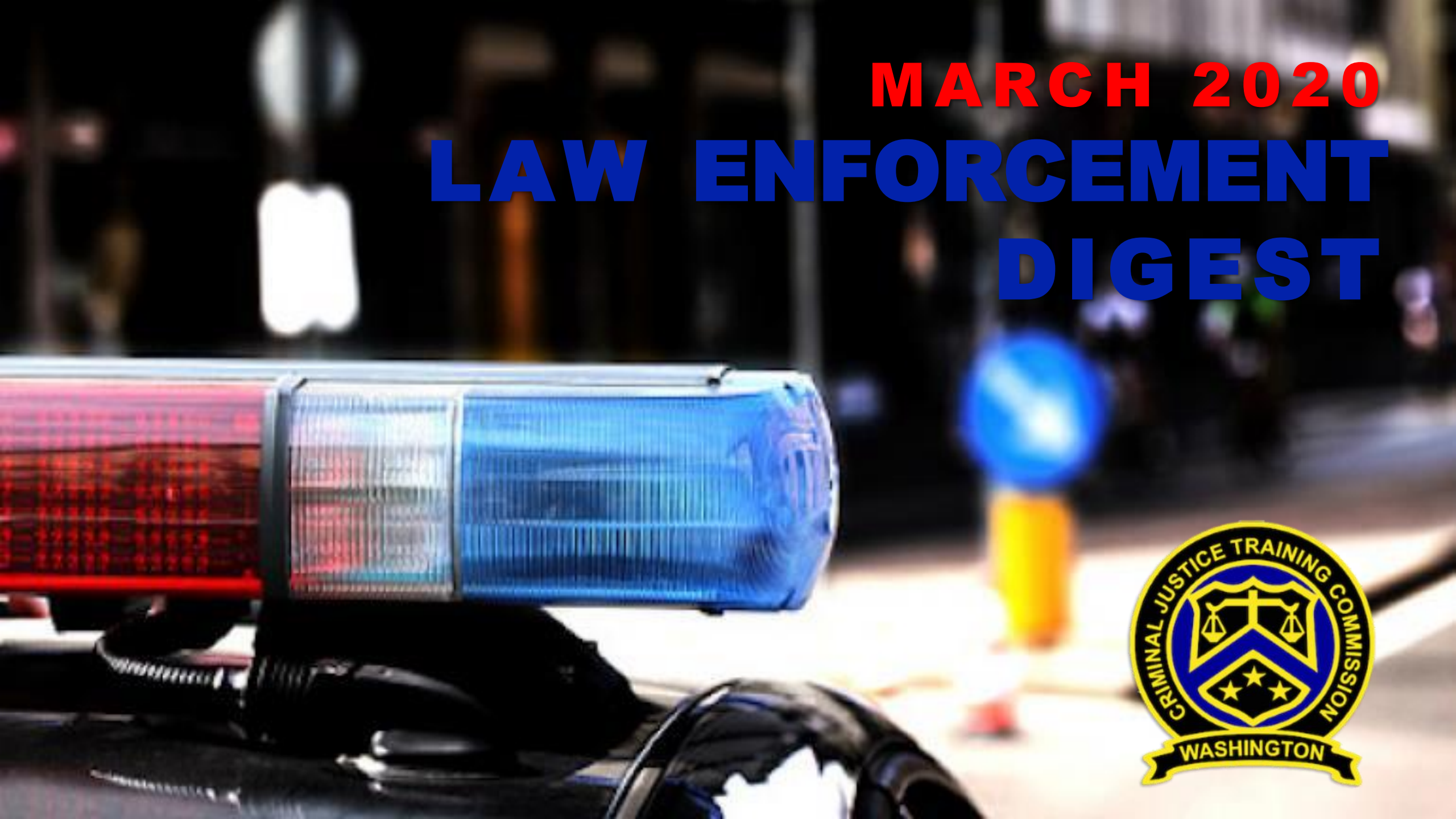


MARCH 2020

LAW ENFORCEMENT DIGEST

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the March 2020 **Law Enforcement Digest Online Training**! This LED covers select court rulings issued in the month of March from the Washington State Supreme Court, the Washington Courts of Appeal, the United States Supreme Court, and the Ninth Circuit Court of Appeals. The cases are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges.

Each cited case includes a hyperlinked title for those who wish to read the court's full opinion, as well as references to select RCWs. Links to additional Washington State prosecutor and law enforcement case law reviews and references are also included.

The materials contained in this document are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

MARCH 2020 EDITION

Covering select case opinions issued in March 2020

1. **DUI; DRUG RECOGNITION EXPERTS; OPINION TESTIMONY**
2. **DURESS; KIDNAPPING; MURDER**
3. **TELEPHONE HARASSMENT; CHARACTER EVIDENCE; PRIOR BAD ACTS**
4. **ADDITIONAL RESOURCE LINKS: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)**

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

FACTS:

The defendant failed to stop in time and rear-ended another vehicle. The investigating officers noted that the driver was behaving erratically, and suspected that he was impaired. The officer observed that the driver was sweating, despite standing outside in windy, chilly weather; could not recall how the collision occurred; and had mannerisms and actions that indicated per his training and experience to be consistent with someone under the influence of drugs, specifically a stimulant. No SFST were performed due to the location of the collision (the West Seattle Bridge in Seattle) and the collision. The arresting officer was trained to administer the SFSTs and general DUI enforcement, but was not a Drug Recognition Expert ("DRE"). The officer attempted to call out a DRE to the scene, but none was available to respond. The driver was placed under arrest for DUI and transported to the hospital for a blood draw, which later revealed amphetamine and methamphetamine in the driver's system at the time of the crash.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

FACTS, cont.:

At trial, the defendant filed motions in limine to limit the officers' testimony to personal observations, and to exclude any testifying officer's opinion on ultimate issues. Both motions were granted. The arresting officer testified to the signs and symptoms of impairment that led him to arrest the driver for DUI, and that "based on his training and experience [the driver showed] signs of possibly being impaired by a stimulant." When asked if thought the driver was impaired by drugs, the officer testified that his "opinion was that he was definitely impaired at the time of the accident." The defendant objected to that testimony, but the court overruled the objection. The defendant was found guilty of DUI.

The defendant appealed his conviction to the Superior Court claiming that the officer's testimony and that of the second officer were improper opinion testimony. The Superior Court granted the appeal and reversed the defendant's conviction. The City now appeals the reversal to the Court of Appeals.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY:

An officer who is not qualified as an expert witness and is not a Drug Recognition Expert may not testify as to the specific category of drug a DUI driver is suspected to be under the influence of, and may not testify that a driver was "definitely impaired" by drugs because that is the ultimate issue of guilt to be decided by the jury.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – EXPERT VERSUS LAY WITNESS:

Testimony may be given by a lay witness (governed by Evidence Rule 701) or as an expert witness (governed by Evidence Rule 702).

- **As an officer, you may be either a lay witness or an expert witness depending on the case, your potential qualification as an expert in a field, and the evidence desired to be admitted.**

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – EXPERT WITNESS OPINION TESTIMONY:

A witness who is to testify as an expert will have to be qualified by the court following ER 702 before they are allowed to give expert testimony.

The Rules of Evidence permit a witness to testify in the form of an opinion if:

(1) Scientific, technical, or other specialized knowledge will assist the trier of fact (jury or judge) to understand the evidence or to determine a fact in issue, and
(2) The witness qualifies as an expert by skill, knowledge, training, experience, or education. ER 702

An expert may be qualified by experience alone for issues that don't concern sophisticated or technical matters. See, State v. Johnson-Forbes (2012)

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – DRUG RECOGNITION EXPERTS AND *BAITY*:

The Washington State Supreme Court determined that the DRE 12-step evaluation protocol met the *Frye* standard for novel scientific procedures in State v. Baity (2000).

- In allowing this evidence, the WA Supreme Court noted the extensive training, education, field training, and testing required for an officer to receive certification as a Drug Recognition Expert lend the program scientific credibility.

A DRE who is properly qualified as an expert by the court may testify as to the DRE's opinion that a suspect's behavior and physical signs and symptoms are or are not consistent with those associated with a particular category of drug.

- DREs may NOT testify in a fashion that casts an aura of scientific certainty or offer an opinion as to the specific level of drugs present in a suspect.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – EXPERT OPINION TESTIMONY, DRUG CATEGORY:

Where neither officer testifying was a qualified Drug Recognition Expert, and the 12-Step DRE protocol was not performed, there is insufficient foundation for testimony that the driver was suspected to be under the influence of a specific category of drug.

While you don't have to be a DRE to investigate, arrest, and testify about a driver's suspected impairment by drugs in general, without the expert qualification and the 12-Step DRE protocol, you cannot suggest that you believe the impairment was due to a specific category of drugs without the expert qualification.

- The officer's training consisted of the standard 40-hour DUI course, additional basic training, and 13 DUI investigations, most of which had been performed with the assistance of a senior officer.
- While that level of training and experience qualifies the officer to form probable cause for a DUI arrest and offer an opinion in court based on the fact that he observed signs and symptoms consistent with drug and/or alcohol impairment, as a non-DRE, he is not qualified to offer an expert opinion that the defendant's behavior was or was not consistent with a specific category of drug.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – LAY OPINION:

If there isn't sufficient foundation to qualify a witness as an expert, the testimony may still be admissible as a lay opinion if it is based on knowledge from which a reasonable lay person could rationally infer the subject matter of the offered opinion.

The court found that a typical person with general experience wouldn't have the knowledge from which to rationally infer that an individual was impaired by a specific category of drug, so the officer's testimony about the suspected drug category also could not be offered as a lay opinion.

NOTE: The court previously held that an officer may offer lay opinion testimony as to a DUI suspect's alcohol intoxication based on the officer's training and experience. City of Seattle v. Heatley

It appears the court is distinguishing *Heatley* from the present case because here (1) no SFSTs were conducted on the defendant; (2) drug impairment is arguably more scientifically complex than alcohol-only impairment, requiring specialized knowledge or experience, which the officer didn't have; and (3) *Baity* set the bar requiring qualification as an expert in order to offer an opinion as to what category of drug caused the impairment.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – IMPROPER OPINION OF GUILT:

You should generally avoid using the legal standard in offering your opinion – aka you don't want to use the actual words of the jury instruction definition.

- **A trooper's testimony that a driver's specific level of intoxication was "impaired" mirrored the jury instruction definition for "under the influence" and therefore was an impermissible opinion of the driver's guilt. State v. Quaale (2014)**

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – IMPROPER OPINION OF GUILT:

The effects of alcohol are widely known by the average lay person, and a person can draw a conclusion that someone may be under the influence of alcohol by observing that they are unsteady or smell of alcohol. They wouldn't need to know the person's specific BAC to make that reasonable inference.

The court finds that the same inference is not reasonable when an officer is attempting to identify a particular category of drugs that is causing a suspect's impairment because they don't believe observations alone could identify a particular category of drugs.

- Observation is just one of the 12-steps of the DRE process for determining which drug category or categories a suspect is under the influence of.

You may testify as to the observations you made of any signs or symptoms that led you to conclude that drugs were possibly involved in causing a suspect's impairment, but you can't suggest that those observations led you to conclude that the impairment was caused by a particular category of drug.

1 DUI; DRUG RECOGNITION EXPERT; OPINION TESTIMONY

City of Seattle v. Levesque
No. 78304-1-I (March 16, 2020)
Court of Appeals, Division I

TRAINING TAKEAWAY – IMPROPER OPINION OF GUILT:

Opinion testimony isn't objectionable just because it embraces an ultimate issue that the jury must decide – the question is whether the testimony impermissibly comments on the guilt or truthfulness of the defendant.

To determine whether opinion testimony is admissible, the court weighs:

(1) The type of witness involved;
(2) The 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 (jury or judge).

A witness should not express their personal belief as to the defendant's guilt.

COVID-19

DUI Best Practice Guidelines for COVID from WSP

DUI arrests, crashes, and fatalities are all on the rise in Washington State. In order to help you continue your traffic enforcement while keeping yourselves and your communities safe, WSP has issued best practice guidelines for conducting DUI breath tests during the pandemic.

Please review these guidelines with your department legal advisor and/or risk management personnel to ensure you are in compliance with local directives.

2 DURESS; KIDNAPPING; MURDER

State v. Whitaker
No. 96777-6 (March 19, 2020)
Washington State Supreme Court

FACTS:

The defendant was charged in 2002 with helping his friend and several other young adults kidnap and kill the friend's former girlfriend. The defendant participated as his friend and the others lured the victim to a home, beat and bound her, hid her in a garage, and took her to a remote location where the defendant helped dig a grave, took the victim's clothes and jewelry, and buried her body after his friend shot her.

At trial, the defendant unsuccessfully requested a jury instruction on duress as a defense to the robbery and kidnapping aggravating factors, claiming that he acted out of fear of his friend (the victim's ex-boyfriend who led the execution of the crime and fired the shots that killed the victim). He was found guilty in 2004 of aggravated First Degree Murder and Conspiracy to Commit Murder for his role. In 2013, his convictions were reversed due to a public trial right violation. The case was sent back to the trial court where the defendant was again charged and with one count Aggravated First Degree Murder predicated on kidnapping and robbery, and one count Conspiracy to Commit First Degree Murder. In 2018, the Court of Appeals upheld the defendant's retrial conviction and held that the trial court had properly denied the defendant's request for a duress instruction. This issue is now being reviewed by the Washington State Supreme Court.

2 DURESS; KIDNAPPING; MURDER

State v. Whitaker
No. 96777-6 (March 19, 2020)
Washington State Supreme Court

TRAINING TAKEAWAY – DURESS:

A defendant may not claim the defense of duress, RCW 9A.16.060, to the underlying crime (kidnapping) which serves as the aggravator to a murder charge because duress is not available as a defense to the crimes of murder, manslaughter, or homicide by abuse.

The duress defense is available to excuse those who find themselves in a situation where they must choose between being forced to commit a crime against their wishes or facing grievous bodily harm or death, but choosing to kill an innocent person is never the lesser of two evils, and thus never excusable.

2 DURESS; KIDNAPPING; MURDER

State v. Whitaker
No. 96777-6 (March 19, 2020)
Washington State Supreme Court

PRACTICE POINTER – WHY ARE JURY INSTRUCTIONS RELEVANT TO COPS?

Officers sometimes question why they should concern themselves with court rulings that focus on the giving or defining of jury instructions, however, jury instructions are what define the laws that your investigations must provide evidence to support.

Investigations should be conducted with the eye to the end result: have the elements of the particular crime been met by the evidence I have collected?

Jury instructions set the standard of law against which that evidence will be weighed as the jury determines the potential guilt of the defendant, and the more in depth your understanding is of the law, the stronger your cases will be.

Knowing whether a suspect can avoid culpability for his actions by claiming a legitimate defense in court helps you weigh whether you have enough evidence for a charge, and may lead you to seek out additional evidence that can be used to counter their potential reliance on the defense.

3 TELEPHONE HARASSMENT; PRIOR BAD ACTS; CHARACTER EVIDENCE

State v. Riley

No. 36169-1-III, March 17, 2020
Court of Appeals, Division III

FACTS:

A husband and wife separated after 13 or 14 years of marriage. The husband moved out of the family home and contacted the utility company to remove his name from the utility bill. A utility worker was dispatched the home. When the wife learned why he was there, she became visibly upset. The woman made two telephone calls to her estranged husband. The first call was overheard by the utility worker. The husband alleged that the wife threatened to shoot him in the head. The utility worker didn't hear that specific threat, but did hear her cursing and issuing other threats to her estranged husband. Her demeanor was described as angry and loud, and the husband testified that it was "extremely scary." He also noted that she owned two guns, was a good shot, and usually "meant what she said."

The second call was made after the estranged husband called 911 and the responding deputy overheard the conversation. The wife told her estranged husband that if he came to her house to pick up their children later that day as was previously set up, she guaranteed he would "leave in an ambulance."

3 TELEPHONE HARASSMENT; PRIOR BAD ACTS; CHARACTER EVIDENCE

State v. Riley

No. 36169-1-III, March 17, 2020
Court of Appeals, Division III

FACTS, CONT.:

The wife was charged with two counts of Telephone Harassment, one count Witness Tampering, and one count of Violating a No Contact Order. The trial court excluded four proposed defense witnesses who would testify that (1) they hadn't previously observed marital discord between the spouses, and (2) the husband had previously filed a false police report against his estranged wife. The trial court allowed a witness for the State to testify that she had observed the defendant smack her husband in the back of the head on multiple occasions for minor incidents in which she was angry or displeased with him. At trial, the husband was also permitted to testify to multiple prior incidents in which his wife behaved aggressively or displayed threatening behavior. The defendant was convicted of Telephone Harassment, and she now claims that her convictions should be reversed because the trial court erred in admitting the testimony about her alleged prior bad acts.

3 TELEPHONE HARASSMENT; PRIOR BAD ACTS; CHARACTER EVIDENCE

State v. Riley

No. 36169-1-III, March 17, 2020
Court of Appeals, Division III

TRAINING TAKEAWAY – PRIOR BAD ACTS AND CURRENT THREATS:

Evidence of prior bad acts that is offered to prove the reasonableness of a threatened harm is admissible because its purpose is to explain why the defendant's words constituted a true threat in a case of harassment.

- **Character evidence of prior bad acts may generally not be used to prove the witness or party acted in conformity with their prior behavior.**
- **Evidence of a witness' or defendant's character is limited because the fundamental intent of a fair trial is to judge only what someone has done or said, not who they are.**

3 TELEPHONE HARASSMENT; PRIOR BAD ACTS; CHARACTER EVIDENCE

State v. Riley

No. 36169-1-III, March 17, 2020
Court of Appeals, Division III

TRAINING TAKEAWAY – PRIOR BAD ACTS AND CURRENT THREATS:

The court follows a 4-part test set out in Evidence Rule 404(b) to:

(1) Find by a preponderance of the evidence that the misconduct occurred;
(2) Identify the purpose for which the evidence is sought to be introduced;
(3) Determine whether the evidence is relevant to prove an element of the crime charged; and
(4) Weigh the probative value against the prejudicial effect. State v. Vy Thang

3 TELEPHONE HARASSMENT; PRIOR BAD ACTS; CHARACTER EVIDENCE

State v. Riley

No. 36169-1-III, March 17, 2020
Court of Appeals, Division III

TRAINING TAKEAWAY – PRIOR BAD ACTS AND TRUE THREATS:

The purpose of the evidence was not to prove that the current crime occurred because it was within the defendant's modus operandi (which would not be permitted because the current crimes weren't substantially similar to the prior bad acts), but rather to demonstrate why the victim had a reasonable fear that the defendant's threats were true.

- **Evidence that the wife previously threatened and engaged in assaultive behavior toward her husband bolstered the credibility of his fear that the subsequent telephone threats could be carried out and reasonably lead him to fear for his safety.**

3 TELEPHONE HARASSMENT; PRIOR BAD ACTS; CHARACTER EVIDENCE

State v. Riley

No. 36169-1-III, March 17, 2020
Court of Appeals, Division III

TRAINING TAKEAWAY – TRUE THREAT:

A true threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

- The evidence of the wife's prior aggressive and assaultive behavior meets part 3 of the ER 404(b) test because it is relevant to prove the existence of a true threat - a required element in the crime of Telephone Harassment.

COVID-19

WASPC has created an extensive list of COVID-19 resources and guidance for Washington law enforcement.

Access the page here: **WASPC COVID-19 Guidance for Law Enforcement**

REMINDER: Always consult with your agency legal advisor before altering any practice or procedures.

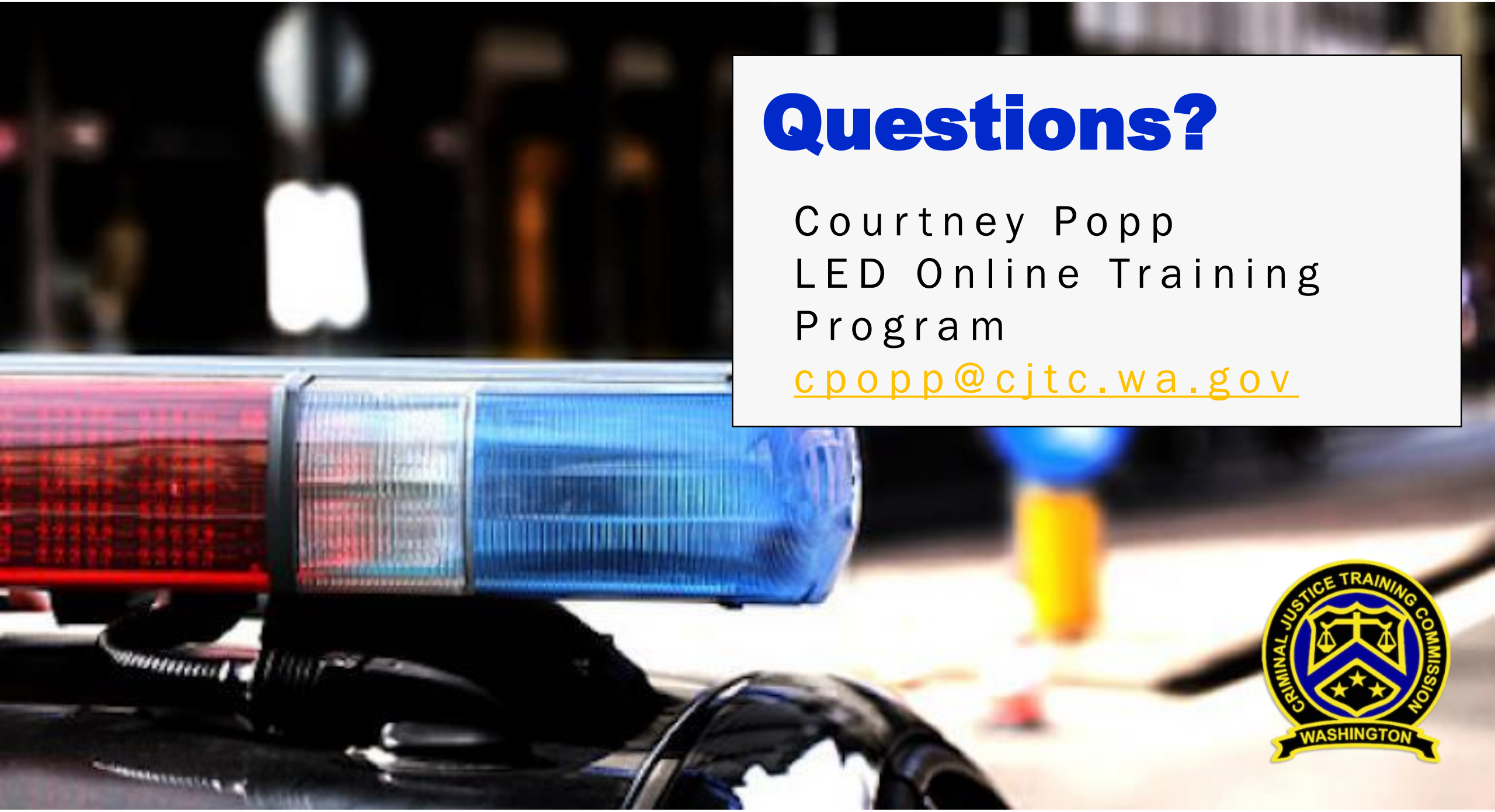
FURTHER READING

For further cases of interest to law enforcement, please see the comprehensive monthly Legal Update for Law Enforcement prepared by Attorney John Wasberg (former longtime editor of the original LED), which is published on the WASPC Law Enforcement Resources webpage:

http://www.waspc.org/legal-update-for-washington-law-enforcement

The Washington Prosecutor's Association publishes a comprehensive weekly summary of a wide range of caselaw geared toward the interests of Washington State Prosecutors. This resource is authored by WAPA Staff Attorney Pam Loginsky.

http://70.89.120.146/wapa/CaseLaw.html



Questions?

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