IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO.64127-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DONALD HUMPHREY, III,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 9, 2010
	)	

Lau, J. — Donald Humphrey challenges his jury convictions for two counts of domestic violence felony violation of a court order. He argues the trial court erred by admitting a police audio recording made during his arrest in violation of Washington's privacy act, chapter 9.73 RCW. Because the recording's admission under these circumstances constitutes harmless error, we affirm.

FACTS

At trial, witnesses testified to the following: Around 7 a.m. on May 25, 2008, a 911 operator received a hang-up call from Crystal Chatman's apartment.[1] The operator immediately called the same number back. No one answered the call. Seattle Police Officers James Yorio and Patrick Nolting were dispatched to the scene. When they

[1] Chatman did not testify at trial.

arrived at the apartment, Chatman answered the door. She said, "He punched me." She appeared to have been crying and had a black eye. Officer Yorio asked if the person was still in the apartment, and she nodded yes. He asked for permission to come in, and she nodded yes. Officer Yorio noticed that Chatman spoke very quietly and seemed hesitant to answer questions for fear of being overheard.

They saw no one else in the apartment. But after a brief search, they found Humphrey hiding behind the bathroom door. They arrested him on suspicion of domestic violence assault and placed him in handcuffs. As they led Humphrey out of the small apartment, Chatman and Humphrey had the following exchange in the living room,

> CHATMAN: When you get out I won't be here.
> HUMPHREY: Sir, I didn't do nothin' man.
> CHATMAN: I'm not gonna press charges against you but I'm not gonna be here. for you no more, its over. You can't keep hitting on me.
> HUMPHREY: I did not hit you.
> CHATMAN: You can't do this, I have a daughter I have to go see. What is she going to think when mommy shows up with a black eye? What is my mom gonna think? . . . What is my mom gonna think? . . . I'm not gonna show up to court, I'm not pressing charges but you cannot, I don't wanna be with you no more
> OFFICER: Come on Donald.
> CHATMAN: You hurt me.
> OFFICER: We're going out this way.
> HUMPHREY: What did I do, what am I being charged with sir?

This conversation was recorded on Officer Yorio's audio/video recording system. He later explained that his patrol car is equipped with a recording system that turns on automatically when he activates the car's overhead emergency lights. As part of this system, he wears a remote microphone on his uniform to record sounds in his

immediate area. The recording system operates until manually deactivated.

The State charged Humphrey with two counts of domestic violence felony violation of a court order.[2] The first count was based on his presence at Chatman's apartment when he was arrested. The second count was based on a phone call he made to Chatman from the jail a few days later. A valid court-issued no-contact order prohibited Humphrey from contacting Chatman in person or by telephone.[3]

Humphrey moved pretrial to exclude the recording, arguing it violated Washington's privacy act. He asserted that Officer Yorio's failure to inform him he was being recorded violated the act's requirements. Therefore, the remedy is exclusion. The State responded that the recording was admissible based on a statutory exigent circumstance exception. After a CrR 3.5 evidentiary hearing, the trial court found exigent circumstances existed and admitted the recording.[4]

To prove the no-contact order violations at trial, the State introduced Officer Yorio's audio recording to show Humphrey with Chatman at her apartment and to show Humphrey called Chatman from jail. The State argued that the voices on this recording and on the jail telephone call recording matched.[5]

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[2] The court also admitted certified copies of judgment and sentences showing that Humphrey had two previous court order violation convictions. Humphrey does not challenge this evidence.

[3] Humphrey does not challenge the no-contact order's validity.

[4] The recording was admitted for the limited purpose of voice identification and not for the truth of the matters asserted, and the trial court so instructed the jury orally during trial and in its written instruction 11 at the close of the trial.

[5] Humphrey does not dispute the admissibility of the jail telephone call recording.

Officers Yorio and Nolting also identified Humphrey in court as the person who they saw with Chatman in her apartment. The officers identified Chatman through her driver's license. The court also admitted the no-contact order signed by Humphrey. For the second count, Sergeant Barclay Pierson testified that Humphrey was in jail when someone called 206-283-6658 from one of the jail phones in the receiving area. Seattle Police Department 911 records custodian Linda Spromberg testified that this number matched the 911 caller's number. Officer Yorio testified that the voices on the jail recording sounded like Chatman and Humphrey and the content of their conversation about bail corresponded to events happening in Humphrey's case.

The jury convicted Humphrey on both counts. Based on an offender score of eight, the court sentenced Humphrey to a maximum 60 months' confinement. He appeals.

ANALYSIS

Under Washington's privacy act, recording private conversations without the consent of all parties is generally prohibited. RCW 9.73.030. But there is an exception for emergency response personnel, including police, under certain circumstances. RCW 9.73.090(1). Pertinent here is an exception for "[s]ound recordings that correspond to video images mounted in law enforcement vehicles." RCW 9.73.090(1)(c). Under this provision, a police officer may make an audio recording while wearing a sound recording device that corresponds to a patrol car mounted video camera. But the officer is required to inform any person being recorded by sound that he or she is being recorded. Nevertheless, the officer "is not required to inform the person being recorded if the person is

being recorded under exigent circumstances." RCW 9.73.090(1)(c). The statute does not define "exigent circumstances." When an officer is required to inform the person about the recording but fails to do so, the recording's exclusion is the remedy. Lewis v. Dep't of Licensing, 157 Wn.2d 446, 452, 139 P.3d 1078 (2006).

Humphrey contends the trial court erred in admitting the recording because the circumstances of his arrest do not qualify as "exigent circumstances" under RCW 9.73.090(1)(c). He concedes that "prior to locating [him] in the apartment and placing him in custody, the exigent circumstance of finding and apprehending the alleged assailant existed." Reply Br. of Appellant at 1. But he argues this exigency ended once the police officer arrested and handcuffed him in Chatman's bathroom. He reasons that he was alone, unarmed, and posed no danger to anyone as he was being escorted out of the apartment. At that point, Officer Yorio was required to inform him that he was being recorded.

The State counters that exigency is established given that the officers were responding to a "very fluid" ongoing emergency that remained dangerous throughout the brief encounter. It notes that Officer Yorio described an "ambush situation," and safety concerns existed throughout the encounter until they secured Humphrey in a patrol car. Officer Yorio also testified that Humphrey's hiding behavior made him unpredictable and a flight risk. And he cited the need to quickly separate Humphrey and Chatman after they started to argue again after Humphrey's arrest.

But we need not address whether the circumstances here qualify as "exigent" under RCW 9.73.090(1)(c). Even if we assume, without deciding, the trial court erred in admitting the recording, the error was

harmless. Evidence admitted in violation of RCW 9.73.090 is a statutory violation, not a constitutional violation. Courtney, 137 Wn. App. at 383. "Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." State v. Lopez, 95 Wn. App. 842, 857, 980 P.2d 224 (1999). Here, no reasonable probability exists that the admission of the recording materially affected the trial's outcome.[6]

As to count 1, the jury heard Officers Yorio and Nolting describe how on May 25, 2008, they found Humphrey hiding from them in Chatman's apartment after a 911 hang up call. The jury saw the no-contact order admitted into evidence prohibiting Humphrey from contacting Chatman in person or by telephone. They saw Humphrey's signature on the order acknowledging that he knew he could not contact Chatman. The officers confirmed that the woman in the apartment was Chatman based on her driver's license. While the audio recording provided voice identification evidence that Humphrey was present at Chatman's apartment, the other evidence overwhelmingly shows that Humphrey knowingly violated the no-contact order term prohibiting him from contacting

[6] The trial court instructed the jury that to convict Humphrey of the crime of felony violation of a court order as charged in count 1, it would need to find the following five elements proved beyond a reasonable doubt.

(1) That on or about May 25, 2008, there existed a no-contact order applicable to the defendant;

(2) That the defendant knew of the existence of this order;

(3) That on or about said date, the defendant knowingly violated a provision of this order;

(4) That the defendant has twice been previously convicted for violating the provisions of a court order; and

(5) That the defendant's act occurred in the State of Washington.

Its "to convict" instruction for count 2 was identical except for the date of violation.

Chatman. Under these circumstances, there is no reasonable probability that the jury's verdict would have differed without the recording.

Recognizing this, Humphrey focuses his prejudice argument on count two—the May 29, 2008 telephone call from the jail. He claims that without the recording, the State "would have been left only with Officer Yorio's testimony that the two people in the jail recording sounded like Humphrey and Chapman." Appellant's Opening Br. at 12–13. But this ignores the testimony from Sergeant Pierson and Spromberg showing that the jail phone call was made to the same number from where the 911 hang-up call originated—Chatman's phone number. The content of the telephone call also corresponded to events happening in Humphrey's criminal case, i.e., Humphrey's $50,000 bail amount. Given this independent evidence that Humphrey called Chatman from the jail when he knew a no-contact order prohibited this call, there is no reasonable probability that the jury's verdict on count two would have differed without the recording. Any error, therefore, in admitting Officer Yorio's audio recording was harmless.[7]

For the foregoing reasons, we affirm.

[7] In his pro se statement of additional grounds, Humphrey references several cases but fails to adequately explain any additional issues for review. His entire statement reads, "I was never Mirandized at all. My privacy right was violated. Lewis case. Crewford issue. Davis issue. State v. Kowalski. Ineffective counsel. Citations are in the transcripts." Aside from the privacy act issue already addressed, Humphrey appears to be arguing that admission of the recording of his conversation with Chatman violated Miranda or the confrontation clause. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). But Humphrey's statements were made spontaneously, not as a product of police interrogation. And Chatman's statements were admitted for voice recognition purposes, not to prove the truth of the matters asserted. Humphrey fails to identify any error below.

WE CONCUR: