

No. 93923-3

NO. 47205-8-II

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

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STATE OF WASHINGTON, Respondent

v.

JOHN GARRETT SMITH, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01035-6

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BRIEF OF RESPONDENT

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**ANSWER TO ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

- I. When the defendant's stepdaughter listened to a recording on defendant's cellular phone that contained the sounds of defendant's attempt to murder his wife she did not intercept a private communication or private conversation in violation of the Privacy Act.**

**STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY**

John Garrett Smith was charged by second amended information with Attempted Murder in the First Degree, Attempted Murder in the Second Degree, Assault in the First Degree, and Assault in the Second Degree for an incident occurring on or about June 2, 2013 with his wife Sheryl Smith. CP 1-3. Each count also contained a special allegation of domestic violence. CP 1-3. Prior to trial, Mr. Smith filed a motion to suppress evidence. CP 4-12. This evidence pertained to an audio recording of the incident that led to the crimes charged. CP 4-12. After a hearing on November 24, 2014, in front of The Honorable Robert Lewis the trial court denied the motion to suppress. CP 90-93; RP 56-93.

The case proceeded to a bench trial before The Honorable Robert Lewis, which commenced on December 1, 2014 and concluded on December 3, 2014 with the trial court's verdict. RP 180-858. The trial court found Mr. Smith guilty of Attempted Murder in the Second Degree,

Assault in the Second, and the related special allegations, but acquitted him of the remaining counts and the aggravator. CP 83-89; RP 851-58. Mr. Smith was sentenced to a standard range sentence of 144 months. CP 99-108; RP 894-96. Mr. Smith filed a timely notice of appeal. CP 112.

B. STATEMENT OF FACTS

John Garrett Smith and Sheryl Smith began dating in 2009 and were married in 2011. RP 232. On the evening of June 2, 2013, at the couples' home, however, Mr. Smith attempted to murder his wife. At first, the couple was simply arguing. RP 194, 250-51, 387, 425, 503-04, 517. Mr. Smith turned this argument into an attempt on Ms. Smith's life when he assaulted Ms. Smith to the point of unconsciousness by continuously punching her in the face and strangling her. RP 240-41, 250-51. Ms. Smith's last memories just prior to losing consciousness were that she could not see and she could not breath; but she could hear and the last thing she heard was Mr. Smith calling her a "fat bitch." RP 239.

When Ms. Smith returned to consciousness, her eyes were black and swollen shut, her whole face was swollen and was bleeding, and she complained about breathing problems. RP 263-64, 391-92, 439-441, 492-93, 502-03. Numerous pictures of Ms. Smith's injuries and how they progressed were admitted into evidence. Ex. 3-9, 34-36, 38-39, 41-43. Ms. Smith's injuries were severe as she was hospitalized for numerous days.

RP 278, 412-13, 439, 737. She was diagnosed with a facial fracture as well as a concussion in addition to her other injuries. RP 263-64, 442, 445-46, 461, 488. Moreover, she suffered from severe head pain, double vision, nausea, and vertigo for months after the assault. RP 277-78, 454-461, 484, 522, 551.

Ms. Smith's memory of the attempt on her life at the time of trial was limited, she recalled:

I'm being strangled. Garrett's on top of me. My face is being punched. I feel like I'm in a very dark place inside of my head, and three punches, and I'm being called a fat bitch, and I thought I was going to die.

RP 238. Other admitted evidence filled in the memory gaps including a written statement by Ms. Smith, which was read into the record and included the following:

Fell to the ground. Garrett on top of my chest. Both fists punching face in hard and fast and continued. Lifted my arms to shield as best I could. Both his hands around my throat cut off breathing. Could not speak. Was passing out. Removed one hand to continue ongoing punches while other hand remained around my throat applying pressure. I begged him to stop. Beating to head continued then both fists in punching bag form. Punching face in rapid hard pace. Could feel I was going to die and not make it out of beating alive. Went unconscious.

RP 250-51.

Additionally, there was a recording made of the incident. Ex. 2. During the incident, Mr. Smith used the home's landline cordless phone to dial his cellphone. RP 74-75, 81. Mr. Smith called his cellphone for the purpose of finding of the phone not because he was attempting to communicate with somebody or because he wanted to leave a voicemail. RP 74-75, 81. Nonetheless, his cellphone's voicemail system recorded what was going on because Mr. Smith left the landline open during his attempt to find his cellphone. This voicemail contained the following audio:

(Audio recording is played.)

MALE: There, are you happy now?  
(Woman screaming.)

MALE: You brought this shit on. I have never done this. You and your fucking Mexican. Fuckcocking three-timer. You're not going to get your (inaudible) three check.

FEMALE: No! Leave me alone. (Screaming.)

MALE: Where is my phone?

FEMALE: Look what you've done to me! (Screaming.)

MALE: Just give me my phone and I'll leave.  
(Woman speaking in background.)

MALE: Not your fucking -- you think she can ring -- give me my fucking phone.  
(Woman shrieking.)

MALE: You're going to call (inaudible) and then you're going to be homeless. You bitch. Fuck you. Give me back –  
(Woman screaming.)

MALE: You fat bitch.

WOMAN: Stop.

MALE: You think you're bleeding? (Inaudible.) You're the most fucked up person. Give me back the phone.

WOMAN: Get away.

MALE: No way. I will kill you.

WOMAN: I know.

MALE: Did you want to kill me? Give me back my phone.

WOMAN: No. Leave me alone.  
(Woman screaming.)

MALE: Where is my phone?  
(Woman screaming.)

MALE: Just give me my phone and I'll go.  
(Woman screaming.)

WOMAN: Look what you did to me? Look what you did to me? (Continues screaming.)

MALE: Phone?  
(Screaming continues.)

MALE: You fucking bitch. I've got your as –

WOMAN: Stop it.  
(Screaming continues.)

MALE: (Inaudible.) Fucking bitch. (Inaudible.)  
(Screaming continues.)

MALE: Where's your phone?  
(Screaming continues.)

MALE: What'd you do with my fucking –  
  
(Audio recording ends.)

RP 241-43, 70-71; Ex. 2; CP 78-80.<sup>1</sup> The female in the recording was identified as Ms. Smith and the male as Mr. Smith. RP 241. Mr. Smith fled the scene without his cellphone after strangling Ms. Smith to unconsciousness and the cellphone ended up in the possession of Skylar Williams, Ms. Smith's daughter and Mr. Smith's stepdaughter, after she returned to the house and helped her mother complete a 911 call. RP 58-60, 393-405, 409; Ex. 1.

On the 911 call, Ms. Smith can be heard gasping and pleading for help. RP 185. She reported being unable to see. RP 186. Ms. Smith explained to the 911 operator that she was "beat to a pulp" by John Garrett Smith. RP 187-88. Ms. Williams, who had just arrived home, then grabs the phone and tells the 911 operator that her mother's face is "like ten times the size of normal and gushing blood" and that "she can't open her eyes because her face is so swollen." RP 190. Ms. Williams can also be

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<sup>1</sup> The transcript that was produced by Mr. Smith for the purposes of one his motions at CP 78-80 is slightly different from the above transcript, which was transcribed from the trial and is part of the report of proceedings. The transcript of the recording at RP 70-71 as part of the CrR 3.6 hearing and part of the report of the proceedings is also slightly different.

overheard telling her mom and the 911 operator that because of her mother's injuries that she "can't even look at her face." RP 191, 195. Following the arrival of the police and paramedics, Ms. Smith received medical care and was transferred to the hospital. RP 489-495, 504-05.

While at the hospital, Ms. Williams looked at Mr. Smith's phone and saw a missed call and a voicemail from the family landline left around the time of the incident. RP 412. She listened to a bit of the voicemail and then played it for an officer. RP 60-62, 412, 508-09. The police, after hearing the voicemail, seized the phone and executed a search warrant on it. RP 60-69. While also at the hospital, Ms. Williams received multiple calls from Mr. Smith. RP 409-411. During one of those calls Mr. Smith indicated that he was at the airport and he had a feeling that he needed to book a flight and leave. RP 411. Ms. Williams told him to instead meet her at the house, but her plan was to send the police to meet him. RP 411.

The police contacted Mr. Smith at the home and noticed that he had luggage and a lot of personal property in the front passenger seat of his truck. RP 510, 650; Ex. 48. At that time he denied any physical altercation between himself and Ms. Smith. RP 511-14. But the next morning, Mr. Smith quickly asked a detective "Is she going to make it?" despite not receiving any information from her about Ms. Smith's injuries. RP 636. Mr. Smith's explanation for what happened that night, however,

continued to vary as evidenced by his statements in the numerous letters that he wrote to Ms. Smith while the case was ongoing, his jail calls, and his trial testimony, which included admissions to punching Ms. Smith. RP 280-310 (letters to Ms. Smith), RP 562-63, 583-87, 594 (jail calls), 769-820 (Mr. Smith's testimony). Ultimately, the trial court concluded that "the Defendant was not a credible witness as to the events that occurred. This finding is based on the Defendant's self-interest in presenting favorable evidence to minimize his conduct and also his various conflicting accounts as to what occurred." CP 84 (Conclusion of Law #1.1); RP 852-53.

#### ARGUMENT

**I. When the defendant's stepdaughter listened to a recording on defendant's cellular phone that contained the sounds of defendant's attempt to murder his wife she did not intercept a private communication or private conversation in violation of the Privacy Act.**

Washington's Privacy Act generally makes it unlawful "for any individual . . . to intercept (1) any "[p]rivate communication transmitted by telephone . . . between two or more individuals between points . . . without first obtaining the consent of all the participants in the communication;" or (2) any "[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation...

without first obtaining the consent of all the persons engaged in the conversation.” RCW 9.73.030(1)(a)-(b); *State v. Modica*, 164 Wn.2d 83, 87, 186 P.3d 1062 (2008). Information obtained in violation of the Privacy Act is inadmissible in a criminal trial. RCW 9.73.050; *Modica*, 164 Wn.2d at 83.

A trial court’s legal conclusions following a motion to suppress based on an alleged violation of the Privacy Act are reviewed de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). Furthermore, while whether a communication or conversation is private under the Privacy Act is a question of fact, it may be reviewed as a question of law where the facts are not in dispute. *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (citing *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996)). In addition, a reviewing court “can affirm on any grounds supported by the record.” *State v. Huynh*, 107 Wn.App. 68, 74 26 P.3d 290 (2001) (citing *State v. Bryant*, 97 Wn.App. 479, 490-91, 983 P.2d 1181 (1999)); *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a), 5.1(d).

**II. The recording at issue was not of a “private communication” as properly understood under RCW 9.73.030(1)(a) or of a “private conversation” under RCW 9.73.030(1)(b).**

Mr. Smith assumes, without providing specific argument,<sup>2</sup> that the recording at issue was of a “private communication” under subsection (a) and/or of a “private conversation” under subsection (b), and seemingly uses the phrases “private communication” and “private conversation interchangeably despite there being a clear legal difference between the two. Br. of App. at 7-11; *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (A “fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.”) (citations omitted). RCW 9A.73.030(1)(a) only prohibits the intercepting of a “private communication” when that “communication [is] *transmitted by telephone . . . or other device between two or more individuals between points. . . without first obtaining the consent of all the participants in the communication.*” (emphasis added). Thus, subsection (a), based on its plain meaning and its differences with subsection (b), only applies to communications where all the individuals involved in the communication are utilizing a device to communicate. Simply put, subsection (a) prohibits a person from recording or intercepting a phone

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<sup>2</sup> “There is no question that a private conversation was recorded by Garrett’s cell phone.” Br. of App. at 7.

call between people, text messages between people, or any other communication where each person is utilizing an electronic medium.

For example, in *State v. Christensen*, the defendant called his girlfriend on the telephone and, unbeknownst to him or his girlfriend, his girlfriend's mother activated the speakerphone function of the cordless telephone system by pressing a button on the base unit in order to listen in on their conversation. 153 Wn.2d 186, 190-91, 102 P.3d 789 (2004). Despite the fact that the defendant and his girlfriend were indisputably having a "conversation," the focus of the analysis was not whether they were having "private conversation" under subsection (b), but whether it was a "private communication" under subsection (a) because of the method by which they were communicating, i.e., with each on a telephone over a telephone line. *Id.* at 191-193. Consequently, the trial court here was correct when it concluded:

6. RCW 9.73.030(1)(a) applies to private communications by electronic means, and that conversation is intercepted by a third party.

7. RCW 9.73.030(1)(a) does not apply to this case because the people in the room where the recording took place, Ms. Smith and the Defendant, were not attempting to communicate by electronic means. Neither party attempted to communicate by electronic means.

CP 92 (Conclusions of Law #6 and #7). Here, when Mr. Smith inadvertently recorded what was going on in the room during the incident

via his cellphone, neither he nor Ms. Smith were communicating with the other by way of a phone or over a phone line. Subsection (a), therefore, does not apply to the recording at issue.

RCW 9A.73.030(1)(b) prohibits the intercepting of a “[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation . . . without first obtaining the consent of all the persons engaged in the conversation.” Subsection (b) then applies to all private conversations in which the parties conversing are not utilizing a device or electronic medium. For example, in *State v. Kipp*, the defendant, who was accused of sexually assaulting two of his nieces, was confronted by his nieces’ father about the accusations. 179 Wn.2d 718, 723-24, 317 P.3d 1029 (2014). The conversation that ensued between the two men was secretly recorded by the father and took place face-to-face. *Id.* Accordingly, the issue in *Kipp* was whether the recording was of a “private conversation” under subsection (b) not whether it was a “private communication” under subsection (a). *Id.* at 724, 729-733.

*State v. Smith* is instructive as to whether the recording at issue here was of a “private conversation.” 85 Wn.2d 840, 540 P.2d 424 (1975). There, the victim in the case received a phone call to meet a person in an alley in the evening. *Id.* at 842. He then purchased a tape recorder, which he concealed under his clothing and attached the microphone to his shirt.

*Id.* at 843. The victim asked his next-door neighbor to accompany him. *Id.* The victim parked his car near the alley, exited his car, and walked towards the alley while his neighbor remained near the car. *Id.* The victim met the defendant, who was in the alley parked in a truck, and the defendant shot the victim several times, killing him. *Id.*

The tape recording of the events was found on the victim's body during an autopsy. *Smith*, 85 Wn.2d at 843. The recording contradicted the defendant's statement and testimony. *Id.* 843-44. The recording contained the following:

The tape begins with remarks by [the victim], introducing [his neighbor] and stating his destination. The two men discuss the walkietalkies and other arrangements, and [the victim] starts toward the designated alley. As he walks he narrates, describing the scene around him and describing with particular care each person in the vicinity. Remarking, 'Everything looks quite normal,' he says he is turning into the upper part of the alley. Then, suddenly are heard the sounds of running footsteps and shouting, the words 'Hey!' and 'Hold it!', [the victim] saying 'Dave Smith,' and a sound resembling a gunshot. The running stops, and Smith tells [the victim] to turn around. [The victim] asks, 'What's the deal?' Smith replies, 'You know what the deal is. I'll tell you one thing baby, you have had it.'

Several more words are exchanged, not all of which are clearly intelligible, about whether Smith has 'a charge.' Then [the victim] asks, 'If you wanted me, why didn't you come to see me?' Smith replies, 'I'll tell you why.' A moment later, another shot is heard. The quality of the recording becomes 'tinny.' (There was expert testimony that this shot damaged the microphone.) Then [the victim], screaming, repeatedly begs for his life. More shots are

fired. There is a slight pause, two more shots are heard, then certain unclear sounds, then silence. After a period of nearly complete silence, a voice is heard to say, 'We've already called the police.' Another voice says, 'Hey, I think this guy's dead, man.' Afterward, the tape records police sirens and the sounds of the officers investigating.

*Id.* at 844-45. *Smith* held that the recording was not of a "private conversation" under the Privacy Act stating "[w]e are convinced that the events here involved do not comprise 'private conversation' within the meaning of the statute. Gunfire, running, shouting, and [the victim's] screams do not constitute 'conversation' within *that term's ordinary connotation of oral exchange, discourse, or discussion.*" *Id.* at 846 (emphasis added). Notably, however, the court did not attempt to definitively define "private conversation" and did note that its holding was based on the "bizarre facts" of the case. *Id.* at 847. That said, the facts of this case regarding how the recording was made and what was captured are legally indistinguishable from *Smith* and equally unique.

Here, Mr. Smith accidentally recorded his attempted murder of his wife when, in an effort to find his cellphone, he called his cellphone from the home's landline and the cellphone's voicemail recorded what was going on in the room. And what was going on was similar to *Smith* as it pertains to whether a conversation took place. Ms. Smith spends the recording screaming, crying, and pleading for Mr. Smith to "get away,"

while Mr. Smith yells at her, assaults her, and threatens to kill her. RP 70-71, 241-43; CP 78-80, 84 (Finding of Fact #1.7), 85 (Finding of Fact #3.3), 86 (Finding of Fact #4.1, #4.4, #4.5); Ex. 2. Consequently, what was recorded was not a “conversation” within that term’s ordinary meaning; it was not “discourse[] or discussion” between Mr. Smith and Ms. Smith captured on the recording, it was Ms. Smith being victimized. *Smith*, 85 Wn.2d at 846. Because there was not a “private conversation” under the Privacy Act, subsection (b) does not apply to recording at issue.

Thus, neither subsection (a) or (b) of the Privacy Act apply to the recording at issue. Accordingly, Ms. Williams’s actions when she listened to the audio recording on Mr. Smith’s cellphone cannot be considered unlawful under the Privacy Act and the audio recording was properly admitted into evidence.

**III. There was no interception of a “private communication” or of a “private conversation.”**

Even assuming there was a “private communication” under subsection (a) or a “private conversation” under subsection (b), there was no interception of either by Ms. Williams when she listened to the audio recording on Mr. Smith’s cellphone. Our Privacy Act is longstanding, and “[s]ince 1909, [it] . . . has protected sealed messages, letters, and telegrams from being opened or read by someone other than the *intended* recipient.”

*Kipp*, 179 Wn.2d at 724 (emphasis added); RCW 9.73.020. Additionally, in 1967 “the legislature amended the act in order to keep pace with the changing nature of electronic communications and in recognition of the fact that there was no law that prevented eavesdropping.” *Id.* (citation omitted). Thus, by 1967 the law prohibited the intercepting of sealed message and letters as well as electronic communications.

“Intercept,” however, is not defined in the Privacy Act, so our Supreme Court has given the term its plain and ordinary meaning, which is to “stop . . . before arrival . . . or interrupt the progress or course.” *Roden* 179 Wn.2d at 904 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1176 (2002)). In *State v. Roden*, our Supreme Court recently fleshed out the concept of what constitutes an “interception” in the context of text messaging. *Id.* at 903-907. There, a person was arrested for a drug crime and had his phone seized by the police. *Id.* at 897. A detective in possession of that phone saw a text message from a contact (the defendant) that appeared to be about a drug transaction. *Id.* The detective posed as the recently arrested person and exchanged a series of text messages with the defendant setting up a purported drug deal. *Id.* When the defendant arrived to conduct the deal he was arrested and charged with attempted possession of heroin as a result of his communications. *Id.*

*Roden* held that the defendant’s private communications (the text messages) were intercepted because the messages the defendant sent to the arrested person “were opened, read, and responded to by an officer before they reached” the arrested person. 179 Wn.2d 904. Importantly, the court noted that “the detective here intercepted text messages *directed* to an actual acquaintance.” *Id.* (emphasis added). Simply put, there was an interception because the detective accessed the “incoming text messages before they reached” the intended recipient. *Id.* at 906.<sup>3</sup>

Despite Mr. Smith’s claims to the contrary,<sup>4</sup> *Roden* is easily distinguishable from this case. First, the mode of the communication is completely different. Second, unlike *Roden*, there is an inadvertent recording made by the defendant. Third, to the extent there is a “private communication” or “private conversation” here, this communication is not directed to a recipient. Fourth, Ms. Williams, unlike the detective in *Roden*, did not “intercept[] . . . incoming . . . messages before they reached” the intended recipient—she listened to an inadvertently made recording, which undeniably was not a communication Mr. Smith sent to himself. 179 Wn.2d at 904, 906. Simply put, Ms. Williams did not interpose herself between the communicator and a specific communicatee

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<sup>3</sup> *Roden* purposefully did not address “[w]hether it is also a violation of the act to access text messages that have already been received by the intended recipient and remain in storage.” *Id.* at 906.

<sup>4</sup> “This case is on all fours with *State v. Roden*.” Br. of App. at 10.

when she listened to the recording and, thus, there was no interception. This conclusion comports with the plain and ordinary meaning of “intercept” adopted by our Supreme Court—to stop before arrival or interrupt the progress or course—and with its analysis in *Roden*. Because there was no interception of a “private communication” or of a “private conversation” the evidence was properly admitted.

**IV. Any error in admitting the recording of Mr. Smith’s attempt to murder his wife was harmless.**

“Failure to suppress evidence obtained in violation of the [Privacy Act] is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial.” *Christensen*, 153 Wn.2d at 200 (citation omitted). Here, the trial court made the following Findings of Fact on the Attempted Murder in the Second Degree the charge that related to the admitted recording:

4.1 The Defendant formed the intent to kill Ms. Smith and is heard telling Ms. Smith that "I will kill you" and then proceeds to beat her in the head and strangle her.

...

4.4 In the moment when the Defendant told his wife, "I am going to kill you," the Court finds beyond a reasonable doubt that killing his wife was his exact intent. The Defendant did not say this because he was angry at his wife, or for some other reason. He said it because he meant it.

CP 86. Thus, the State readily concedes that Mr. Smith's statements on the recording were probative of his intent and relied upon by the trial judge.

Nonetheless, the State does not concede that the admission of the recording, within reasonable probability, affected the outcome of the trial, i.e., that there was a reasonable probability he would have been acquitted of Attempted Murder in the Second Degree had the recording not been admitted. This is because the trial court concluded "beyond a reasonable doubt, *based on all of the evidence presented*, that the Defendant formed the intent to kill his wife. After he formed that intent, the Defendant took a substantial step towards killing Ms. Smith as he continued to beat and strangle her." CP 86 (Conclusion of Law #4.1) (emphasis added). This evidence included (1) the court's finding that the "Defendant strangled his wife into unconsciousness and when the Defendant saw Ms. Smith was not breathing, that apparently stopped him from continuing the attack;" (2) Ms. Smith's serious injuries and condition after the attack; and (3) Mr. Smith's flight, admission to being at the airport, luggage packed in his truck, and question put toward a detective as to whether Ms. Smith was "going to make it." CP 86 (Finding of Fact #2); RP 410-11, 636, 649-50. Thus, even absent the audio recording of the incident, there was ample evidence of an intent to murder Ms. Smith. Consequently, any error in admitting the recording was harmless.

**CONCLUSION**

For the reasons argued above, Mr. Smith's conviction should be affirmed.

DATED this 29 day of October, 2015.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

**October 30, 2015 - 9:55 AM**

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