Court with charged by amended information filed in Kitsap County Superior Court with two counts of rape of a child in the second degree and one count of child molestation in the second degree. CP 8. Following a jury trial, Kipp was found guilty of the charged offenses and the trial court then imposed a standard range sentence. CP 73. The Court of Appeals affirmed. *State v. Kipp*, 171 Wn.App. 14, 286 P.3d 68 (2012).

B. FACTS

The charges in the present case alleged that Kipp committed the crimes of rape of a child and child molestation against a minor victim named D.G.T. CP 8.

Prior to trial, Kipp filed a motion to suppress a recording of a conversation between Kipp and Joseph T., the father of the D.G.T. CP 38. Kipp's argument was that the recording of the conversation violated Washington's Privacy Act found in RCW 9.73.030. CP 38-44. The State argued that that the nature of the conversation, and the relationship of the parties, showed that the conversation was not "private." Specifically, the conversation involved one man accusing another man of molesting his daughters. CP 67, RP 59-60. Given this fact, a reasonable person would not expect the contents of the conversation to remain private. RP 59-60. In addition the location was such that a third party could have walked in. CP 67, RP 59-60.

The trial listened to the contents of the tape and then gave the following ruling:

> The question before me is whether it is a private conversation. And both parties have given me the factors outlined in the case law t review when determining whether this was a private conversation or not.
>
> The first factor is the nature and duration of the conversation. And on this factor I think it splits equally between the parties in terms of their position. It is a confrontation by a father to someone he believes has

molested his daughters. Whether that belief is true or not, it is his belief. And that sort of confrontation is not the kind of thing that remains private. However, it was also long and isn't these offhand remarks to stranger that we see. So I think that factor, balancing, we've got almost identical considerations to both sides.

The second factor is where it took place. And again, we've got a bit of a split. Mr. McFadden is correct, it took place in a private residence, but it did take place in a common area, the kitchen. It didn't take place in a bedroom or basement, anything. And I will accept Mr. McFadden's description of the events as would have been testified to by Mr. Kipp.

I'll accept the offer of proof that it did take place in this kitchen and that [Joseph T.]'s son has left. But the issue is the potential for a third person to come in. And I think that potential is much higher in this situation in a kitchen than it would be in a different place.

The third factor that is outlined by the courts is the role of the nonconsenting party and his or her relationship to the consenting party. And again, we've got a couple of things going on; they are family members, and typically that would be private. But they weren't talking as family members; they weren't talking as brothers-in-law. They were talking as father of a daughter and the accused molester. And I think that's really the nature of the relationship. The State's argument that a reasonable person in the defendant's position should have expected or be reasonably expected to think that this would make its way to the authority is a good one. What tips me though on this analysis is something that was on the tape that isn't covered by one of the factors, but is certainly the expectation and intent of the parties through the language of the parties. At the very end of the tape, as they are kind of winding down the conversation, Mr. Kipp says to [Joseph T.]– and I might not have it exactly correct because of the quality of the tape, but he says: Let's go somewhere and talk about this, just the two of us. That tells me that he is looking for a private conversation and what was going on ahead of time wasn't.

I am going to allow the jury to hear the tape.

RP 62-64.

At trial, D.G.T. testified that Kipp, who is her uncle, had molested her several times at her grandparents' home. RP 138-42. In one instance Kipp put his hand inside her underwear and touched her vagina for several minutes. RP 137, 139-40. D.G.T. was 12 years old at the time. RP 137-38. On another occasion Kipp digitally penetrated her. RP 140-41. D.G.T. tried to push him away because she didn't want it to happen, and Kipp then got mad. RP 142. Kipp kept trying to touch her, but D.G.T. kept pushing Kipp away. RP 142. Kipp eventually stopped when D.G.T.'s grandfather came home. RP 142.

Kipp also digitally penetrated D.G.T. while she was staying overnight at Kipp's house. RP 142-44. D.G.T. also said that Kipp digitally penetrated her "a lot," approximately two to three times a week, while Kipp was around and not out to sea. RP 142, 159. D.G.T. further stated that when these events were occurring Kipp would tell her to be quiet and told her not to tell her aunt. RP 144. D.G.T. explained that she didn't tell anyone about these events because she was embarrassed, but that she eventually told her sister about the abuse. RP 144-45.

D.G.T.'s older sister, J.M.C., also testified that Kipp molested her on a number of occasions, beginning when J.M.C. was 15 years old. RP 173-77. Joseph T., the father of D.G.T. and J.M.C., eventually

confronted Kipp about his daughter's allegations. RP 206. Joseph T. secretly recorded this conversation. RP 206-07.[1]

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[1] At the beginning of the taped conversation Joseph T. explains that his daughters had told him that Kipp had molested them. RP 207. Joseph T. also stated, "It's not okay to do it one time, you know, but it happened twice." RP 208. Kipp responded, "I know what you are saying, and it was – they were both asking me questions, curious about things." RP 208. Kipp later stated that he wanted to explain things and the following exchange then took place,

> Mr. Kipp: It's hard to – it's hard to explain, because everything that happened back then, what was going on back then, and all I can say is just like –
> [Jospeph T.]: You didn't think about it, what you were doing?
> Mr. Kipp: No. I did it, and it stopped, and it hasn't started again, and that was the end of it.
> [Joseph T.]: Yeah, but it happened to [J.M.C.]. it happened to [D.G.T.]. What do you think about that? Have you got a sickness or something like that? Are you sick?
> Mr. Kipp: No. Like I said, because both of them – like with [J.M.C], she actually started with me first. She started with me.
> [Joseph T.]: Yeah, but you are an adult.
> Mr. Kipp: I know, I know.
> [Joseph T.]: You are an adult.
> Mr. Kipp: Joe-Joe, Joe-Joe, I was 19 at the time. I wasn't an adult. I was a kid with [J.M.C.]. I was still a kid, and she started with me.
> [Joseph T.]: Yeah, but you know, [J.M.C.] is only what, 10 years old, 15, when that thing happened?
> Mr. Kipp: 15, yeah.
> [Joseph T.]: And –
> Mr. Kipp: I was four years older than her.
> [Joseph T.]: [D.G.T.] is ten years old when that happened. That year you are old enough to realize that, right?
> Mr. Kipp: But – [D.G.T.], yeah. But like I said, it was just there was a lot going on at the time. Both – she was – like I said, it stopped, and it hasn't since.

RP 208-10. Joseph T. later asked if Kipp understood that this was a crime, and Kipp replied, "Yeah." RP 210. Kipp also stated, "It's done. It was something stupid. It happened a long time ago. It is done." RP 212. The taped conversation ends with the following exchange:

> Mr. Kipp: No, no. No, like I say, when we get a chance, just you and I, we will go somewhere and we'll talk, try to –
> [Joseph T.]: Okay.
> Mr. Kipp: --explain everything.
> [Joseph T.]: Okay.

RP 213.

III. ARGUMENT

A. THE COURT OF APPEALS DID NOT ERR IN APPLYING THE LONG STANDING STANDARD OF REVIEW FOR THE DENIAL OF SUPPRESSION MOTIONS: NAMELY, THAT FINDINGS ENTERED AT A SUPPRESSION HEARING ARE REVIEWED FOR SUBSTANTIAL EVIDENCE.

Kipp first argues that the Court of Appeals erred when it applied an incorrect standard of review. Petition for Review at 5. This claim is without merit because the Court of Appeals applied the standard of review that this Court has long held is appropriate in a review of a trial court's denial of a suppression motion: whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law.

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). An appellate court is not to disturb a trial court's rulings on the admissibility of evidence absent an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (*citing State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

An appellate court reviews findings of fact on a motion to suppress

under the substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence." *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Mendez*, 137 Wn.2d at 214; *Hill* 123 Wn.2d at 644.

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *Mendez*, 137 Wn.2d at 214; *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

In the 1990's the Court of Appeals issued several opinions that created some confusion regarding the appropriate standard of review that is to be used when an appellate court reviews a trial court's decision on a motion to suppress. For instance, in *State v. Dempsey*, 88 Wn.App. 918, 921, 947 P.2d 265 (1997), the Court of Appeals stated that it reviews denial of a suppression motion "by independently evaluating the evidence to determine whether substantial evidence supports the findings and the findings support the conclusions." *Dempsey*, 88 Wn.App. at 921 (*citing*

State v. Teran, 71 Wn.App. 668, 671, 862 P.2d 137 (1993)).

This Court, however, rejected this approach as an "anomaly" "misappropriated" into state law by misapplication of federal law governing federal review of state court decisions. *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). This Court also explained that under Washington appellate procedure, the appellate court limits its review of findings of fact entered following a suppression motion solely to "those facts to which error has been assigned." *Hill*, 123 Wn.2d. at 647. "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." *Id.* Unchallenged findings are verities binding on appeal. *Id.* at 644. This Court further concluded that "There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." *Id* at 647.

In the years since *Hill*, this Court has repeatedly reaffirmed its holding. See, e.g., *State v. Maxfield*, 125 Wash.2d 378, 385, 886 P.2d 123 (1994) (findings entered at a suppression hearing are reviewed for substantial evidence); *State v. Schultz*, 170 Wash.2d 746, 753, 248 P.3d 484 (2011) (same); *State v. Winterstein*, 167 Wash.2d 620, 628, 220 P.3d 1226 (2009) (same). Similarly, in *State*

v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997), this Court applied the *Hill* standard to review of a CrR 3.5 motion, and noting,

> We concluded in *Hill* that because the principle of independent review of the evidence lacked a sound foundation in Washington law, and because there is no reason to distinguish between constitutional claims and other claims of right, "in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal.

Broadaway, 133 Wn.2d at 130, *citing, Hill*, 123 Wn.2d at 647. This Court thus concluded that "there is no more foundation existing in Washington law for a principle of independent review of the record in a confession case than in one involving search and seizure" and that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. *Broadaway*, 133 Wn.2d at 131. Furthermore, this Court explained,

> There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal .... This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact.

Broadaway, 133 Wn.2d at 131, *citing Hill*, 123 Wn.2d at 647.

Despite the well-settled law in this regard, one "anomaly" remains. In *State v. Clark*, this Court, citing a previous civil case, stated that "Whether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law." *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996), *citing Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992).

Kadoranian was a civil summary judgment case, and in *Kadoranian* the Court stated that whether a particular communication or conversation is "private" and thus protected from intrusion by the privacy act, is a question of fact. *Kadoranian*, 119 Wn.2d at 190. Furthermore, this Court explained that because the facts in *Kadoranian* were undisputed and because reasonable minds could not differ on the subject, the issue of whether the communication in that case was private could be determined as a matter of law. *Kadoranian*, 119 Wn.2d at 190, *citing Central Wash. Bank v. Mendelson–Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989).

Tracing this standard of review back further, it is clear that this standard applies in civil summary judgment cases. The full passage from the *Central Washington Bank* case reads as follows:

> However, when reasonable minds could reach but one conclusion from the evidence presented, questions of fact may be determined as a matter of law, and **summary judgment** is appropriate.

Central Washington Bank, 113 Wn.2d at 353 (emphasis added), *citing*, *Davis v. Niagara Mach. Co.*, 90 Wn.2d 342, 348, 581 P.2d 1344 (1978); *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966).

The *Davis* and *Meissner* cases cited in *Central Washington Bank* case further demonstrate that this "standard of review" is really little more than a reformulation of the summary judgment standard.[2] For instance, in *Davis* the Court merely stated,

> We are mindful of the fact that this case was decided on motion for summary judgment and that in such a case all evidence and reasonable inferences therefrom must be

[2] When an appellate court reviews a summary judgment order, the appellate court makes the same inquiries as the trial court. *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006); *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992). That is, the court considers all the facts and reasonable inferences in the light most favorable to the nonmoving party, and summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party shows that he or she is "entitled to a judgment as a matter of law." CR 56(c). "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Furthermore, a trial court need not even make findings of fact when ruling on a summary judgment motion, since findings of fact are findings of fact entered in summary judgment proceedings are "merely superfluous" in a summary judgment proceeding. *Chelan County Deputy Sheriffs' Ass'n. v. County of Chelan*, 109 Wn.2d 282, 294 n. 6, 745 P.2d 1 (1987). These rules regarding summary judgment have long been the law in Washington. *See, e.g, State ex rel. Bond v. State*, 62 Wn.2d 487, 488, 383 P.2d 288 (1963) ("The purpose of a summary judgment is to avoid a useless trial. It permits the trial court to cut through formal allegations and grant relief when it appears from uncontroverted facts, set forth in affidavits, depositions, admissions on file or in the pleadings, that there are no genuine issues as to any material fact.").

> considered in favor of the nonmoving party. *Wilber Dev. Corp. v. Les Rowland Constr., Inc.*, 83 Wash.2d 871, 523 P.2d 186 (1974). Summary judgment is proper here, however, where reasonable men could reach but one conclusion.

Davis, 90 Wn.2d at 348. Similarly, in *Meissner* the Court explained that,

> A summary judgment is properly granted if the pleadings, affidavits, depositions or admissions on file show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. In ruling upon such motion, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party. If, from this evidence, reasonable men could reach only one conclusion, the motion should be granted.

Meissner, 69 Wn.2d at 951 (internal citations omitted).

Given this lineage, it is clear that the standard outlined in *Davis*, *Meissner*, *Central Washington Bank*, and *Kadoranian* represents a "misappropriation" of the standard of review that applies in cases involving review of a *civil summary judgment* motion. Thus, the *Clark* court erred to the extent that it incorporated this standard into *criminal* cases involving review of a privacy act suppression motion. In addition, *Clark's* incorporation of this standard into a criminal case directly contradicts this Court's long and continuing line of cases that clearly hold that the proper standard of review for trial court's ruling regarding a criminal suppression motion is the "substantial evidence" standard.

Given these facts the Court of Appeals did not err when it

addressed the standard of review as follows,

> Before continuing, we address the standard of review applicable to a trial court's decision as to the admissibility of recordings under the privacy act. The oft-cited standard of review from *Clark* is "[w]hether a particular conversation is private is a question of fact, but where the facts are undisputed and reasonable minds could not differ, the issue may be determined as a matter of law." 129 Wash.2d at 225, 916 P.2d 384. But this is the wrong standard as to motions to sup-press in criminal trials. Not only was it imported from a civil case, but it is inconsistent with Washington's Rules of Criminal Procedure and valid case law setting forth the correct standard of review for criminal motions to suppress.
>
> *Clark* imported the above standard of review from *Kadoranian*, 119 Wash.2d at 190, 829 P.2d 1061. *Clark*, 129 Wash.2d at 225, 916 P.2d 384. Kadoranian had filed a class action lawsuit alleging that the Bellingham Police Department violated the privacy act by inadvertently intercepting one of her private conversations and the similar conversations of those in a class she sought to certify. 119 Wash.2d at 181–83, 829 P.2d 1061. The superior court granted summary judgment to the police department. 119 Wash.2d at 183, 829 P.2d 1061.
>
> Our Supreme Court affirmed summary judgment in part because Kadoranian's intercepted conversation was not private. 119 Wash.2d at 190–92, 829 P.2d 1061. In the summary judgment context, the court held, "Whether a particular communication or conversation is 'private' and thus protected from intrusion by the privacy act is a question of fact." 119 Wash.2d at 190, 829 P.2d 1061. The court further held that because the facts were undisputed and "reasonable minds could not differ on the subject," the issue could be determined as a matter of law. 119 Wash.2d at 190, 829 P.2d 1061.
>
> Viewed in light of this procedural posture, it is clear that the standard of review noted in *Kadoranian* can have no application to a criminal motion to suppress. Because *Kadoranian* came before the Supreme Court on appeal from summary judgment, the standard of review was de

novo review for whether there was any genuine issue of material fact and whether Kadoranian was entitled to judgment as a matter of law. CR 56(c); *Jackowski v. Borchelt*, 174 Wash.2d 720, 729, 278 P.3d 1100 (2012). Because the facts were undisputed, there were no genuine issues of material fact, and thus it was proper for the court to determine the privacy act issue de novo as a matter of law.

There is no procedure analogous to summary judgment in criminal cases. But by applying the *Kadoranian* standard to a CrR 3.6 motion to suppress, courts would resolve the issue as if it came before them on cross motions for summary judgment, as in *Kadoranian*. 119 Wash.2d at 183, 829 P.2d 1061. Neither the Rules of Criminal Procedure nor the existing, valid case law of this state permits this civil standard of review in criminal cases, and we would err by perpetuating such a standard.

It is well settled that we review factual findings on a motion to suppress for whether substantial evidence supports them, and if so, whether they support the trial court's conclusions of law. *State v. Fowler*, 127 Wash.App. 676, 682, 111 P.3d 1264 (2005); *State v. Cole*, 122 Wash.App. 319, 322–23, 93 P.3d 209 (2004). We do not conduct the same review as the trial court—we do not substitute our own findings for those of the trial court.

This holding is consistent with our Supreme Court's prior rejection of de novo review of criminal motions to suppress in *State v. Hill*, 123 Wash.2d 641, 870 P.2d 313 (1994). There, our Supreme Court considered and overruled a line of cases requiring reviewing courts to "undertake an independent evaluation of the evidence" when reviewing factual findings following a motion to suppress. 123 Wash.2d at 644–45, 870 P.2d 313. The court held that such an "anomaly in Washington law" should be discarded in favor of the rule that factual findings are reviewed for substantial evidence. 123 Wash.2d at 645–47, 870 P.2d 313.

Just as the "independent evaluation of the evidence" standard addressed in *Hill*, the *Kadoranian* standard as applied to criminal cases is an "anomaly in Washington

> law" that should be discarded. There is no principled reason to depart from *Hill* and conduct a de novo review of privacy act issues as if they were brought before us in a civil case on summary judgment. We accordingly decline to perpetuate *Clark's* adoption of the *Kadoranian* standard in criminal cases, instead applying the well-settled standard of review for whether the trial court's findings of fact are supported by substantial evidence and whether those findings support the trial court's conclusions of law.

Kipp, 171 Wn.App. at 23-25.

B. KIPP'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING HIS TAPED STATEMENT MUST FAIL BECAUSE THE CONVERSATION WAS NOT "PRIVATE" AS THE TERM IS USED IN THE PRIVACY ACT BECAUSE KIPP COULD NOT HAVE REASONABLY EXPECTED THAT HIS CONVERSATION WITH THE FATHER OF HIS VICTIM WOULD REMAIN PRIVATE.

Kipp next claims that the trial court erred in admitting the taped conversation between Kipp and the victim's father. Petition For Review at 8. This claim is without merit because Kipp has failed to show that the trial court abused its discretion as the taped conversation was not a "private" conversation for purposes of Washington's Privacy Act.

With respect to the present case, Washington's Privacy Act prohibits recording of any:

> Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(b). The statute clearly prohibits only the recording of *private* conversations. *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 458, 139 P.3d 1078 (2006) (emphasis in original). The Act does not define the term "private."

This Court, however, has explained that whether a conversation is private depends on the "intent and reasonable expectations of the participants, as manifested by the facts and circumstances of each case." *Clark*, 129 Wn.2d at 224, quoting *Kadoranian*, 119 Wn.2d at 190. In addition, this Court has applied the ordinary and usual meaning of the term private:

> "belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public."

State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996), *citing Kadoranian*, 119 Wn.2d at, 190 (*quoting State v. Forrester*, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), *review denied*, 92 Wn.2d 1006 (1979)).

This Court has thus stated that a communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. *Christensen*, 153 Wn.2d at 193; *Townsend*, 147 Wn.2d at 673. Furthermore, "because any defendant will contend that his or her conversation was intended to be private," a court

must also "look to other factors bearing upon the reasonable expectations and intent of the participants." *Clark*, 129 Wn.2d at 225. Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. *Christensen*, 153 Wn.2d at 193; *Clark*, 129 Wn.2d at 225-27.

Several Washington cases have further addressed the third factor: the role of the nonconsenting party and his or her relationship to the consenting party. In *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 460, 139 P.3d 1078 (2006), this Court addressed whether a conversation between a police officer and a driver who had been pulled over was a "private" conversation. This Court noted that "it is not persuasive that the nonconsenting parties to these conversations, the drivers, would expect the officers to keep their conversations secret, when the drivers would reasonably expect that the officers would file reports and potentially would testify at hearings about the incidents." *Lewis*, 157 Wn.2d. at 459, *citing Clark*, 129 Wn.2d at 226, 916 P.2d 384; *State v. Bonilla*, 23 Wn. App. 869, 873, 598 P.2d 783 (1979) ("It would strain reason for Bonilla to claim he expected his conversations with the police dispatcher to remain purely between the two of them."); *State v. Flora*, 68 Wn. App. 802, 808,

845 P.2d 1355 (1992) ("Because the exchange [between a police officer and an arrestee during an arrest] was not private, its recording [by the arrestee] could not violate RCW 9.73.030 which applies to private conversations only"). Similarly, in *Clark* this Court noted that there was no reasonable expectation of privacy where the listener was a person who might disclose information about the conversation to others. *Clark*, 129 Wn.2d at 227, *citing State v. Goucher*, 124 Wn.2d 778, 786, 881 P.2d 210 (1994) (the defendant had no reasonable expectation of privacy because he voluntarily exposed his desire to buy drugs to a stranger and, thus, ran the risk that such stranger might provide others access to the conversation) and *State v. Wojtyna*, 70 Wn.App. 689, 695-96, 855 P.2d 315 (1993) (A communication is not private where anyone may turn out to be the recipient of the information or the recipient may disclose the information).

The basic notion behind these rulings is that there is no reasonable expectation of privacy in a conversation that a person has with a police officer or other person who might reasonably be expected to disclose the contents of the conversation on to others.

In this present case, the trial court reached a similar conclusion regarding the conversation at issue, noting that the nature of the conversation was a confrontation between a "father of a daughter and the accused molester," and noted that "that sort of confrontation is not the

kind of thing that remains private." RP 63-64. In addition, the court noted that a reasonable person in the defendant's position should have expected that the conversation would be reported to the authorities. RP 64.

While it is possible that Kipp subjectively hoped that the conversation would remain private, this wish alone does not make the conversation private in terms of the Privacy Act, because the wish is simply not reasonable given the fact that conversation revolved around Kipp's molestation of Joseph T.'s daughters. Under Washington law, a defendant must show that he *reasonably* expected the conversation would remain private, not that he hoped or wished that a conversation would remain private. *Lewis*, 157 Wn.2d. at 459; *Clark*, 129 Wn.2d at 227; *Goucher*, 124 Wn.2d at 786. Given the nature of the conversation, the trial court did not err in concluding that Kipp had failed to make such a showing.[3]

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[3] In addition, the trial court also relied on Kipp's own comments at the end of the tape where he suggested that he and Joseph T. go somewhere, "just you and I," and talk about the allegations. Specifically, the tape contains the following exchange:

> Mr. Kipp: No, no. No, like I say, when we get a chance, just you and I, we will go somewhere and we'll talk, try to –
> [Joseph T.]: Okay.
> Mr. Kipp: --explain everything.
> [Joseph T.]: Okay.

RP 213. The trial court reasoned that this exchange demonstrated that Kipp reasonably understood that the conversation was not "private" as that term is use in the Privacy Act. Rather, the court held that this passage demonstrated the "expectation and intent of the parties through the language of the parties," and that,

> That tells me that he is looking for a private conversation and what was going on ahead of time wasn't.

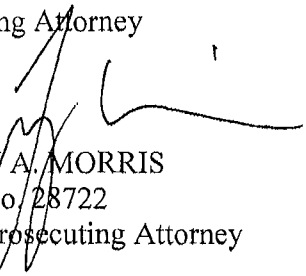
Given all of these facts, the trial court did not abuse its discretion in denying Kipp's motion to suppress because the evidence showed that the nature of the conversation was such that a reasonable person would have understood that the contents of the conversation would not remain private and because Kipp's own words on the tape demonstrated that he understood that the conversation was not "private" as that term is used in the Privacy Act. Kipp's claim, therefore, must fail.

IV. CONCLUSION

For the foregoing reasons, Kipp's conviction and sentence should be affirmed.

DATED May 2, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
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RP 62-64. This analysis was proper, as this Court has explained that a court is to "look to other factors bearing upon the reasonable expectations and intent of the participants." *Clark*, 129 Wn.2d at 225.

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Attached, please find the State's "Supplemental Brief of Respondent" in the case of State v William Kipp, No. 88083-2.

Sincerely,

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