LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: ***Thank you for your service, protection and sacrifice***

FEBRUARY 2022

TABLE OF CONTENTS FOR FEBRUARY 2022 LEGAL UPDATE

****

WASHINGTON STATE SUPREME COURT

TWO HOLDINGS: (1) ANIMAL ABUSE CAN CONSTITUTE A CRIME OF DOMESTIC VIOLENCE; (2) UNDER THE FACTS OF THE CASE, WHERE A WITNESS OBSERVED THE ACTS OF ANIMAL ABUSE, A JURY COULD FIND FOR SENTENCING PURPOSES THAT THE CRIME HAD A DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM

In State v. Abdi-Issa, ___ Wn.2d ___ , 2022 WL ___ (February 17, 2022), the Washington Supreme Court unanimously rules under the facts of this case that animal abuse can be a crime of "domestic violence" under RCW 10.99.020 even though the crime is not one of the examples of domestic violence crimes listed in the statute. Therefore, the Supreme Court rules that the trial court had authority to enter a post-conviction no-contact order under RCW 10.99.050.

The Supreme Court also rules by a 7-2 vote that the facts support the jury's finding for sentencing purposes under RCW 9.94A.535(3)(r) that that the crime involved a destructive and foreseeable impact on persons other than the victim.

A separate Opinion signed by two Justices disagrees with this second ruling, arguing that under Washington case law a finding of a "destructive and foreseeable impact" cannot be based, as it apparently was in this case, on the mere facts that (1) the crime was committed in public against an animal and (2) a person who witnessed the crime became significantly distressed.

The Supreme Court's Majority Opinion describes the facts of the case as follows:

> Julie Fairbanks began dating Charmarke Abdi-Issa shortly after she moved to Seattle with her dog, Mona. Mona was a small Chihuahua and Dachshund mix. Fairbanks testified she was close to Mona. Abdi-Issa, however, had a history of disliking Mona. Abdi-Issa was abusive toward Fairbanks and Mona, even threatening to kill them both.
>
> One evening, while they were out in Seattle's International District, Abdi-Issa insisted Fairbanks let him take Mona on a walk. Fairbanks objected, but Abdi-Issa ignored her and left with Mona. Fairbanks felt powerless, claiming, "[I]t didn't matter[; if] he wanted to [take her on a walk,] he was going to do it either way."
>
> Not long after he left, Abdi-Issa called Fairbanks claiming that Mona had gotten out of her harness and that he could not find her. Fairbanks did not believe him, as Mona had never gotten out of her harness before. Abdi-Issa refused to tell her more. Fairbanks began to panic after she heard Mona yelping over the phone.
>
> Around that same time, Melissa Ludin and William Moe heard a sound of great distress. They followed the sound and saw Abdi-Issa beating and making "brutal stabbing" motions toward Mona. They saw Abdi-Issa kick Mona so hard that she went up into the air and "flew into the bushes." Each time Mona was struck she made a "screeching[,] screaming[,] pained[,] awful sound" that was at last followed by silence.

> While Ludin called the police, Moe yelled at Abdi-Issa to stop hitting Mona. Abdi-Issa turned toward Moe and yelled, "[D]o you want to get some?" When Moe once again told Abdi-Issa to stop, Abdi-Issa walked away.
>
> Seattle Police Officers [A] and [B} responded to Ludin's call. While [Office A] talked to Abdi-Issa, [Officer B] went to find Mona. With Ludin's help, [Officer B] found Mona, still alive, underneath a bush. Officers transported Mona to an emergency veterinary clinic.
>
> Ludin testified she was very upset by the incident. When the police arrived Ludin was in distress, "[h]yperventilating and having a panic attack." Ludin cried as she explained to the officers what she saw and where she had last seen Mona. Ludin suffered a severe panic attack that night and continued to experience flashbacks in the following week.
>
> Meanwhile, Fairbanks was frantically searching for Mona. During her search, she ran into [the officers], who realized that Fairbanks was Mona's owner. The officers directed Fairbanks to the veterinary clinic.
>
> Mona arrived at the clinic nearly comatose, with severe swelling in her brain, bruising on her chest, and a wound to the top of her head. By the time Fairbanks arrived at the veterinary clinic Mona had died. A necropsy found that Mona had died from multiple instances of blunt force trauma.

[Footnote omitted; citations to the record omitted]

Result: Affirmance of King County Superior Court conviction of Charmarke Abdi-Issa for animal cruelty domestic violence and a jury finding (for sentencing purposes) that the crime involved a destructive and foreseeable impact on persons other than the victim.

****

WASHINGTON STATE COURT OF APPEALS

RULE AGAINST POLICE TESTIMONY THAT DEFENDANT HAS LIED WAS NOT VIOLATED BY TRIAL COURT JUDGE'S ADMISSION OF RECORDING AND TRANSCRIPTION OF POLICE INTERROGATION IN WHICH DETECTIVE ASKED DEFENDANT IF CHILD WITNESS IN SEX CRIME CASE WAS LYING ABOUT CERTAIN MATTERS; THE EVIDENCE WAS ADMITTED FOR THE PERMISSIBLE PURPOSE OF PROVIDING CONTEXT FOR THE INTERROGATION AND FOR UNDERSTANDING THAT DEFENDANT MADE CONTRADICTORY STATEMENTS DURING THE INTERROGATION

In State v. Putnam, ___ Wn. App. 2d ___ (Div. I, February 22, 2022), Division One of the Court of Appeals rejects defendant's challenge to his convictions for sex crimes committed against his daughter.

During an interrogation, defendant admitted to detectives that he had committed some sexual abuse of his daughter. However, he denied having committed some additional abuse that the daughter had reported to the detective. The detectives asked defendant if his daughter was lying about additional abuse.

The trial court subsequently allowed the State to play the recording of the full interrogation to the jury. Defendant challenged the admission of the detective's testimony as impermissible police

testimony opining that defendant was guilty. Citing the Washington Supreme Court decision in In the Matter of Lui, 188 Wn.2d 525 (2017), the Court of Appeals rules that it is not impermissible opinion testimony where the jury receives evidence repeating statements of law enforcement accusing a witness of lying, and the testimony (1) provides context for the interrogation and (2) aids an understanding that the defendant made contradictory statements during the interrogation.

The Opinion in Putnam is published only in part. The published portion of the Opinion includes the ruling discussed above in this Legal Update entry.

Result: Affirmance of King County Superior Court convictions of David M. Putnam for three counts of first degree child rape, one count of first degree child molestation, and one count of second degree child molestation.

TRIAL BY DISTRICT COURT COMMISSIONER HELD VALID WHERE DEFENDANT'S ATTORNEY AGREED TO THAT PROCEDURE

In State v. Boldt, ___ Wn. App. 2d ___ , 2022 WL ___ (Div. I, February 22, 2022), defendant loses her challenge to her conviction for third degree theft in a trial before a Clark County District Court Commissioner. She argued on appeal that she did not personally consent to the Commissioner presiding over her trial. However, her attorney consented on the record to having the Commissioner try the case, and the Court of Appeals rules that she is bound by that consent. The opening paragraph of the Opinion summarizes the reasoning of the Court of Appeals:

> RCW 3.42.020 controls when and how a district court commissioner has the authority to preside over a criminal trial. It provides a district court commissioner the same power and authority as a district court judge but prohibits a commissioner from presiding over a criminal or a civil jury trial "unless agreed to on the record by all parties." This is a procedural statute. An attorney is presumed to have authority to speak for their client on procedural matters.

Result: Affirmance of Clark County Superior Court order that affirmed the Clark County District Court conviction of Crystal Dawn Boldt of third degree theft.

****

BRIEF NOTES REGARDING FEBRUARY 2022 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 very 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 probably not sufficiency-of-evidence-to-convict issues).

The entries below address the three February 2022 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 descriptions of the holdings/legal issues are bolded.

1. State v. Gualupe Ramos Leiva: On February 8, 2022, Division Two of the COA rejects the defendant's challenges to his Pierce County Superior Court convictions for (A) *three counts of rape of a child in the second degree,* (B) *one count of attempted rape of a child in the second degree,* (C) *one count of assault in the second degree, and* (D) *one count of felony harassment*. Leiva argued on appeal, among other contentions, that the trial court erred by denying his motion for a mistrial based on a law enforcement officer's "opinion testimony." **The Court of Appeals agrees with defendant that the detective gave improper opinion testimony in violation of a trial court order, but the Court rules that in light of all of the facts – including that (1) the prosecutor did not intentionally elicit the opinion, and (2) the trial court immediately responded with a curative jury instruction – the testimony does not require giving defendant a new trial**. The Leiva Court quotes the improper testimony as follows:

> [The State:] And did you observe anything about her demeanor during the interview?
>
> [Detective:] Yeah. I hate to say typical victim, unfortunately, but, you know, very upset, very emotionally distraught. But also in the things that she described, the repetitive nature kind of – it showed –
>
> [Defense Counsel:] I'm going to object. This is getting to commenting on the credibility of the witness, in this case the alleged victim, and vouching for her credibility.
>
> [The Court:] I'll sustain that. You can rephrase.
>
> [The State:] That's fine, Your Honor.
>
> [The State:] Was there anything about [A.S.'s] demeanor that you observed other than what you've already described?
>
> [Detective:] She was distressed, but she was also calm, which was kind of disturbing in that fact.
>
> [The State:] Why do you say that?
>
> [Detective:] Because – to say that someone is calm is to say that they've been conditioned with it, that it's been happening so much that they almost accept it, which is kind of sad. I mean, you could tell she was upset, but –

> [Defense Counsel:] Your Honor, I'm going to object. Can I be heard outside the presence of the jury?

The Opinion of the Court of Appeals provides lengthy analysis of the facts and of numerous legal considerations, including discussion of the "abuse of discretion" standard of review that requires giving great deference to the trial court's contemporaneous assessment of the effect on the jury of improper opinion testimony. Ultimately, although the fact that it was a law enforcement officer who gave the improper opinion testimony provides support for defendant's argument, the Court of Appeals rules that the detective's testimony does not require that defendant be given a new trial.

The Leiva Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2054439-3-II%20Unpublished%20Opinion.pdf

2. State v. Rachel G. Newell: On February 10, 2022, Division Three of the COA rejects the defendant's challenges to her Lincoln County Superior Court convictions for (A) *second degree burglary,* (B) *second degree malicious mischief, and* (C) *third degree theft*. Ms. Newell loses her argument that officers did not have reasonable suspicion under Terry v. Ohio to justify her temporary detention and questioning following a search-warrant-authorized seizure (1) of her boyfriend and (2) of the car that he was operating and in which she was a passenger. **The Court of Appeals rules that the seizure was justified based on facts that included the following: (1) officers had probable cause that the defendant's boyfriend had committed a particular burglary; (2) at the scene of the burglary, officers had observed a second set of suspect footprints that were smaller than the other set, and could be those of a female; (3) she and the boyfriend each had been arrested in the past for thefts and burglaries, had been stopped numerous times together, and the detaining officer had seen them many times and "never not together."**

The Newell Court rejects the State's alternative argument for justifying the temporary seizure. The State unsuccessfully argued that the seizure also could be justified under the U.S. Supreme Court decision in Michigan v. Summers, 452 U.S. 692 (1981), which held that an occupant of a residence that is being searched under authority of a warrant may be detained on the premises during the reasonable duration of the search. The Newell Court declares that the U.S. Supreme Court ruling in Michigan v. Summers applies only to warrant-based searches of fixed premises and does not apply to warrant-based searches of vehicles.

The Newell Opinion can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/377628_unp.pdf

3. State v. Matthew John McCollian: On February 28, 2022, Division One of the COA rejects the defendant's challenges to his Thurston County Superior Court convictions for (A) *murder in the second degree*, (B) *unlawful possession of a firearm in the second degree*, and (C) *arson in the second degree*. The Court of Appeals concludes, among other rulings, that **testimony from a police officer noting the existence of a perjury statement on a form signed by McCollian was not an improper comment on defendant's credibility, and, in the alternative, that, if viewed as such an improper comment, the officer's testimony about that statement was harmless error in light of the other evidence in the record**. In key part, the explanation of the Court of Appeals panel for its ruling is as follows:

> Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant. State v. Kirkman, 159 Wn.2d 918, 927 (2007). Such

testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. In determining whether testimony amounts to impermissible opinion testimony, courts consider the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759 (2001). In State v. Jones, this court concluded that an officer's statement that the defendant was lying was improper opinion testimony. 117 Wn. App. 89, 91-92 (2003). "Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence Is not improper opinion testimony." City of Seattle v. Heatley, 70 Wn. App. 573, 578 (1993).

In the instant case, the officer described the form that McCollian filled out when McCollian reported the theft of his Toyota Camry. The officer stated, "There's the perjury statement on there that we always have the person read. Basically, it says that you're not making a false preliminary report, that you understand that making a false police report is a crime." After the defense objected on the basis of improper testimony and veracity of a witness, the prosecutor explained, "I'm not planning to ask him any questions about anybody's veracity. He was just noting what the form had printed on it." The court overruled the objection, and the officer continued, ". . . perjury is also a crime, that's kind of the gist of it."

The officer never made a direct comment on McCollian's veracity. His testimony included statements of fact including a description of the perjury statement on the police report, a description of how he reminded McCollian about the perjury statement he signed after the vehicle was found, and a description of McCollian's demeanor and reactions. None of this testimony was improper.

After the vehicle was located, the officer described McCollian's reaction to the news, saying McCollian got increasingly "sort of aggressive and defensive on the phone." The officer responded to McCollian and "reminded him that making a false police report is a crime . . ." The prosecutor asked the officer, "Did you feel at that point that you had accused him of anything?" The officer responded, "No. I had not."

To the extent that the officer's reminder can be interpreted as the officer not believing the veracity of McCollian's statement, the error of including this statement was harmless. Once again, evidentiary error is not of constitutional magnitude. "[E]rror is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Kelly, 102 Wn.2d 188, 199, 685 P.2d 564 (1984).

The officer's comment did not materially affect the outcome of the trial in light of all of the other evidence presented as discussed above.

McCollian further contends that this issue is one of prosecutorial misconduct because it is improper for a prosecutor to seek to compel a witness' opinion as to whether another witness is telling the truth. As discussed, the prosecutor did not seek to compel the officer's opinion as to whether McCollian was telling the truth.

[Some citations omitted, others revised for style]

The McCollian Opinion can be accessed on the Internet at:

https://www.courts.wa.gov/opinions/pdf/832841.pdf

****

NEXT MONTH

The March 2022 Legal Update will include an entry on the March 3, 2022, Washington State Supreme Court decision in State v. Elwell. The Supreme Court has ruled in Elwell that an officer was not supported by the Fourth Amendment in removing a blanket and plastic wrapping from an item in possession of defendant Elwell under the following circumstances: **(A) About two hours before contacting the Elwell on the street, a law enforcement officer watched a surveillance video taken the previous evening of the unmasked Elwell stealing a large, Pac-man arcade machine and a large dolly, and wheeling the dolly and machine out of the burgled premises; (B) when the officer contacted Elwell on the street several hours later about a mile from the burgled premises, the suspect was a very close match in facial appearance and clothing to the thief on the video, and he was pushing on a dolly a large object about the size of a Pac-man machine covered by a large red blanket; and (C) the officer asked, "There wouldn't happen to be a [Pac-Man] machine in there, would there be?" and Elwell responded that he found it "in the garbage," and the officer pulled off the blanket and some plastic wrapping, uncovering the Pac-Man machine. The Court of Appeals had ruled by unpublished Opinion that "open view" justified the officer's actions, but the Washington Supreme Court's ruling is that the officer made an unlawful search when he removed the blanket and wrapping from the Pac-Man. However, the Supreme Court concludes that the trial court's error in admitting the evidence was harmless error in light of the other evidence in the case.**

The Supreme Court Majority Opinion and Concurring Opinion in State v. Elwell can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/995460.pdf

****

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 Assistant 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.

****

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].

****