

NO. 93923-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

JOHN GARRETT SMITH, Respondent

FROM THE COURT OF APPEALS DIVISION II
NO.47205-8-II

SUPPLEMENTAL BRIEF OF PETITIONER

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ISSUE FOR WHICH REVIEW WAS GRANTED

- I. **Whether in this criminal prosecution the defendant's inadvertent recording by voice mail of a conversation with his wife in the midst of assaulting her violated the Privacy Act, making the recording inadmissible at trial.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

John Garrett Smith was charged 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 the incident occurring with his wife on June 2, 2013. CP 1-3. Prior to trial, Mr. Smith filed a motion to suppress an audio recording found on his phone that captured part of the incident to include him threatening to kill his wife. CP 4-12. Mr. Smith argued that Skylar Williams, his wife's daughter, unlawfully intercepted the recording pursuant to the Privacy Act when she listened to the voice message left on his phone. CP 4-12; RCW 9.73.030. 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. 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 of domestic violence, 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 appealed and his appellate counsel focused exclusively on the denial of the motion to suppress and continued to assert that the recording was unlawfully admitted because Ms. Williams had unlawfully intercepted it. Accordingly, at no point did Mr. Smith argue that *he* had unlawfully recorded what had happened.

The Court of Appeals reversed Mr. Smith’s conviction for Attempted Murder in the Second Degree, holding that the trial court erred in denying the motion to suppress the recording of the incident because (1) the recording was of a “private conversation” and (2) *Mr. Smith* unlawfully recorded the “private conversation,” despite the fact that the recording was made inadvertently. *State v. Smith (John Smith)*, 196 Wn.App. 224, 382 P.3d 721 (2016).

Additionally, the court rejected the consistent position of Mr. Smith at trial and on appeal—that Ms. Williams unlawfully intercepted the conversation—and decided the case on a different issue: whether Mr. Smith’s actions violated the Privacy Act. *Id.* at 236. This issue was raised *sua sponte* at oral argument¹ and the court did not request supplemental briefing.

¹ Oral Argument 4/14/2016 at 9 minutes 10 seconds and 29 minutes 50 seconds.

B. FACTUAL SUMMARY

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. 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 Ms. Smith's memory gaps to include her written statement, which was read into the record. 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 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:

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 78-80.² 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. 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. Following the arrival of the

² Other transcripts of the recording were made. RP 70-71; CP 78-80. Each transcript of the recording is slightly different. For the purposes of determining the legal issues before the Court, however, none of them is an adequate substitute for listening to the actual recording. Ex. 2.

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 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 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 multiple explanations for what happened that night varied. 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.” CP 84 (Conclusion of Law #1.1); RP 852-53.

For the reasons set forth below, the State asks this Court to reverse the decision of the Court of Appeals and reinstate Mr. Smith’s conviction for Attempted Murder.

ARGUMENT

I. When Ms. Smith was screaming and crying and Mr. Smith was yelling at her, assaulting her, and made a threat to kill her, the two were not having a “private conversation.”

RCW 9A.73.030(1)(b) prohibits the recording 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.” Because the Privacy Act does not define “conversation,” courts may use a dictionary to discern the plain meaning of that term. *Newton v. State*, 192 Wn.App. 931, 937, 369 P.3d 511, review denied, 186 Wn.2d 1003, --- P.3d ---- (2016). *Webster’s Third New International Dictionary* 498 (2002), defines “conversation” in pertinent part as an “oral exchange of sentiments, observations, opinions, ideas: colloquial discourse.” The dictionary definition, as well as this Court’s decision in *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).

In *Smith*, the victim 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. After some introductory remarks and discussion between the victim and his neighbor, all of which was admitted into evidence, the recording contained the following:

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. . . . 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. . . .

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). This holding was reached despite the fact that the recording contained some “unmistakably verbal exchanges” between the defendant and victim. *John Smith*, 196 Wn.App. at 234. 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 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 vast majority of the

recording screaming, while Mr. Smith yells about the location of his phone, yells at Ms. Smith, 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, nor was it an “oral exchange of sentiments, observations, opinions, ideas: colloquial discourse.” *Smith*, 85 Wn.2d at 846; *Webster’s Third New International Dictionary* 498 (2002). Rather, the recording is of Ms. Smith being victimized.

In holding that the recording captured a “private conversation” between Mr. Smith and Ms. Smith, the Court of Appeals unconvincingly tried to avoid the precedential effect and persuasiveness of *Smith* by describing the opinion as “*sui generis*” with “little bearing on the case,” instead of actually distinguishing the case other than to conclude “there was a much greater oral exchange of words and sentiments between John and Sheryl.” App. A at 4. *Listening* to the recording and comparing it to the description of the recording in *Smith*, however, shows that that conclusion is not well-supported. Moreover, while *Smith* did not attempt “a definitive construction of the term ‘private conversation’” it *did hold*

that the “shouting, and . . . screams” that were present on that recording did not constitute conversation. 85 Wn.2d at 846.

Additionally, the Court of Appeals approvingly cited a dictionary definition for “conversation” as “oral exchange of sentiments, observations, opinions, ideas: colloquial discourse” but then continued to use the term “verbal exchange” as a synonym for “conversation”—it is not. The opinion then cites what it considers good examples of these “verbal exchanges” from the recording even though these exchanges Ms. Smith’s “responses” are non-responsive. e.g., “(1) John calling Sheryl a ‘[f]at [b]itch’ and Sheryl responding, ‘Stop’; (2) John asking, ‘Where is my phone?’ and Sheryl screaming, ‘Look what you have done to me!’” App A at 4. What is the topic of this conversation? Inexplicably, and in direct contravention of *Smith*, the opinion concludes that even Ms. Smith’s screams “constitute part of the conversation” because they are “responsive” to statements that Mr. Smith was making. *Id.* The State concedes that a victim who is getting attacked and threatened by her attacker may scream in response to being victimized or may make other audible noises to include screaming for help or saying “get away” that may in fact be responsive to the attack or threats, but it cannot be the case that anything short of silence on the part of the victim is the equivalent to

her participating in a conversation with her attacker. The Court of Appeals erred in holding this to be a private conversation.

The State also maintains that the “conversation” was not private and that any expectation of privacy was unreasonable. *See Huff v. Spaw*, 794 F.3d 543, 552 (6th Cir. 2015). Any expectation of privacy in the conveyance of his threat during an assault was unreasonable because of the likelihood the victim would report—and the victim here did call 911 upon regaining consciousness—the assault, which included the threat to kill, combined with his use of what amounts to a recording device, which was recording, at that time. *Id. State v. Duchow*, 320 Ws.2d 1, 22-27, 749 N.W.2d 913 (2008); *State v. Inciarrano*, 473 So.2d 1272, 1275-76 (FL 1985). A person cannot have a reasonable expectation of privacy in his or her criminal attack of another person when actively using a recording device.³

II. Under the Privacy Act, a person who leaves a voice message on an answering machine or sets up an answering machine to record a voice message consents to the recording.

The Court of Appeals concluded in a footnote that neither party consented to the “conversation” that was recorded. *John Smith*, 196

³ This conclusion is materially different than the holdings of *State v. Kipp*, *State v. Fajford*, and *State v. Clark*, which merely state that there *can be* a reasonable expectation of privacy in conversations about illegal activity or when making an incriminating statement such as a confession. 179 Wn.2d 718, 730-31, 317 P.3d 1029 (2014); 128 Wn.2d 476, 488-89, 910 P.2d 447 (1996); 129 Wn.2d 211, 231, 916 P.2d 384 (1996).

Wn.App.at 231 FN 3. But the Court of Appeals did not have the benefit of briefing on that issue as consent was not germane to issues raised by the appellant. Consent, however, is an issue on the forefront of the determination of whether Mr. Smith violated the Privacy Act when the incident and his threat were recorded by his cellular phone's answering machine.

A party to a conversation need not explicitly consent to the conversation being recorded for our courts to find that that party did indeed consent to the recording. *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002); *State v. Modica*, 164 Wn.2d 83, 89 FN 1, 186 P.3d 1062 (2008). For example, “[a] party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded.” *Id.* at 675; RCW 9.73.030(3). Additionally, “a communicating party will be deemed to have consented to having his or her communication recorded when the party knows that the messages will be recorded.” *Id.* (citing *In re Marriage of Farr*, 87 Wn.App. 177, 184, 940 P.2d 679 (1997)); *Modica*, 164 Wn.2d 83.

Thus, a person who leaves a message on a telephone answering machine “consent[s] to the recording of his messages.” *Farr*, 87 Wn.App at 184; *Townsend*, 147 Wn.2d at 676. Even where there is not an explicit

announcement that a conversation will be recorded, however, consent to record may be implied when a person is using technology that the person “had to understand” was “among other things, a message recording device.” *Townsend*, 147 Wn.2d at 676, 678. Importantly, the person who has setup the recording device to accept voice messages *does* consent to the recordings that will take place. *State v. Robinson*, 38 Wn.App. 871, 885, FN 5, 691 P.2d 213 (1984) (holding that where defendant left a threatening message on a person’s answering machine, the defendant’s consent to the recording was immaterial).

Here, Mr. Smith consented to the recording in two ways. First, Mr. Smith consented by setting up and using voicemail technology on his cellphone. *Robinson*, 38 Wn.App. at 885; *Townsend*, 147 Wn.2d at 676, 678. If Mr. Smith is considered the individual who “recorded” because it was his cellphone’s voicemail system that recorded the “conversation” then he consented to the recording under *Robinson* and *Townsend*.

Second, Mr. Smith consented because he dialed his cellphone and let it record when he did not hang up the landline telephone. Cellphones are ubiquitous; Mr. Smith undoubtedly knew that if any calls came to his phone and he did not answer the phone that the phone’s voicemail technology would record whatever message was left. Furthermore, voicemail systems announce “in an effective manner that the conversation

[will] be recorded.” *Farr*, 87 Wn.App. at 184. That a person is not paying attention to the announcement or is otherwise preoccupied at the time of the announcement has not ever been part of the analysis of consent under the privacy act, especially where knowledge of how the technology works can be presumed. *See Townsend*, 147 Wn.2d at 676-78; *Modica*, 164 Wn.2d at 89 FN 1. Thus, if Mr. Smith is considered the person who “recorded” because he did not hang up the landline phone and, as a result, let his cellphone record the “conversation” then he consented to the recording.

Regardless of how Mr. Smith is considered to have “recorded” the incident, however, he consented to the recording, and it is only his consent that matters in this instance because of the threat exception of the Privacy Act. The threat exception of the Privacy Act allows that communications or conversations that “convey threats of . . . bodily harm, or other unlawful requests or demands . . . may be recorded with the consent of one party to the conversation.” RCW 9.73.030(2)(b). Because Mr. Smith both conveyed threats and consented to the recording, the recording was admissible at trial and the Court of Appeals erred in holding otherwise.

III. The Privacy Act is not a strict liability statute such that inadvertent or accidental recordings of conversations without the participants' consent violate the statute, especially in situations in which an intentional recording would not violate the statute.

Statutory interpretation begins by looking to the plain meaning of the words used in the statute. *State v. Fjermestad*, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). Statutes, however, must be “construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided.” *Id.* (citation omitted); *State v. Day*, 96 Wn.2d, 646, 648, 638 P.2d 546 (1981). The Privacy Act expresses “a legislative intent to safeguard the private conversations of citizens from dissemination . . . [and] a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement.” *Fjermestad*, 114 Wn.3d at 836.

Here, the Court of Appeals' opinion claimed that “[w]hether John inadvertently or purposely recorded himself is beside the point; the statute requires no specific mental state for a person to improperly record a conversation.” *John Smith*, 196 Wn.App at 237.⁴ But such a construction leads to absurd results in multiple ways. First, such a construction criminalizes the entirely innocent and daily occurrence of pocket dialing.

⁴ A violation of RCW 9.73.030 by unlawfully recording, absent an exception, triggers both suppression of the evidence and criminal liability. RCW 9.73.050 (“Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except . . .”); RCW 9.73.080 (“Except as otherwise provided in this chapter, any person who violates RCW 9.73.030 is guilty of a gross misdemeanor.”)

Second, the construction results in the conclusion that a person can unlawfully record and at the same time not consent to the recording. Third, because in the recording at issue Mr. Smith conveyed a threat, he could have only violated the statute by recording the incident inadvertently. And by violating the statute and committing another crime he receives the windfall of having evidence of his attempted murder excluded from his attempted murder trial. Meanwhile, if he had purposefully recorded the incident, the recording would have fallen under the threat exception and been properly admissible at trial—though he would have been innocent of any Privacy Act violation.

Other absurd hypotheticals abound, such as determining who would have violated the Privacy Act, i.e. who is the recorder, if when Mr. Smith knocked Ms. Smith to the ground her phone inadvertently called another cellphone and a recording of the incident was made. Or who violated the act if Mr. Smith had accidentally stepped on Ms. Smith's phone, which in turn recorded the incident. Importantly, the determination of whether a particular person is considered a recorder is a prerequisite for the finding of a violation, and the attendant consequences of the inadmissibility of evidence or criminal liability, because a violation of the Privacy Act only occurs when an "*individual . . . record[s]*" a "private

conversation . . . without first obtaining the consent of all the persons engaged in the conversation.” RCW 9.73.030(1)(b) (emphasis added).

Furthermore, when faced with a criminal statute without a mental state element courts must determine whether the legislature intended to create a strict liability crime. *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). A statute’s “failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.” *Id.* Indicia of a legislature’s desire to create a strict liability crime include the removal of an existing intent element or the inclusion of an affirmative defense. *Id.* (citing cases). This Court in *State v. Bash* provided additional factors to look at to determine whether the legislature created a strict liability crime:

(1) ... the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a “public welfare offense” created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) ... the harshness of the penalty [;] ... (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, “even at the cost of convicting innocent-minded and blameless people”; and (8) the number of prosecutions to be expected.

Anderson, 141 Wn.2d at 363 (quoting *Bash*, 130 Wn.2d at 594, 605-06, 925 P.2d 978 (1996)). “All of these factors are to be read in light of the

principle that offenses with no mental element are generally disfavored.”

Id. The most compelling of the *Bash* factors is that “entirely innocent conduct may fall within the net cast by the statute in question.” *Id.* at 364, 366; *See also Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994).

Here, the Court of Appeals concluded “[w]e are unwilling to risk compromising the scope of the privacy act by the doubtful implication of a mental state requirement from language saying nothing about a mental state. Therefore, the trial court erred by holding that John's inadvertence in recording the private conversation removed his actions from the reach of the privacy act.” *John Smith*, 196 Wn.App. at 237. But the court did no more analysis than the above and its conclusion omits an analysis of the *Bash* factors. The absurd results of such a construction and the large amount of entirely innocent conduct that would be criminalized suggest that the legislature did not intend for the Privacy Act to be one of strict liability. Consequently, Mr. Smith's inadvertence in recording the incident takes his conduct outside of the scope of the Privacy Act. Thus, the recording was properly found to be admissible against him at trial. The Court of Appeals erred in holding that the mental state of Mr. Smith was immaterial in determining whether there was a violation of the Privacy Act.

CONCLUSION

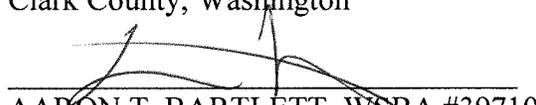
The State respectfully asks this Court to reverse the decision of the Court of Appeals, hold that the recording at issue was properly admitted at trial, and reinstate Mr. Smith's conviction for Attempted Murder in the Second Degree.

DATED this 28 day of April, 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


AARON T. BARTLETT, WSBA #39710
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CLARK COUNTY PROSECUTING ATTORNEY

April 28, 2017 - 3:39 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 93923-3
Appellate Court Case Title: State of Washington v. John Garrett Smith
Superior Court Case Number: 13-1-01035-6

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