LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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FEBRUARY 2024

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

WARRANTLESS SEARCH OF DEFENDANT'S APARTMENT BASED ON CONSENT OF HIS CO-TENANT GIRLFRIEND VIOLATED THE FOURTH AMENDMENT WHERE (1) DEFENDANT WAS IN THE VICINITY OF THE APARTMENT, AND (2) OFFICERS HEARD HIM ASKING HIS GIRLFRIEND NOT TO ALLOW THE OFFICERS TO SEARCH THE APARTMENT (AT THE TIME OF THE CONSENT REQUEST AND SEARCH, THE GIRLFRIEND WAS INSIDE THE APARTMENT AND DEFENDANT WAS OUTSIDE)

In U.S. v. Parkins, ___ F.4th ___ , 2024 WL ___ (9th Cir., February 14, 2024), defendant is successful in his request to the Ninth Circuit to reverse the U.S. District Court's denial of his motion to suppress evidence found by law enforcement officers in a warrantless search of his apartment. The officers relied on consent from the defendant's co-tenant girlfriend who was present in the house while defendant was just outside the apartment talking to the officers.

The panel's Opinion (1) suppresses a laser pointer found in the warrantless search of the apartment and (2) apparently remands the case for re-trial on a charge of pointing a laser pointer at a helicopter.

A Ninth Circuit staff summary (which is not part of the panel's Opinion in Parkins) provides the following synopsis of the ruling on the third party consent search issue:

> The district court held that patrol officers' warrantless search of the apartment, to which Parkins's girlfriend consented, was valid. After reviewing the Supreme Court's cases regarding warrantless searches involving the consent of a co-tenant, the panel

concluded that to satisfy Georgia v. Randolph, 547 U.S. 103 (2006), Parkins must have both been present on the premises and expressly refused consent.

The panel explained that a defendant need not stand at the doorway to count as being physically present — presence on the premises (including its immediate vicinity) is sufficient. The panel wrote that in light of the layout of the property and Parkins's close proximity to his apartment, the nearby mailboxes bordering the parking lot where Parkins was detained were part of the relevant premises; thus, under Randolph, Parkins was physically present on the premises to validly object.

The panel also wrote that it is clear that Parkins expressly refused consent, as Parkins's statement [to his girlfriend] not to let the police into the apartment expressly conveyed his objection and the import of that statement was especially clear following on the heels of his physical resistance at the doorway of his home. Accordingly, the consent-based search of Parkins's home was unlawful.

Result: Reversal of the order of the U.S. District Court (Central District of California) that denied the suppression motion of Brett Wayne Parkins regarding the search of his apartment; affirmance of orders of the U.S. District Court denying the defendant's motions for suppression of his pre-arrest statements and post-arrest statements; the case is remanded, apparently for re-trial. This Legal Update entry does not address the legal issues addressed in the Parkins Opinion regarding defendant's theories for suppressing defendant's pre-arrest and post-arrest statements.

LEGAL UPDATE EDITOR'S COMMENT: The Ninth Circuit staff summary above for the Parkins case states that to be eligible to invoke the protections of the Fourth Amendment under Georgia v. Randolph, 547 U.S. 103 (2006), Parkins was required to meet two requirements, and he met them. Thus, in order to challenge the validity of the third party consent to search by his housemate/girlfriend: (1) he was required under the Fourth Amendment to have been present on the premises when the consent request by law enforcement was made to the cohabitant; and (2) he was required under the Fourth Amendment to have expressly refused consent to law enforcement. Readers should note that there is a difference, not relevant to the Parkins case, between the Fourth Amendment third party consent rule and the Washington third party consent rule for residential third party consents involving cohabitants.

Under the Washington constitution (article I, section 7) and under a line of Washington appellate court "independent grounds" rulings under that constitutional provision that began with State v. Leach, 113 Wn.2d 735 (1989) and include State v. Morse, 156 Wn.2d 1 (2005), if a cohabitant suspect is present on the premises, law enforcement officers cannot obtain valid consent to search – as applicable against that cohabitant – solely by getting consent from another cohabitant who is also present in the residence (something that the U.S. Supreme Court authorizes under the Fourth Amendment, per Georgia v. Randolph). Under the Washington constitution, officers must request consent to search from all cohabitants who are present on the premises in order to obtain valid consent to search that will be controlling on all of the present cohabitants.

Note, however, that even under the Washington constitutional rule, a cohabitant who does consent cannot challenge the validity of the consent based on the rights of a cohabitant who was present and was not asked for consent. State v. Walker, 136 Wn.2d

767 (1998). But again, the other present cohabitants can challenge the validity of the consent search if those other cohabitants did not give express consent to search.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LOCAL GOVERNMENT/LAW ENFORCEMENT: IN A CHALLENGE TO THE CITY OF SEATTLE GRAFFITI/MALICIOUS MISCHIEF ORDINANCE, SEATTLE WINS REVERSAL OF DISTRICT COURT PRELIMINARY INJUNCTION THAT, PER THE NINTH CIRCUIT'S RULING, ERRONEOUSLY INTERPRETED FIRST AMENDMENT FREE SPEECH AND FOURTEENTH AMENDMENT DUE PROCESS PROTECTIONS

In Derek Tucson v. City of Seattle, ___ F.4th ___ (9th Cir., February 2, 2024), a Ninth Circuit panel sets aside a U.S. District Court order that granted a preliminary injunction against enforcement of Seattle's graffiti ordinance. The Opinion of the Ninth Circuit states that the Seattle ordinance is "nearly identical" to the Washington malicious mischief statute's RCW 9A.48.090(1)(b) which provides as follows:

> (1) A person is guilty of malicious mischief in the third degree if he or she:
>
> . . . .
>
> (b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.

A Ninth Circuit staff summary (which is not part of the panel's Opinion) provides the following synopsis of the panel's ruling:

> The panel reversed the district court's order preliminarily enjoining enforcement of a Seattle ordinance that criminalizes the intentional writing, painting, or drawing on property without the express permission of the property's owner or operator.
>
> Plaintiffs brought suit pursuant to 42 U.S.C. § 1983 alleging, in part, that the Seattle ordinance was substantially overbroad under the First Amendment and facially vague under the Fourteenth Amendment.
>
> The panel first determined that plaintiffs had Article III standing because enjoining enforcement of the ordinance was substantially likely to redress plaintiffs' injury by allowing them to chalk political messages on City sidewalks and barriers erected on public walkways without fear of arrest.
>
> The panel next held that the district court erred when it enjoined the ordinance as facially overbroad. To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep. Here, the district court never acknowledged the ordinance's numerous applications that would not implicate protected speech. By failing to inquire into the ordinance's numerous lawful applications, the district court was unable to analyze whether the number of unconstitutional applications was substantially disproportionate to the statute's lawful sweep. The panel therefore reversed the district

court's order granting plaintiffs a preliminary injunction on their First Amendment facial overbreadth claim.

The panel next held that the district court erred in applying the facial vagueness doctrine. Instead of examining whether the ordinance was not vague in the vast majority of its intended applications, the district court instead speculated about possible vagueness in hypothetical and fanciful situations not before the court. The district court's failure to employ the requisite analysis to sustain a facial vagueness claim was sufficient to warrant reversal.

Result: Reversal of U.S. District Court (Western District of Washington) preliminarily enjoining enforcement of the Seattle ordinance.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR CORRECTIONS: TRIAL COURT MUST APPLY TURNER V. SAFLEY BALANCING ANALYSIS TO ISSUE OF WHETHER DELIVERY HOT (AT THE TIME OF DELIVERY) EVENING MEALS TO A PRACTICING MUSLIM AT 3:30 P.M. DURING RAMADAN VIOLATES THE PRISONER'S FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION

In Long v. Sugai, ___ F.4th ___ , 2024 WL ___ (9th Cir., February 5, 2024), a three-judge Ninth Circuit panel, rules that Mr. Long, a practicing Muslim, is entitled to further hearings in U.S. District Court in his Civil Rights Act lawsuit against various officers and officials with the State of Hawaii Corrections Department. Mr. Long contended that the officials had been violating his right to free exercise of religion as a practicing Muslim. Among other complaints, Mr. Long argued that the prison system violated his rights during Ramadan by delivering his evening meals at 3:30 pm. He argued that this timing violated his rights because his religion does not allow him to eat his evening meal until sundown.

The three-judge Ninth Circuit panel describes as follows the key facts relating to this element of Mr. Long's lawsuit:

> Shortly after his transfer to the high-security facility, Ramadan began. During Ramadan, Sgt. Lee delivered his evening meal to him at about 3:30 p.m.—even though Long could not break his fast until sundown, at about 7:30 p.m. Long stated that by the time he could eat, the food was cold, congealed, and unsafe under prison food-safety guidelines. He stated further that the cold food aggravated his stomach ulcers, and that on several occasions he was "unable to eat the dinner meal." He stated that he asked if Lee could call the kitchen to request a hot meal or allow Long to use a staff microwave to reheat the food. Lee refused, telling Long that the kitchen was closed and that prison policy forbade staff from using a staff microwave to heat food for inmates.

In key part, the legal analysis by the Ninth Circuit panel in Long v. Sugai of the First Amendment free exercise of religion issue is as follows:

> In granting summary judgment, the district court relied on a single case, LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993), in which we held that serving prisoners unappetizing but nutritious "Nutraloaf" did not constitute cruel and unusual punishment under the Eighth Amendment. We wrote in LeMaire that food "served cold, while unpleasant, does not amount to a constitutional deprivation." Id. (quoting Hamm v. DeKalb County, 774 F.2d 1567, 1575 (11th Cir. 1985)).

LeMaire, decided under the Eighth Amendment, does not control Long's First Amendment claim. The question in the case before us is not whether serving cold, unappetizing, and possibly unsafe food is cruel and unusual punishment. Rather, it is whether serving such food unconstitutionally burdened Long's free exercise of his religion.

In ruling on a prisoner's First Amendment free exercise claim, we first determine whether the challenged prison policy or practice substantially burdened the prisoner's free exercise of his or her religion. See Jones v. Williams, 791 F.3d 1023, 1031 (9th Cir. 2015). If it does, we then apply the four factors set forth in Turner v. Safley, 482 U.S. 78 (1987), to determine whether the burden was "reasonably related to legitimate penological interests." Shakur, 514 F.3d at 884 (quoting Turner, 482 U.S. at 89).

Viewing the evidence in the light most favorable to Long, by the time Long could eat his evening meal at about 7:30 p.m., the food was often inedible and potentially unsafe, and, if eaten, exacerbated his stomach ulcers. We take judicial notice of the fact that some food cannot safely sit at room temperature for four hours. [Here, the Ninth Circuit Opinion cites some internet sites]

The evidence before the district court, viewed in the light most favorable to Long, establishes that the 3:30 p.m. delivery of Long's evening meal during Ramadan substantially burdened his free exercise of his religion. A "substantial burden exists when the state places 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" Jones v. Slade, 23 F.4th 1124, 1142 (9th Cir. 2022) (quoting Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005)). "[M]ore than an inconvenience on religious exercise," a substantial burden has "a tendency to coerce individuals into acting contrary to their religious beliefs." Jones v. Williams, 791 F.3d 1023, 1031–32 (9th Cir. 2015) (quoting Ohno v. Yasuma, 723 F.3d 984, 1011 (9th Cir. 2013)). A prison practice "may impact religious exercise indirectly, by encouraging an inmate to do that which he is religiously prohibited or discouraged from doing." Slade, 23 F.4th at 1140; see also Warsoldier, 418 F.3d at 995 ("[C]ompulsion may be indirect. . . ." (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981))).

We have consistently held that the failure to provide food consistent with a prisoner's sincerely held religious beliefs constitutes a substantial burden on the prisoner's free exercise. In Shakur, 514 F.3d at 881–82, a Muslim prisoner requested a kosher meat diet consistent with Islamic Halal requirements because the vegetarian diet offered to him gave him gas and irritated his hernia. When the prison denied his request, he brought an action under the Free Exercise Clause. . . .. We held that the prison's refusal "implicate[d] the Free Exercise Clause" and that the district court was therefore required to analyze the Turner factors. . . .

Our sister circuits agree that nourishment consistent with a prisoner's religious beliefs and practices must be provided in a reasonable manner. [Here, the Ninth Circuit Opinion cites Opinion from other Federal Circuit courts]

Makin v. Colorado Department of Corrections, 183 F.3d 1205, 1215 (10th Cir. 1999), is directly on point. There, a Muslim prisoner housed in punitive segregation during Ramadan was unable to eat his evening meal when it was delivered to his cell. . . .To maintain his fast, he saved his "supper and food such as dry cereal and crackers . . .

> from lunch and breakfast" to eat after sundown. . . . Although the inmate managed to fast under these circumstances for the entire month of Ramadan, the Tenth Circuit held that the prison's actions infringed on the inmate's right to free exercise of his religion and that the defendants had not offered "any legitimate penological interests to justify that infringement" under Turner. . . . In Williams v. Hansen, 5 F.4th 1129, 1134–35 (10th Cir. 2021), the court characterized [the Makin decision] as "clearly establish[ing] a substantial burden for a partial religious deprivation" where "prison officials failed to provide meals to an inmate at appropriate times throughout the month of Ramadan."
>
> Our own cases as well as out-of-circuit cases thus clearly establish that delivery of Long's evening meal at 3:30 p.m. during Ramadan substantially burdened his free exercise of religion. The district court should have evaluated the [four factors under Turner v. Safley, 482 U.S. 78 (1987] to determine whether the burden was justified. Because the court did not conduct that analysis, we remand to allow it to do so. The district court also did not conduct a qualified immunity analysis. If the court concludes, after conducting the [Turner v. Safley, 482 U.S. 78 (1987] analysis, that the burden was not justified, our remand allows the court to conduct a qualified immunity analysis.

Result: The free-exercise-of-religion issue is remanded to the Hawaii U.S. District Court for that Court to conduct analysis under Turner v. Safley and also to address qualified immunity questions.

FURTHER NINTH CIRCUIT REVIEW HAS BEEN ORDERED ON A SECOND AMENDMENT ISSUE REGARDING BUTTERFLY KNIVES: IN A CIVIL ACTION, A NINTH CIRCUIT THREE-JUDGE PANEL'S 3-0 RULING STRIKING DOWN HAWAII'S BAN ON BUTTERFLY KNIVES IS SET ASIDE, AND THE SECOND AMENDMENT ISSUE WILL BE REVIEWED BY AN 11-JUDGE PANEL

In Teter v. Lopez, No. 20-15948, on February 22, 2024, a Ninth Circuit procedural panel rules that an 11-judge Ninth Circuit panel must consider whether a 3-judge Ninth Circuit ruling in August of 2023 was contrary to the Second Amendment. In the earlier three-judge Ninth Circuit panel decision in Teter v. Lopez, 76 F.4th 938 (9th Cir., August 7, 2023), the three-judge panel unanimously ruled that a Hawaii criminal statute that prohibits possession of butterfly knives is invalid on grounds that it violates the Second Amendment right to "keep and bear arms."

LEGAL UPDATE EDITOR'S NOTE:

Subsection 2 of RCW 9.41.250 contains a similar prohibition to that determined in August of 2023 to be unconstitutional by the 3-judge Ninth Circuit panel in Teter v. Lopez.

RCW 9.41.250 reads as follows:

> **(1) Every person who:**
>
> **(a) Manufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as slungshot, sand club, or metal knuckles, or spring blade knife;**
> **(b) Furtively carries with intent to conceal any dagger, dirk, pistol, or other dangerous weapon; or**

(c) Uses any contrivance or device for suppressing the noise of any firearm unless the suppressor is legally registered and possessed in accordance with federal law,
is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(2) "Spring blade knife" means any knife, including a prototype, model, or other sample, with a blade that is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement. A knife that contains a spring, detent, or other mechanism designed to create a bias toward closure of the blade and that requires physical exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure to assist in opening the knife is not a spring blade knife.

[Emphasis added]

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WASHINGTON STATE SUPREME COURT

SUFFICIENCY OF EVIDENCE: SECOND DEGREE ASSAULT CONVICTION IS UPHELD BASED ON RULING THAT DEFENDANT'S DISPLAY OF A RIFLE AND HIS OTHER FRIGHTENING BEHAVIOR DURING A ROAD RAGE INCIDENT SUPPORTED THE STATUTORY REQUIREMENTS FOR PROOF OF BOTH (1) SPECIFIC INTENT TO CREATE REASONABLE FEAR AND APPREHENSION OF BODILY INJURY," AND (2) IN FACT THE CREATION IN THE WOULD-BE VICTIM OF "A REASONABLE APPREHENSION AND IMMINENT FEAR OF BODILY INJURY"

In In the Matter of the Personal Restraint Petition of Ricky Arntsen, ___ Wn.2d __ , 2024 WL (February 29, 2024), the Washington Supreme Court is unanimous in reversing a decision of Division One of the Court of Appeals that in 2021 set aside the 2017 King County Superior Court conviction of defendant for assault in the second degree arising from a road rage incident.

Facts and trial court verdict:

The unanimous Washington Supreme Court Opinion in Arntsen describes as follows the key testimony (by victim Kim Koenig and eyewitness Robert Morill) and the verdict in the case:

> 1. *Koenig Testimony*
>
> Koenig testified that around 8:00 a.m. that morning, she was driving north on Auburn Way when she noticed an "older-model Jaguar" car driving in the same direction behind her with a blinker on, signaling intent to change lanes. The road had two lanes of traffic in each direction with a central turn lane; Koenig was in the right lane and the Jaguar was in the left, signaling to move into the right lane. Koenig moved into a spot in the left lane in front of the Jaguar in order to create space for it to merge.
>
> The Jaguar, driven by Arntsen, whom Koenig did not know, did not change lanes; instead, Arntsen started "getting really aggressive with [Koenig,] like [she] had made him very mad." Koenig said it was like he was "trying to attack" her car: "Driving up on me

and stopping short of hitting me, swerving over into the other lane and acting like he wanted to hit me from the other side."

He had his window rolled down and he was yelling at her, though she could not make out his words. Koenig testified that this behavior went on for perhaps a minute or two before he sped around her car, turned, and "slammed on his brakes" so that the car stopped diagonally across the lane in front of her and forced her to a stop.

Arntsen exited his car, carrying a rifle and with his face partially covered with a kerchief. He approached Koenig's car, holding the rifle, but not pointing it at her. Koenig testified that at this point, she believed that

> he meant to do me harm. What kind of harm he meant to do, I don't know. Whether or not I was going to be shot, whether or not he was going to assault me, steal my vehicle, I had no idea. But anybody that does something like that after being so angry is clearly not, you know, pulling a prank or doing anything fun. This was a lethal weapon that he was holding and he was coming at me. . . . I had no idea what was going to happen, but I was sure that it was not going to be good for me.

Arntsen circled Koenig's vehicle before returning to the Jaguar and driving away. At trial, when asked whether she thought Arntsen might shoot her, Koenig responded, "Oh, yeah, yeah." She explained, "I've been around guns my whole life. Why in the world would you have a gun unless you were going to use it? There are a number of things that you could do, I guess, with a gun, but my first thought is, yeah, I'm going to get shot." . . . "He clearly meant me harm." . . ..

On cross-examination, when asked about a statement she made to the police that, at some point, she did not believe the other driver was going to shoot her, Koenig acknowledged that "it's possible that I had that thought, too. I had many thoughts." She later explained that when Arntsen got out of his car, she was afraid he was going to shoot her, though by the time he got close to her, she believed "he was not looking to shoot me, he did . . . not raise the gun like, you know, he wanted to shoot me. He had something else in mind. I have no idea what it was. I still don't know what it was."

2. *Morrill Testimony*

Robert Morrill was also driving down Auburn Way on the morning of December 1, 2014, when he saw a car stopped and angled into both the center and the left-hand lane, "like it had been cut off," and an older model Jaguar in front of it. Morrill testified that as he approached, he watched a man (who we now know was Arntsen), who "looked like he was like in a fit of rage," jump out of the Jaguar with a machine gun in his hand.

Morrill said the man "held [the gun] up in his hand and he went to approach the car that it appeared that he [had] cut off." Morrill described the way the man carried the gun:

> [H]e had it in his hand like a sign of intimidation. And so whoever that person was in the car that he had cut off, he wanted everybody to know he had a gun. I mean, that's the way I perceived it to be. And at that moment, you're saying, Uh-oh, something's going to happen here.

Morrill recognized the weapon as an AK-47 assault rifle.

According to Morrill, Arntsen ran to the driver's side of the other car "like he was going to shoot" the person in the car. Morrill testified that when Arntsen approached the car, he changed the position of the gun from a lifted position down to his waist.

He never saw Arntsen actually point the gun at Koenig. He recalled that Arntsen ran toward Koenig's car and then ran back to his own car and took off at high speed.

Morrill also described Arntsen as "a pretty good sized [B]lack man," "every bit of six-two, . . . maybe six-three. He was a big guy." He also described his clothing, hoodie, and sunglasses as making Arntsen look "like a bank robber" trying to disguise his face, and he said Arntsen acted "[a]ggressive. Scary aggressive."

3. *Verdict*

Arntsen was charged with felony harassment and second degree assault with a deadly weapon for the Koenig incident. For the assault charge, the jury instructions included the elements of second degree assault, the required specific intent to create apprehension and fear of bodily injury, and the information that a firearm is a deadly weapon. The jury was also instructed on the lesser offense of unlawful display of a firearm.

The jury returned a verdict of not guilty as to felony harassment, but guilty as to second degree assault with a deadly weapon. It also found Arntsen guilty on all other counts.

[Citations to the record omitted; some paragraphing revised for readability]

Legal Analysis

In key part, the unanimous Washington Supreme Court Opinion in Arntsen provides the following legal analysis of the sufficiency of evidence questions:

Arntsen emphasizes that both Koenig and Morrill testified they did not see him point the firearm directly at another person. He argues, and the Court of Appeals agreed, that with this evidence, the jury could have found only intent to intimidate for unlawful display. Absent evidence he pointed the rifle directly at another person, he contends, the jury could not have found the intent to create apprehension and fear of injury, as required for assault. The Court of Appeals also concluded there was insufficient evidence that Koenig actually experienced fear and apprehension of bodily injury.

The State argues the Court of Appeals erred as to both elements. We agree with the State and reverse.

A. Specific Intent

The sufficiency of the evidence analysis "is highly deferential to the jury's decision" and requires courts to view the evidence and all reasonable inferences in favor of the State. . . . . Moreover, specific intent "may be inferred from the conduct where it is plainly indicated as a matter of logical probability." . . . .

Here, sufficient evidence existed for the jury to find that Arntsen intended to cause apprehension of harm. The State's evidence showed that in response to Koenig changing lanes, Arntsen approached her with his AK-47 after swerving and nearly colliding with her car and forcing her to an abrupt stop in the middle of the road. Although he did not point the rifle directly at Koenig, the jury could infer from Koenig's and Morrill's testimony that he intended to make her fear he might harm her with it.

Koenig testified that Arntsen's driving and approach with the rifle indicated he might shoot her, assault her, or steal her car. Her testimony would support an inference that he intended something menacing: "[A person who] does something like that after being so angry is clearly not, you know, pulling a prank or doing anything fun. This was a lethal weapon that he was holding and he was coming at me." . . .

And, she thought Arntsen must have had the rifle in order to use it, either to shoot her or to harm her in some other way. Morrill also testified that Arntsen held the AK-47 "like a sign of intimidation . . . he wanted everybody to know that he had a gun," and when he ran over to Koenig's car it was "like he was going to shoot" her.

Taking the evidence together and all reasonable inferences in favor of the State, as required in a sufficiency review, a rational trier of fact could infer from this conduct that Arntsen became angered at Koenig's driving, so he stopped both cars, took out his AK-47, and approached her car with the gun in order to create fear and apprehension that he would harm her with it. . . .

Arntsen argues that the evidence is insufficient because intent to cause apprehension of harm can never be inferred unless there is evidence he pointed the gun at Koenig. . . .

. . . .

While Washington courts have often recognized that pointing a gun is sufficient to show specific intent for assault, we have never held that it is necessary. . . . We decline to do so now. Instead, we adhere to the sufficiency of the evidence standard, which requires us to consider the evidence together with all reasonable inferences to determine whether a rational trier of fact could infer that intent "from the conduct where it is plainly indicated as a matter of logical probability." . . . .

Here, a rational trier of fact could find the State proved the requisite intent based on Arntsen approaching and circling Koenig's car with the rifle after angrily forcing her to stop in the middle of the road. His behavior before he stopped her car was also menacing and evinced rage, which carried through the entire incident as he circled the car, holding the rifle.

The State also argues the Court of Appeals erred in considering that "unconscious bias [could] creep into the process" because "[w]ithout any evidence as to what Arntsen said, the jury is left with what he did and what he looked like." . . . The court was correct that unconscious bias could be triggered by Morrill's descriptions of Arntsen as a "[s]cary aggressive," "pretty good sized [B]lack man." . . . But the conduct described by the witnesses here would be sufficient evidence of second degree assault, regardless of the appearance of the actor. Nothing in the case shows that the witnesses' descriptions of Arntsen impacted the jury in a manner that would result in an unjust verdict.

We decline to adopt Arntsen's proposed bright line rule that evidence is insufficient to prove specific intent to cause apprehension and fear of injury unless the gun is pointed at the victim. Instead, sufficiency of the evidence analysis requires us to consider the evidence together with all reasonable inferences to determine whether a rational trier of fact could infer that intent "from the conduct where it is plainly indicated as a matter of logical probability.". . . Here, a rational trier of fact could find the State proved the requisite intent based on Arntsen approaching and circling Koenig's car with an AK-47 after angrily forcing her to stop in the middle of the road. The evidence was sufficient to prove intent.

B. Actual Apprehension and Imminent Fear

Last, Arntsen argues there was insufficient evidence that Koenig experienced fear in fact. "[F]ear is a necessary element of assault by attempt to cause fear." . . . The Court of Appeals concluded the State failed to prove Arntsen in fact created apprehension and fear of injury in Koenig in light of her testimony that she did not know what type of harm he meant her, and that by the time he reached her car, she thought he "was not looking to shoot" her.

This is an incomplete reading of the facts. Koenig testified that her "first thought" when she saw Arntsen approaching her with the rifle was, "I'm going to get shot." She also testified that she thought he could have shot her from a distance when he first exited his own car, but the fact that "he didn't shoot me immediately doesn't mean that he wasn't going to do something to me and then shoot me."

Though Koenig may have eventually believed that Arntsen was not going to shoot her, she testified unequivocally that at times during this incident, she believed he was going to shoot her or harm her in some way. Koenig's testimony was sufficient evidence she experienced actual apprehension and fear of injury. . . . Viewing the evidence in the light most favorable to the State, Koenig's testimony would permit a rational trier of fact to believe she experienced actual apprehension and fear of injury because during parts of this encounter, she believed Arntsen would shoot her or harm her.

[Some paragraphing revised for readability; record citations, case citations, and citations to other authority omitted]

Result: Reversal of the Court of Appeals ruling that granted the personal restraint petition of Ricky Marvin Arntsen on sufficiency-of-evidence grounds; remand of the case to the Court of Appeals for that court to address the additional arguments of Arntsen that (1) the "Kim Koenig" who testified was not shown to be the same person as the "Kim Weyer Koenig," complaining witness; and (2) his conviction violated equal protection because he, a Black man, was treated differently from armed white people who stormed the Washington Governor's Mansion following the riot at the United States Capitol on January 6, 2021.

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WASHINGTON STATE COURT OF APPEALS

TWO INSUFFICIENCY-OF-EVIDENCE RULINGS: (1) RESIDENTIAL BURGLARY CONVICTION IS REVERSED BECAUSE DEFENDANT ENTERED ONLY A FENCED-IN BACKYARD, NOT THE ASSOCIATED HOME; AND (2) ASSAULT THREE CONVICTION IS

REVERSED BECAUSE THE HOMEOWNER'S DETENTION OF DEFENDANT WAS IN RELATION TO A GROSS MISDEMEANOR, NOT A FELONY, AND THEREFORE WAS NOT A LAWFUL DETENTION FOR PURPOSES OF THE ASSAULT THREE STATUTE

In State v. Wixon, ___ Wn. App.2d ___ , 2024 WL ___ (Div. III, January 25, 2024), a three-judge panel of Division Three of the Court of Appeals reverses, on grounds of insufficiency of evidence to convict, defendant's Spokane County Superior Court convictions for residential burglary and assault in the third degree. The introductory paragraphs of the Wixom Opinion summarize the unanimous ruling in the case as follows:

> Todd Wixon entered a fenced backyard and attempted to pry open the locked back door of the house. The homeowner confronted Wixon and tackled him as he attempted to run away. Wixon was convicted of residential burglary and third degree assault among other charges. On appeal he challenges the sufficiency of the evidence for these two charges. We agree that the evidence is insufficient.
>
> Residential burglary requires proof that the defendant entered a dwelling. A dwelling is defined to include a building or portion thereof used for lodging. As interpreted by State v. Neal, 161 Wn. App. 111, 113 (2011), residential burglary requires entry into a building primarily used for lodging, or entry into a portion of a building where that portion is used for lodging.
>
> Here, the State argues that the house was primarily used for lodging and the fenced area was so connected to the house that it was part of the house. The State contends that entry into the fenced area could be entry into the house.
>
> The ordinary definition of a "building" means the secured area enclosed by walls and a roof. We hold that to enter a building used for lodging means to enter within the area secured by the walls and roof. Under this definition, entry into an area outside the walls and roof cannot be entry into the building.
>
> Under this legal definition, the fenced backyard was not part of the walls and roof of the house. Thus, Wixon's entry into the fenced backyard could not constitute entry into the house. Because there is no other evidence that Wixon entered a dwelling, the evidence is insufficient to support the conviction for residential burglary.
>
> We also conclude that the evidence is insufficient to support Wixon's conviction for third degree assault. The jury was instructed that third degree assault requires proof that Wixon assaulted the homeowner with the intent to prevent or resist the lawful apprehension or detention of himself.
>
> The homeowner could lawfully detain Wixon if Wixon committed a felony. The only felony identified for the jury was residential burglary. The State concedes that if the evidence is insufficient to support the residential burglary conviction, under the law of the case the State failed to prove that Wixon was committing a felony at the time the homeowner detained him. Thus, the homeowner's detention was not lawful and the evidence is insufficient to support a finding that Wixon assaulted the homeowner with the intent to prevent or resist his lawful apprehension or detention.

> We reverse the convictions for residential burglary and third degree assault and dismiss the charges with prejudice. We affirm Wixon's remaining convictions and remand for resentencing.

The legal analysis portion of the Wixon Opinion distinguishes factually some Washington Court of Appeals decisions that held, under the circumstances of those cases, that certain areas could be held to be held to be parts of buildings used for lodging. In key part, that discussion in Wixon is as follows:

> [T[he State cites [State v. Neal, 161 Wn. App. 111, 113 (2011)]. In Neal the court interpreted the term "dwelling" to determine whether entry into a tool room located inside an apartment building was entry into a dwelling used for lodging. After construing the legal definition, the court held that a "'dwelling' may be a building or structure used [primarily] for lodging, or it may be any portion of a building where the portion is used for lodging." . . . . Since the apartment building was primarily used for lodging, entry into any part of the building, including the tool room, was entry into a building used for lodging even though the tool room was not actually used for lodging. . . .
>
> Neal is helpful, but it does not answer the question posed in this case. The State argues that since the fence in this case abutted the house, the fenced yard could be considered part of the house, which was used primarily for lodging, similar to the tool room in Neal. Under the State's theory, entry into the fenced area was entry into the house. We disagree. Even though the fence touches the outside of the building (house), this does not make the fenced area part of the building.
>
> . . . .
>
> In State v. Moran, the defendant entered a crawlspace beneath the house by removing lattice hanging from a deck, crawling under the deck, and going through an access door built into the foundation of the house. 181 Wn. App. 316, 319 (2014). Inside the access door was a lighted area under the house with a dirt floor covered in plastic. The court held that entry into the area beneath the living space was entry into the house. . . .
>
> In State v. Murbach, the defendant entered an attached garage. 68 Wn. App. 509 (1993). Because the attached garage was part of the house, which was itself used for lodging, entry into the garage constituted entry into a building used for lodging. . . .
>
> In State v. McPherson, the defendant entered a jewelry store through a hole in a common wall. 186 Wn. App. 114 (2015). The jewelry store owner's son lived in an apartment above the store that was accessed by stairs located inside the store through a "'swinging door' at the bottom of the stairway and a door at the top of the stairs that did not lock." . . . Recognizing the distinction made in Moran, Division Two held that because the jewelry store could be considered part of the apartment building, it was a question of fact for the jury as to whether the building was primarily used for lodging so that entry into the store was entry into a dwelling. . . . The court [in McPherson] held that the evidence was sufficient for the jury to find that the jewelry store was part of the apartment, noting that the store and apartment occupied the same structure, the apartment was not separately secured, and the sole access to the apartment was through the store. . . .

> While these cases have not considered the ordinary meaning of a building, they have consistently held that entry into a part of the building used as a dwelling occurred when the person entered the enclosed area secured by the walls and the roof of the building. A tool room inside an apartment building, a crawlspace inside the foundation, an attached garage, and a first-floor store are all within the walls and roof of the building. On the other hand, while a fenced area might independently qualify as a building, it is not part of a building used for lodging (i.e. a dwelling), because it is not part of the area secured by the walls and roof of the building.

[Some citations omitted; footnotes omitted]

Result: Reversal of Spokane County Superior Court convictions of Todd James Wixon for residential burglary and third degree assault, and dismissal of those charges with prejudice; affirmance of Wixon's remaining convictions for one count of possession of burglary tools and two counts of bail jumping; the case is remanded for resentencing.

PROSECUTOR SUCCEEDS IN DEFENDING A LAW ENFORCEMENT STING THAT CAUGHT A MAN WHO TARGETED ONLINE A FICTIONAL 13-YEAR-OLD GIRL; DEFENDANT LOSES HIS DUE PROCESS CLAIM OF OUTRAGEOUS GOVERNMENT CONDUCT REGARDING HOW STING WAS CONDUCTED

In State v. Stott, ___ Wn. App. 2d ___ , ___ 2024 WL ___ (Div. II, February 13, 2024, order issued to publish the previously unpublished December 19, 2023, Opinion of the Court), Division Two of the Court of Appeals upholds the convictions of defendant for multiple sex crimes. The convictions stem from Stott's communications with an undercover Washington State Patrol (WSP) officer who was posing as a fictional 13-year-old girl ("Kaci") in an online sting operation that aimed to find and arrest adults trying to engage in sex with children.

Stott was arrested and charged upon leaving his home to meet up with "Kaci." Stott moved to dismiss the charges against him, claiming that he was denied Due Process under the constitution as a result of what Stott characterized as outrageous government conduct in the sting operation. The Court of Appeals rules in extended legal analysis of the totality of the circumstances that the trial court, after applying the five factors outlined in State v. Lively, 130 Wn.2d 1 (1996), correctly denied the motion.

Defendant in Stott relied on the 2018 Court of Appeals decision in State v. Solomon, where the Court of Appeals ruled that the governmental tactics in a sting operation were outrageous based on the five-factor, fact-intensive legal standard by the Washington Supreme Court in the non-sting case of State v. Lively. The Legal Update paraphrases as follows the five State v. Lively factors, which have some overlap: 1) whether the police essentially instigated the crime; 2) whether the police went too far in trying to overcome reluctance of the defendant through persistent solicitation by the government agent-decoy; 3) whether the police conduct constituted control of criminal activity; 4) whether the police motive was to protect the public; and 5) whether the police conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.

This Legal Update entry will quote only the analysis in the Stott Opinion of the first factor:

> Stott relies primarily on Solomon, in which an undercover officer posted an ad on Craigslist stating that she was "'a young female looking for sex with either a man or woman." . . . Solomon responded to the ad asking whether she was "'[o]nly interested in

> [a] woman.'". After not hearing back for a few hours, Solomon sent another message saying "'[m]ust be I won't bug [you] anymore.'" . . . .
>
> Four days later, the undercover detective responded to Solomon's messages, indicating interest in a sexual encounter with him. . . . The detective then told Solomon that she was 14 years old. Upon learning that she was a minor, Solomon immediately and expressly rejected the detective's proposition. . . .
>
> The detective continued to send explicit and lewd messages after Solomon rejected her, trying to entice him into agreeing to have sex with her. . . . Solomon and the detective messaged each other back and forth for four days, during which Solomon rejected the detective's solicitations seven times. . . . The trial court in Solomon found that the government instigated the crime by both posting the advertisement and "by initially messaging Solomon even though he had indicated that he would not again contact the individual who had posted the advertisement." . . .
>
> Here, the trial court, in its oral ruling, emphasized that the initial advertisement did not specifically target Stott, and that Stott initiated the exchange by responding to the ad. The trial court found that the State did not instigate the crime, but merely infiltrated potential criminal activity.
>
> Stott continued to text "Kaci" after he learned that she was underage. Unlike Solomon, Stott did not at any time seek to withdraw from the exchange, even when he expressed some concern that he was possibly being set up. Moreover, it was Stott who introduced sexually explicit language to the conversation. The trial court therefore did not abuse its discretion in weighing this factor against Stott.

[Case citations omitted; some paragraphing revised for readability]

Result: Affirmance of Pierce County Superior Court convictions of Benjamin Adam Stott for (A) attempted second degree rape of a child, (B) attempted commercial sexual abuse of a minor, and (C) communication with a minor for immoral purposes.

RCW 9A.72.150, TAMPERING WITH PHYSICAL EVIDENCE: DEFENDANT LOSES HIS ARGUMENT THAT THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO MEET THE STATUTORY ELEMENT THAT HE HAD "REASON TO BELIEVE THAT AN OFFICIAL PROCEEDING [WAS] PENDING OR ABOUT TO BE INSTITUTED" AT THE POINT WHEN HE WAS DESTROYING EVIDENCE

In State v. Walton, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. I, February 5, 2024), defendant lost his challenges to his convictions for murder in the second degree and tampering with physical evidence. One of defendant's arguments on appeal was that the evidence in the case was insufficient to support his conviction under RCW 9A.72.150 for tampering with physical evidence.

RCW 9A.72.150 provides as follows:

> (1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he or she:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceeding; or
(b) Knowingly presents or offers any false physical evidence.
(2) "Physical evidence" as used in this section includes any article, object, document, record, or other thing of physical substance.
(3) Tampering with physical evidence is a gross misdemeanor.

[Underlining added]

Legal Analysis by the Court of Appeals:

Specifically, Walton contends the State failed to prove one of the statutory elements of the charge: that he had reason to believe an official proceeding was pending or about to be instituted before he tampered with physical evidence. . . . .
. . . .

[The widow of the victim] testified that [on the day that her husband disappeared] she saw Walton cleaning up blood from the ground outside of his unit and said to him, "You murdered my husband." Investigating officers [that same day] found [the victim's] blood within Walton's unit and discovered a garbage bag that contained cleaning supplies, surgical gloves, clothes, and shoes, all of which had blood on them.

The nature of the blood stains in Walton's unit indicated that someone had attempted to clean up the blood before it had dried. There were garbage bags found in a dumpster near Walton's unit that contained cleaning supplies and blood as well.

When Walton was eventually detained by officers in Marysville [later on the day of the disappearance of the victim], [defendant Walton's] vehicle was parked near a dumpster in which officers found what appeared to be the missing passenger floor mat from Walton's car along with plastic bags that contained items with "a lot of blood saturation on them." In that same dumpster, officers also found a poster with Walton's fingerprints on it that matched the posters inside his unit.

Further, on the afternoon [that the victim] went missing, Walton met with his friends, Marcus Harvey and "Diego," and asked Harvey to say that they had been playing basketball earlier that day. Diego then pulled some black garbage bags out of Walton's car and put them into the trunk of [the victim's] car.

According to Harvey, Diego told him "there was some personal belongings [inside the bags] and that he needed to go drop them off somewhere."

Shortly after, Walton drove to Skagit County and Harvey followed him in another car. When Walton stopped in a rural area on a one-way road with a "cut-out" where cars could pull over, Harvey felt things were "getting weird" and decided to turn around and go home. However, Diego, who was in Harvey's car, told Harvey to stop at two separate locations where Diego got out of the car and removed the black plastic garbage bags he had placed there earlier.

Howard's body was discovered [two days after the victim went missing] with black plastic covering his head which matched the material of the garbage bags that were found at

the dumpster near Walton's unit as well as in the dumpster in Marysville where Walton was detained.

In briefing and at oral argument, Walton only challenged the sufficiency of the evidence as to whether he had reason to believe an official proceeding was pending or was about to be instituted when he tampered with physical evidence.

Specifically, Walton argues that because he was not under arrest or the target of a police investigation when he allegedly tampered with the physical evidence, he "could not have had reason to believe a proceeding would be initiated in relation to the evidence he allegedly destroyed, mutilated, or concealed." Walton's argument erroneously assumes that the State can only prove this element when a defendant is already under arrest or investigation for a specific crime and then tampers with physical evidence in relation to that crime.

Walton's contention rests on an unpublished and distinguishable case, State v. Edwards, in which Division Two of this court interpreted RCW 9A.72.150 to require that the prospective proceeding must relate to the physical evidence the defendant tampered with. Police officers responded to a call that Edwards was fighting and arrested him on an outstanding warrant from an unrelated matter. State v. Edwards, No. 46469-1-II, slip op. at 1 (Wash. Ct. App. July 7, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2046469-1-II%20%20Unpublished%20Opinion.pdf.

While processing Edwards at the jail, a corrections officer noticed Edwards' hand on his mouth and told him to remove it. When he did so, a small oxycodone pill fell to the floor and the officer retrieved it. The State then charged Edwards with unlawful possession of a controlled substance and one count of tampering with physical evidence.

The court reversed the conviction for tampering because "Edwards was arrested on an unrelated outstanding warrant" and, until the officer retrieved the oxycodone pill from the ground, "Edwards could not have had reason to believe that a proceeding would be initiated for unlawful possession of a controlled substance." .

Unlike Edwards who was charged with tampering with physical evidence that was completely unrelated to the crime for which he was arrested, Walton was convicted of tampering with the physical evidence that was directly linked to the murder for which he was investigated, arrested, and ultimately charged.

More importantly, Edwards was convicted of possession of a controlled substance based on the possession of one pill that he dropped in front of an officer, and the State conceded that there was insufficient evidence to support the count of tampering with physical evidence based on that momentary circumstance.

Walton, however, was convicted of murder in the second degree and tampering with physical evidence in relation to the same underlying crime based on a continuing course of conduct throughout the day as he cleaned the blood, threw away the cleaning supplies, transported physical evidence away from the crime scene, and requested his friends lie about his whereabouts. Although Walton may not have been under arrest or identified by police as a suspect at the time he tampered with the physical evidence

related to Howard's murder, a reasonable juror could find that he was still aware that an official proceeding, specifically a criminal investigation, would be initiated.

Shortly after Howard's murder, while Walton was in the process of cleaning Howard's blood, [the wife of the victim] confronted Walton and accused him of murdering her husband. Under the circumstances, her assertion was sufficient for Walton to believe that an official proceeding would be forthcoming; whether it was coming at that moment or once Denise repeated those words to law enforcement is immaterial.

Walton's arguments to the contrary ignore the reality of the situation and the lens through which we view the evidence when considering a sufficiency challenge. Assuming the truth of the State's evidence on this charge, a rational juror could find beyond a reasonable doubt that Walton tampered with physical evidence at a time when he had reason to believe that an official proceeding would be instituted.

[Footnotes omitted; most citations omitted; some paragraphing revised for readability]

Result: Affirmance of Snohomish County Superior Court convictions of Frank Edmund Walton for (1) murder in the second degree and (2) tampering with physical evidence.

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BRIEF NOTES REGARDING FEBRUARY 2024 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The six entries below address the February 2024 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. State v. EA: On February 6, 2024, Division Two of the COA rejects the appeal of defendant from his Pacific County Superior Court juvenile court adjudication of *first degree child rape*.

DE, the eight-year-old cousin of EA told several adults that his 14-year-old cousin EA had sexually assaulted him multiple times. But then, at a child hearsay hearing, the eight-year-old cousin denied that EA had sexually assaulted him. The trial court considered the child hearsay factors of State v. Ryan, 103 Wn.2d 165, 175-76 (1984) and ruled that the eight-year-old cousin's child hearsay statements to the adults were admissible under RCW 9A.44.120(1). After a Juvenile Court trial in which several witnesses testified about eight-year-old cousin's hearsay statements, the trial court adjudicated EA as guilty.

The EA Court's Opinion contains a lengthy recitation of the testimony in the lower court, as well as a lengthy analysis of the highly-fact-based legal questions under State v. Ryan, 103 Wn.2d 165, 175-76 (1984) and RCW 9A.44.120(1). **The analysis concludes with the following explanation as to why the Court rejects the reliance of the defendant on the recantation by the eight-year-old-cousin:**

> **A recantation does not automatically render child hearsay evidence inadmissible. See State v. Clark, 139 Wn.2d 152, 153 (1999); State v. Young, 62 Wn. App. 895, 900 (1991); State v. Madison, 53 Wn. App. 754, 759 (1989). Instead, as with any recantation, the trial court can "weigh the credibility of a recantation against the evidence that a statement is reliable." State v. Young, 160 Wn.2d 799, 808 (2012).**
>
> **Here, [the victim] DE's recantation came nine months after his original disclosures. And it is reasonable, given DE's family's strong, emotional reactions to the disclosures, that DE was under considerable pressure to recant. Accordingly, the trial court did not abuse its discretion when it admitted the hearsay evidence despite DE's recantation. See Madison, 53 Wn. App. at 759.**

Here is a link to the Opinion in State v. EA:
https://www.courts.wa.gov/opinions/pdf/D2%2057099-8-II%20Unpublished%20Opinion.pdf

2. State v. Jeremy Dale Smathers: On February 6, 2024, Division Two of the COA rejects the appeal of defendant from his Lewis County Superior Court convictions for *(A) attempting to elude a pursuing police vehicle and (B) third degree driving with a suspended license*. **The Smathers Court rejects defendant's argument that he was unlawfully seized by a law enforcement officer without reasonable suspicion before defendant fled the scene of a contact with the officer.**

The Smathers Opinion describes the somewhat unusual facts of the case as follows:

> One night in February 2022, a homeowner called law enforcement to report a man jumping over his fence. [A Sheriff's Office Deputy] was on duty and spoke with the homeowner. The homeowner said that after jumping the fence, the man ran back to the roadway and got into a truck.
>
> The homeowner identified the truck as an older Ford Ranger with a loud exhaust but could not identify the truck's color or license plate number. The homeowner called back a few minutes later to report that he thought the same truck was in the area and may have driven up a forest road by his house.
>
> [The deputy] approached the forest road and heard a vehicle with a loud exhaust approaching. The deputy was wearing his patrol uniform and was in his marked patrol

car. It was dark, so he activated his light bar to illuminate the road with bright white lights, but he did not turn on his red and blue emergency lights.

The truck stopped with its engine off. The deputy then got out of his vehicle and approached the truck, which was a Chevrolet S-10, not a Ford Ranger. Because the light bar brightly illuminated the deputy's back, the occupants in the truck could only see a silhouette until he was a few feet from the truck, and they could not tell he was law enforcement.

When [the deputy] got closer to the truck, he noticed a male driver and a female passenger. As he looked more closely at the driver, he recognized him as Smathers. The deputy was aware of a warrant for Smathers' arrest and had been looking for him for the last few days. The deputy yelled at Smathers to put his hands up, but Smathers started up the truck and began to drive away. Despite yelling at Smathers, the deputy never identified himself as law enforcement.

Smathers accelerated away at a high speed, causing [the deputy] to run back to his patrol car to follow. The deputy activated his red and blue emergency lights and sirens and tried to catch up to the truck, accelerating as quickly as his patrol car allowed.

[The deputy] initially lost sight of the truck, but he eventually saw it again. Soon thereafter, because of the speed involved, [the deputy] stopped pursuing the truck, turned off his emergency lights and sirens, and lost sight of the truck again.

Although the deputy ended the pursuit, he suspected that the truck turned down a nearby road, so he continued his search. When the deputy found the truck backing out of a one-way road, he got out of his patrol car and began giving the driver commands. But the deputy quickly saw that a female was then driving; Smathers was nowhere to be found.

Smathers was eventually apprehended, arrested, and charged with attempting to elude a pursuing police vehicle and third degree driving with a suspended or revoked license.

The Smathers Opinion provides the following analysis of the "seizure" issue in the case:

Initially, prior to the moment when the deputy recognized Smathers, no seizure occurred. It is true that [the deputy] turned on his light bar, but he did not activate his red and blue emergency lights.

While walking toward the truck, the deputy never identified himself and, because of the bright lights, he was merely a faceless silhouette, preventing Keffer and Smathers from realizing that he was law enforcement.

Under these circumstances, using the objective standard, a reasonable person would not have believed that they were being seized by law enforcement because there was no ability to know law enforcement was involved. In fact, Keffer's testimony about her subjective belief was consistent with this objective conclusion; she testified she had no idea the deputy was law enforcement and, not only did she feel free to leave, she urged Smathers to drive away (which he did).

> **Although the situation changed as soon as [the deputy] recognized Smathers, there was still no constitutional violation — at that point, the deputy had the authority to stop Smathers rooted in the arrest warrant. Based on the warrant, the deputy had been looking for Smathers the days prior.**
>
> **At the moment he recognized Smathers, the arrest warrant placed any seizure of Smathers (to the extent any seizure occurred) outside the constitutional prohibition on warrantless seizures. Smathers makes no argument otherwise.**
>
> In the end, Smathers has not shown an unconstitutional seizure at any point to justify suppressing the evidence resulting from his interactions with [the deputy].

Here is a link to the Opinion in State v. Smathers:
https://www.courts.wa.gov/opinions/pdf/D2%2057331-8-II%20Unpublished%20Opinion.pdf

3. State v. Isaiah Thomas Oliver: On February 6, 2024, Division Two of the COA rejects the appeal of defendant from his Spokane County Superior Court conviction for *first degree unlawful possession of a firearm*. On appeal, defendant contended, among other things, that his trial counsel rendered ineffective counsel at trial by failing to raise the argument that an officer violated defendant's constitutional right to privacy when the officer, with aid of a flashlight, looked through the window of a vehicle at night**. The Oliver Opinion holds that this argument fails because the officer did not violate a constitutional right of privacy of the defendant because the Open View Doctrine authorized the officer's use of a flashlight to aid his vision from outside the defendant's vehicle.**

The Oliver Opinion describes the facts of the case and elements of the trial court proceedings as follows:

> . . . On the date of the incident in question, [an officer] was on duty and conducting a daily prowl check at an apartment complex. While at the complex, he noticed a bright green Dodge Charger with its lights on, parked at the complex's office even though the office was closed. [The officer] was fairly familiar with vehicles in the complex and had never seen the Charger before, and there were not usually vehicles parked in that area with their lights on.
>
> [The officer] left the apartment complex to respond to a welfare check at a nearby casino. At the casino he noticed the same Charger and saw two individuals exiting the vehicle. After [the officer] conducted the welfare check, he returned to the Charger and shined his flashlight through the driver's side window. He immediately observed a firearm "tucked in the driver's seat and the center console."
>
> [The officer] learned that the passenger of the vehicle was Isaiah Oliver and that he and the driver were both prohibited from possessing firearms.
>
> Oliver was placed under arrest, and the State charged him with first degree unlawful possession of a firearm. He waived his right to a jury trial and the case was tried to the bench.
>
> At trial, [the officer] testified about his discovery of the firearm. Defense counsel cross-examined [the officer] and elicited testimony that the Charger had tinted windows.

> Following a bench trial, the trial court found Oliver guilty of one count of first degree unlawful possession of a firearm based on the firearm observed by [the officer] in the Charger. The court entered written findings of fact and conclusions of law. Relevant to this appeal, the court found:
>
> > 12) Upon looking in the driver's side door window, [the officer] observed a semi-automatic handgun lodged between the driver's seat and the center console of the vehicle in plain view;
> >
> > 13) [The officer] testified that he also looked in the passenger side door window with the assistance of a flashlight and observed the same semi-automatic handgun lodged between the driver's seat and the center console of the vehicle in plain view from that view[.]

The Oliver Opinion provides the following analysis of application of the Open View Doctrine to the facts of this case:

> Notably, the open view doctrine provides that a detection does not constitute a search "'when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used[.]'" State v. Bobic, 140 Wn.2d 250, 259, 996 P.2d 610 (2000) (quoting State v. Rose, 128 Wn.2d 388, 392, 909 P.2d 280 (1996)).
>
> There is no argument regarding whether [the officer] was permitted to be in the area of the vehicle. Just as [the officer] could lawfully be parked outside of the casino, he could also intentionally look through the windows of the vehicle also parked there.
>
> **In regard to [the officer's] use of a flashlight to look through the window of the vehicle, our [Washington] Supreme Court has upheld the use of a flashlight under the open view doctrine where the flashlight "does not transform an observation which would fall within the open view doctrine during daylight into an impermissible search simply because darkness falls." Rose, 128 Wn.2d at 398-99. "There is no reasonable expectation of privacy in" "contraband [left] in plain sight, visible through" a window. [Rose] at 394, 399. The court in Rose explained that employing a flashlight does not render the viewing intrusive because it is an "exceedingly common device." [Rose] at 399.**
>
> **Here, [the officer] used a flashlight to aid in looking through the window of the vehicle at night. This use of a flashlight to aid in seeing what would apparently be readily visible during daylight hours is permissible under the open view doctrine, and therefore did not transform [the officer's] observation inside the vehicle into a search.**
>
> Although Oliver argues on appeal that the vehicle's windows were tinted and therefore [the officer] still would not have been able to see through them during daylight hours without the aid of a flashlight, the record is undeveloped as to this fact and therefore this court cannot rely on it as a basis for finding that a motion to suppress brought by defense counsel would have succeeded.

> On the record before us, defense counsel was not ineffective for failing to bring a motion to dismiss [the officer] "search" of the Charger because it did not constitute a search under the open view doctrine.

[Footnotes and some case citations omitted; paragraphing revised for readability]

Here is a link to the Opinion in State v. Oliver:
https://www.courts.wa.gov/opinions/pdf/393844_unp.pdf

4. State v. William Earl Talbott II: On February 12, 2024, a three-judge panel of Division One of the COA denies defendant's motion for reconsideration of the panel's December 4, 2023, decision that affirmed the Snohomish County Superior Court convictions of defendant for *two counts of aggravated murder in the first degree*. The February 12, 2024, decision of the Court of Appeals is supported by a substitute Unpublished Opinion of the Court of Appeals.

One of defendant's arguments is that a deputy sheriff gave improper opinion testimony when the deputy testified at trial that the deputy had told his sergeant that the case "had been solved," and that, as noted above, the defendant's attorney provided inadequate counsel by failing to object to the testimony. To determine whether statements constitute impermissible opinion testimony, the courts should consider all relevant circumstances of the case, including the following: (1) the type of witness involved (particularly troubling is opinion testimony from a law enforcement witness because of a tendency for jurors to accept such testimony), (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Demery, 133 Wn.2d 753 (2001).

The Court of Appeals declares that the testimony from the deputy that the deputy had previously told his sergeant that the case "had been solved" was improper opinion testimony. However, the Court of Appeals rules that the failure of the defense attorney to object to that testimony was not prejudicial to the defendant because defense counsel incorporated the testimony in defense counsel's argument to the jury that the police had arrested the wrong person (i.e., the defendant) due to law enforcement's alleged "tunnel vision" early in the investigation.

Here is a link to the Opinion in State v. Talbott
https://www.courts.wa.gov/opinions/pdf/803344%20order%20and%20opinion.pdf

5. State v. Richard Carl Howard II: On February 22, 2024, Division Three of the COA rejects defendant's challenges to his Spokane County Superior Court conviction for *second degree assault – domestic violence*. Among other issues, the Howard Opinion rejects the defendant's arguments on the highly-fact-intensive issues of whether: (1) the trial court abused its discretion in admitting the expert witness testimony of a sexual assault nurse examiner (SANE), and (2) the trial court abused its discretion in admitting hearsay under (A) the excited utterance exception, and (B) medical records/medical diagnosis exception.

In regard to the SANE expert testimony, some of the rulings by the Howard Court (supported by lengthy analysis) are that: **(1) the SANE testimony was admissible despite the fact that the SANE did not examine the victim herself or offer an opinion on whether the victim was strangled; (2) the trial court did not abuse its discretion in allowing the SANE to testify under the circumstances of this case that visible signs of strangulation occur in only about 50 percent of cases, and that bruising marks from strangulation may not appear immediately after the assault; and (3) the trial court did not abuse its discretion in**

allowing the SANE to explain that a relatively small amount of pressure is required to stop airflow and blood flow during a strangulation.

On the "excited utterances" issue, the Howard Opinion describes as follows the relevant facts relating to the trial court's admission of testimony from the 911 recording, from the DV victim, from the DV victim's eyewitness friend, and from a responding officer:

> Donald Richardson was talking on the phone with [his friend, the DV victim] Dusti Jones when [Dusti] suddenly began screaming and the phone went dead. Richardson [the friend of the victim] immediately called 911. While Richardson was still on the phone with 911, he found Jones who was holding her sides and crying. After Jones got into Richardson's vehicle, Richardson relayed questions and answers between the 911 operator and Jones.
>
> Jones and Richardson then met up with [Officer A] [about 20 minutes after the call]. [Officer A's] body camera recorded the contact. Jones told [Officer A] that she had been attacked and strangled by Howard, her estranged husband. She also explained that there was a dispute between her and Howard regarding a vehicle and Howard had driven off with her truck. She later reported to a doctor that Howard had tackled her from behind, body slammed her, and strangled her.

The Howard Opinion describes as follows the standard for the "excited utterances" exception:

> **A statement generally excluded as hearsay may be admitted if it qualifies as an excited utterance. The rule defines an excited utterance as "[a] statement relating to a startling event or condition made while the declaration was under the stress of excitement caused by the event or condition." ER 803(a)(2). The proponent of evidence under this exception has the burden of showing that a startling event occurred, the proffered statements were made while the declarant was under the stress of the event, and the statements relate to the event. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). "Often, the key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Woods.**

In further analysis not addressed in this Legal Update entry, the Howard Opinion goes on to explain why the utterances noted above meet the standard.

Finally, the Howard Opinion explains as follows why the Court rejects the defendant's argument against the trial court's application of the Medical Records/Medical Diagnosis Hearsay Exception:

> Howard also argues that the trial court abused its discretion in admitting a prior statement from [the victim, Jones] under the medical records exception. Specifically, Howard is referring to the trial court's decision to allow Dr. Hartley to read from Jones' medical records: "Patient states that she does have some neck pain and ligature marks from her husband's hands."
>
> **The medical records exception to the hearsay rule applies to statements "reasonably pertinent to diagnosis or treatment." ER 803(a)(4). The medical records exception generally does not allow admission of statements attributing**

fault. State v. Redmond, 150 Wn.2d 489, 496 (2003). However, in cases of domestic violence, "a declarant's statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury." State v. Williams, 137 Wn. App. 736, 746 (2007).

Here, this was a domestic violence case. Jones [the victim] was in the process of separating and divorcing from Howard when he assaulted her. The State alleged, and the jury found that Howard and Jones were intimate partners. Because it was a domestic violence case, Jones' statement that the marks on her neck were from Howard's hands were within the medical records exception because part of the treatment was to prevent future injury. Accordingly, the trial court did not abuse its discretion in admitting the statement under the medical records exception.

Here is a link to the Opinion in State v. Howard:
https://www.courts.wa.gov/opinions/pdf/384373_unp.pdf

6. State v. Mark Thomas Hensley: On February 27, 2024, Division Two of the COA reverses defendant's 2022 Clark County Superior Court conviction for *felony harassment* for threatening to kill a Clark County Superior Court judge. The case is remanded for re-trial.

The Hensley Opinion rejects the defendant's sufficiency-of-evidence arguments but rules that the jury instructions were incorrect where they failed to anticipate the U.S. Supreme Court's 2023 "true threat" ruling in Counterman v. Colorado, 143 S.Ct. 2106 (June 27, 2023). Counterman held under the First Amendment free speech clause that, in order to convict for crimes that involves a threat element, there must be a "true threat," which means, among other things, that a trial fact-finder must determine that defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

The Hensley Opinion notes that the U.S. Supreme Court asserted in Counterman that in the threats context, this "true threat" standard means that a speaker (1) is aware that others could regard his statements as threatening violence, and (2) delivers the statements anyway. Thus, the prosecution must prove that the defendant had some subjective understanding of the threatening nature of his or her statements. The defendant must have been at least reckless in consciously disregarding a substantial risk that the statements would be viewed as threatening violence. Jury instructions in a threat-based prosecution must so inform the jury, and the jury instructions in Hensley did not do that.

Here is a link to the Opinion in State v. Hensley:
https://www.courts.wa.gov/opinions/pdf/D2%2057518-3-II%20Unpublished%20Opinion.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assist ant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

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