FEBRUARY 2018

LAW ENFORCEMENT DIGEST

CRIMINAL JUSTICE TRAINING COMMISSION
WASHINGTON

LAW ENFORCEMENT ONLINE TRAINING DIGEST

Welcome to the new **Law Enforcement Digest Online Training**! This refreshed edition of the LED continues the transition to an online training resource created with the Washington law enforcement officer in mind. Select court rulings from the previous month are summarized briefly, arranged by topic, with emphasis placed on the practical application of legal changes to law enforcement practices.

Each cited case includes a hyperlinked title for those who wish to read the court's full opinion. Links have also been provided to additional Washington State prosecutor and law enforcement case law reviews and references.

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.

LAW ENFORCEMENT ONLINE TRAINING DIGEST

FEBRUARY 2018 Edition

Covering Select Cases Issued in January and February 2018

- WITNESS TAMPERING
- PC FOR ARREST & QUALIFIED IMMUNITY
- ACCOMPLICE LIABILITY
- ACCOMPLICE LIABILITY & EXTREME INDIFFERENCE
- BURGLARY – JAIL CELL
- UNLAWFUL POSSESSION OF A LOADED RIFLE OR SHOTGUN IN A VEHICLE
- VOYEURISM & UNITS OF PROSECUTION
- Additional Resource Links: Legal Update for Law Enforcement (WASPC, John Wasberg) & Prosecutor Caselaw Update (WAPA, Pam Loginsky)

1 WITNESS TAMPERING

UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

State v. Gonzalez, COA No. 48850-7-II (January 17, 2018)

Division 2, Court of Appeals

Facts:

Defendant charged with Possession of a Controlled Substance (methamphetamine) and Witness Tampering related to his unauthorized taking of his girlfriend's mother's vehicle. Upon returning to the mother/girlfriend's home and seeing the police, he fled the home in the mother's vehicle. After bailing from the vehicle, which crashed, and fleeing on foot, the defendant was arrested. A baggie of methamphetamine and cocaine was found in the defendant's pocket during the search incident to arrest.

Following his arrest, defendant phoned his girlfriend from a recorded line in the jail. During this call, defendant told the girlfriend that someone ("an 'investigator,' or 'somebody'") was going to call her, and she should tell that person that she gave him permission to use the vehicle. The girlfriend replied "that would be hard for her to do." Gonzalez then replied, "well then, don't do it." When the girlfriend told him that he, "knew the deal" (apparently about the use of her mother's car), the defendant aggressively interrupted her with "listen" and "we aren't going to talk about all of that," and instructed her that "she knew what to do." After requesting she visit so they could discuss marriage, and the girlfriend expressing that she would miss him, defendant ended the call by asking her "whether she'd rather deal with that for 6 or 15 years" (apparently implying the difference in sentencing range depending on crimes he would be convicted of depending on the girlfriend's testimony.)

1 WITNESS TAMPERING

UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

State v. Gonzalez, COA No. 48850-7-II (January 17, 2018)

Division 2, Court of Appeals

Facts:

At trial, the State briefly mentioned that methamphetamine was found on the defendant, and later testimony by the forensic toxicologist confirmed the tested substance contained both methamphetamine and cocaine. Neither the testifying officers nor either attorney during closing argument mentioned cocaine.

After testifying along the lines of the facts above, on cross examination by the defense, the girlfriend confirmed that the defendant had asked her to change her story (that he didn't have permission to use the car), but claimed he must've been "just talking" since he would've known she was not the kind of person to change her story and "look like a dumbass."

In this appeal, defendant challenged the State's failure to name the drug in the to convict jury instruction at trial, claiming this was not a harmless error, and claims there wasn't enough evidence to convict him of the witness tampering.

1 WITNESS TAMPERING

UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

State v. Gonzalez, COA No. 48850-7-II (January 17, 2018)

Division 2, Court of Appeals

TRAINING TAKEAWAY:

Identifying the controlled substance is a necessary element of the crime of Unlawful Possession of a Controlled Substance, and therefore must be named in the "to-convict" jury instruction.

** The error was found to be harmless (not requiring the conviction to be overturned), but because the particular drug on which a possession charge is based impacts the sentence range for the crime, the case was sent back to the trial court for resentencing.

Details Matter! This case is a great reminder to provide the most specific information in any charging documents, case reports, and if you're a prosecutor, the jury instructions.

**Tip: Follow the RCW to ensure you don't leave out any critical elements of a crime.

Asking a witness to tell a false story to a defense investigator supports a charge of witness tampering because in order for that to be of value, it would also ultimately require her to testify falsely in court.

1 WITNESS TAMPERING

INVESTIGATIVE TIPS

When determining if evidence is sufficient to prove a crime, the court asks "would any rational finder of fact be able to find the crime was committed beyond a reasonable doubt" based on what was presented.

**Circumstantial and direct evidence have the same weight, and the evidence is weighed most favorably to the non-moving party (the party that is not making the motion to exclude the testimony…which in this case was the State).

While the evidence in this case largely came from the witness' own words via the recorded jail call and her on the stand testimony, it also applies when you are documenting information that a witness relays to you during an investigation.

Adding "between the lines" context of any statements can be valuable evidence.

**Tip: Convey the witness' tone of voice, any physical signs of reluctance or fear, and other details to paint a clear and robust picture of the interaction (both between you and the witness, and information the witness provides about their interaction with the defendant).

2 PC FOR ARREST; WITNESS TAMPERING

UNLAWFUL ENTRY

District of Columbia v. Wesby, No. 15-1485 (Jan. 22, 2018)

UNITED STATES SUPREME COURT

Facts:

District of Columbia officers responded to reports of loud music and illegal activity at 1am in a house that had been vacant for months. When officers arrived, the house was nearly empty, littered with beer bottles and liquor cups on the dirty floor, smelled of marijuana, and had a makeshift strip club set up in the living room. Officers found a naked woman and several men in an upstairs bedroom, and many partygoers who fled and/or hid when the officers arrived.

The 21 partygoers provided inconsistent statements, with two of the women saying the tenant of the house, "Peaches," had given the partygoers permission to have the party. Peaches was not in the home. Officers reached Peaches by phone. She first claimed to be renting the house and that she had given permission for the party, but finally admitted she did not have permission to be in the home. The owner of the house confirmed that although he had been in discussions to potentially rent the home to Peaches, they had not made an arrangement, and she did not have permission to use the house.

The partygoers were arrested for false entry/trespassing. Several sued for false arrest, and the District Court concluded the officers lacked PC, and that two of the officers were not entitled to qualified immunity. The Circuit court confirmed, and the officers appealed to the Supreme Court.

2 PC FOR ARREST; WITNESS TAMPERING

UNLAWFUL ENTRY

District of Columbia v. Wesby, No. 15-1485 (Jan. 22, 2018)

UNITED STATES SUPREME COURT

TRAINING TAKEAWAY:

The sufficiency of probable cause is determined by reviewing the totality of the circumstances, not a standalone review of each individual fact.

Officers can make reasonable inferences and "common sense conclusions about human behavior" from the totality of the circumstances they encounter, as well as their training and experience.

Evidence for which there is a potentially innocent explanation is not to be automatically disregarded.

ASK: Would a reasonable officer conclude, considering all of the surrounding circumstances, including the believability of the explanation itself, that there was a substantial chance of criminal activity?

Qualified Immunity: The officers had qualified immunity against the false arrest claims because they were entitled to disbelieve the partygoers' story that they were there as innocent invitees.

2 PC FOR ARREST; WITNESS TAMPERING

INVESTIGATIVE TIPS

EXPLAIN YOUR THOUGHT PROCESS!

The primary basis for the claim of false arrest was that the partygoers claimed to have been invited to the property, and to have had no actual knowledge of or reason to know that the invitation was unauthorized.

By providing reasonable facts and explaining the logical inferences they drew from what they observed, the officers successfully contradicted these claims.

- Makeshift strip club in the living room and apparent group sex activity in a bedroom occupied only by a single mattress on the floor, one naked woman, and several men = these are not typical activities in a residence.
- Home was exceptionally filthy, mostly vacant/unfurnished, and there were no moving boxes = didn't look like anyone lived there or was moving in;
- Partygoers fled and hid when officers arrived = knew they weren't supposed to be there;
- Numerous inconsistent stories as to who lived there, who gave them permission to be there, and what was occurring = dishonesty

2 PC FOR ARREST; WITNESS TAMPERING

INVESTIGATIVE TIPS

CLOSE THE OPEN DOORS!

Officers also used the interview with the home's owner to get additional information relevant to establishing that neither "Peaches," nor her "guests" had permission to occupy the home, successfully closing any "open doors" that the defense could have walked through.

Officers confirmed that:

- It was a vacant property;
- The homeowner knew "Peaches" and had discussed possible tenancy but did not have any occupancy or use agreement with her; and
- No one was authorized to be there or to be engaging in the activities occurring.

These facts not only helped establish the elements of the charge, but also proactively closed off potential defenses as to both "Peaches" and the partygoers.

3 ACCOMPLICE LIABILITY

Burglary 1st Degree and Assault 2nd Degree
State v. Dreewes, COA No. 74055-5-I (Jan. 29, 2018)
Division 1, Court of Appeals

Facts:

Defendant's personal property, including a laptop, iphone, jewelry, and credit cards, was stolen from her truck. She reported the theft to police. The following day, defendant's credit card was used in several stores. After police were unable to get video from those stores, the defendant went in person to ask store employees who they saw using the card. One employee replied that it was a "skinny white crack whore looking girl with pink hair." Defendant posted that information on her Facebook page with a request for help identifying the woman and getting her property back. A high school friend contacted the defendant and offered the assistance of her boyfriend in tracking down the woman. After a series of texts, Facebook messages, and calls between them, the friend provided defendant with a name – Vanessa "Ness" Miller, phone number, address, and vehicle description/plate (determined by police to be registered to Marty Brewer-Slater, to whom no connection could be made to Ms. Miller) from a house where her nephew said he saw the pink haired girl and the defendant's property.

In subsequent messages and calls between the friend and defendant, the defendant offered the friend and the friend's boyfriend $300 in cash if they tracked down the pink haired girl, gave her two black eyes, and got defendant's property back without police involvement. The friend accepted this offer, and was told by defendant that there would be 4 to 5 people in the house, and not to go there unless "packing."

3 ACCOMPLICE LIABILITY

Burglary 1st Degree and Assault 2nd Degree
State v. Dreewes, COA No. 74055-5-I (Jan. 29, 2018)
Division 1, Court of Appeals

Facts, cont.:

On the morning of the Burglary and Assault, the friend and her boyfriend went to the home twice. The first time they were unable to gain access. The defendant was informed of this and the pair's plan to return a second time. On the return trip, the boyfriend, armed with a rifle, forced his way into the Brewer-Slater home (the wife, Marty, being the RO of the previously identified vehicle they believed to be associated with the pink haired girl). The girlfriend was armed with a pistol, duct tape, and zip ties. In the ensuing melee, the boyfriend threatened to kill the family, struck the husband in the face with the rifle, attempted to shoot the wife (but with the gun's safety still on, was unable to), and then tried to flee. The girlfriend's pistol was taken from her by the homeowner, and she fled.

After fleeing the home, the girlfriend called the defendant and told her what had happened. The defendant instructed the girlfriend to go to defendant's mother's house, and that she would be there soon. Defendant erased all of the messaged they'd exchanged. The girlfriend contacted police.

3 ACCOMPLICE LIABILITY

Burglary 1st Degree and Assault 2nd Degree
State v. Dreewes, COA No. 74055-5-I (Jan. 29, 2018)
Division 1, Court of Appeals

Facts, cont.:

Defendant was charged as an accomplice to one count Burglary 1st Degree while armed with a firearm, and one count Assault in the 2nd Degree of Marty Brewer-Slater while armed with a firearm.

At trial, there was significant testimony to support that defendant was involved in the planning and encouragement of the burglary of the Brewer-Slater home. Text and Facebook messages and witness testimony confirmed she had asked her friend (and the friend's boyfriend) to go to the home, beat up the suspected thief of her belongings, and get her property back. Defendant had also discussed the need for the pair to be armed when going to the home. She was notified prior to the burglary that the pair was in the neighborhood and ready to commit the crime, and again once the friend had fled the home. Defendant then offered to help the friend following the crime.

Defendant denied knowing about the plan to hurt the pink haired girl, or the planned use of weapons, saying the messages were just a joke. She denied knowing anything about the day of the Burglary, despite a witness confirming she took a call and then said a friend got in a scuffle trying to get defendant's things back for her, and there were guns involved. Defendant was convicted of both charges.

3 ACCOMPLICE LIABILITY

Burglary 1st Degree and Assault 2nd Degree
State v. Dreewes, COA No. 74055-5-I (Jan. 29, 2018)
Division 1, Court of Appeals

TRAINING TAKEAWAY

To be an accomplice, the defendant must have knowledge that his or her conduct would promote or facilitate the crime charged.

That knowledge doesn't need to extend to every element of the crime – general knowledge of the crime is enough.

- The accomplice is legally accountable if she solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime.
- The accomplice does not need to be present during the commission of the crime.

3 ACCOMPLICE LIABILITY

Burglary 1st Degree and Assault 2nd Degree
State v. Dreewes, COA No. 74055-5-I (Jan. 29, 2018)
Division 1, Court of Appeals

TRAINING TAKEAWAY

The court found sufficient evidence had been presented to convict the defendant as an accomplice to Burglary in the 1st Degree while armed with a firearm.

- Her co-defendants used the firearms defendant told them to bring to force their way into the residence to commit a crime against "a person or property therein."

The court reversed the conviction for accomplice to Assault in the 2nd Degree of Marty Brewer-Slater while armed with a firearm.

- Because the "to convict" jury instruction named the victim, which otherwise wasn't required, that became an essential element of the crime.
- Although uncontroverted evidence proved that defendant was generally an accomplice to Assault in the 2nd Degree, there was not enough evidence to specifically support that she had knowledge of a specific assault as to the named victim.

3 ACCOMPLICE LIABILITY

INVESTIGATIVE TIPS

Charging a defendant as an accomplice to a crime requires your investigation establish the elements of the underlying crime, as well as establish the defendant's participation as an accomplice.

In this case, the defendant not only solicited the crime to be committed by offering her co-defendants cash to assault the supposed thief, but she also engaged in extensive planning and promoting of the crime during the lead up and commission of the actual burglary and assault. Her involvement continued following the crime by trying to keep the friend from getting caught. Although she may not have known who would be in the home, and/or what exactly might occur, the evidence clearly showed that she could and would have known that crimes would be committed.

4 BURGLARY (Jail Cell)

Burglary 2nd Degree, Theft 3rd Degree, and Assault 3rd Degree
State v. Dunleavy, COA No. 34762-1-III (Feb. 6, 2018)
Division 3, Court of Appeals

FACTS

Defendant was an inmate at the Walla Walla County Jail. He threatened a fellow inmate with physical harm after asking for, and being denied, food that inmate had in his cell. That inmate was shortly thereafter severely beaten by a third inmate, during which time the defendant entered his cell and took the food he had previously been denied. Jail staff believed the assault and the theft were linked, and therefore forwarded the case to prosecutors for charging.

Cells house 2 inmates, with a group of 8 cells opens to a common area. Individual cell doors are open in the jail between the hours of 6am and 9pm. An inmate may choose to close his door during that time, but it will then remain locked until the following morning. Testimony stated that inmates are made aware that they are not to enter into another inmate's cell, and that an inmate has an expectation of privacy from other inmates in his cell.

Defendant moved to dismiss the Burglary charged on the basis that an inmate's cell is a separate building for purposes of RCW 9A.04.110(5). .

4 BURGLARY (Jail Cell)

Burglary 2nd Degree, Theft 3rd Degree, and Assault 3rd Degree
State v. Dunleavy, COA No. 34762-1-III (Feb. 6, 2018)
Division 3, Court of Appeals

TRAINING TAKEAWAY

Burglary in the 2nd Degree requires proof that the defendant, with intent to commit a crime against a person or property therein, enter or remains unlawfully in a building other than a vehicle or a dwelling. (RCW 9A.52.030(1).)

"Building" as relevant here, is defined as "any structure used for lodging of persons; each unit of a building consisting of two or more units separately secured or occupied is a separate building."

- Both parties agreed that the jail is a building used to lodge inmates.
- Testimony established that each cell is secure at night, and an inmate can secure his cell from others.
- A jail is therefore a building multiple separate units that can be separately secured or occupied.

The court held that under the statute, a jail cell is a separate building, and therefore meets the necessary element of Burglary in the 2nd Degree.

There is no requirement that the individual unit/jail cell be secured or occupied at the time the crime is committed.

5 UNLAWFUL POSSESSION OF A LOADED FIREARM IN A VEHICLE

Unlawful Possession of a Loaded Rifle in a Vehicle

State v. Pinkham, COA No. 34438-0-III (Feb. 6, 2018)

Division 3, Court of Appeals

FACTS

Defendant was charged in District Court by a Fish and Wildlife Officer for unlawfully possessing a loaded rifle in a vehicle under RCW 77.15.460(1), a simple misdemeanor.

Unlawful Possession of a Loaded Rifle or Shotgun in a vehicle is a "strict liability" crime, meaning only proof of the act, and not an accompanying mental state (ie. knowledge), is required for the conviction.

- The court held that there is no knowledge requirement in the statute, and despite the prosecutor having added it in to the charging paperwork, it wasn't a necessary element that had to be proven in order to convict the defendant of Unlawful Possession of a Loaded Rifle in a Vehicle, RCW 77.15.460(1).

NOTE: This finding is limited to the misdemeanor crime of Unlawful Possession of a Loaded Shotgun or Rifle in a Vehicle, RCW 77.15.460(1).

- See, State v. Anderson, 141 Wash.2d 357 (2000), which held that 2nd Degree Unlawful Possession of a Firearm is not a strict liability crime, and the State must prove the defendant had or should have had knowledge of the presence or possession of the firearm.

6 VOYEURISM; UNIT OF PROSECUTION

Voyeurism
State v. Mason, COA No. 34438-0-III (Feb. 6, 2018)
Division 3, Court of Appeals

FACTS

Defendant hid a camera in the bathroom he shared with his stepsister and brother in law. Over the course of a few months, the camera recorded his stepsister once, his brother in law three times, and once captured no one. Defendant's stepbrother discovered the camera, and police were contacted once the family watched the video and saw the defendant setting up the camera. Defendant was charged with 4 counts of Voyeurism and one count of Attempted Voyeurism. At trial, his stepsister (the first victim filmed) testified that she always showered between 10:30pm and midnight. The first video was of her, but captured only her shoulders and above as she entered and exited the shower. The camera angle of the remaining 4 videos was adjusted to show more of the bathroom (and its occupants' bodies), and all were filmed between 9:42pm and 11:53pm. Defendant testified that his intent was to use the footage to get back at his brother in law for walking into his room while defendant's girlfriend was half dressed, and to show that his brother in law fixed the family dinner without washing his hands after urinating.

Defendant now appeals the conviction alleging that charging him for multiple counts on a single victim violated his double jeopardy rights, and claims that there was insufficient evidence of his intent to film for the purpose of sexual gratification.

6 VOYEURISM; UNIT OF PROSECUTION

Voyeurism
State v. Mason, COA No. 34438-0-III (Feb. 6, 2018)
Division 3, Court of Appeals

TRAINING TAKEAWAY

UNIT OF PROSECUTION:
The voyeurism statute (RCW 9A.44.115) prohibits knowingly viewing, photographing, or filming, without knowledge or consent, for the purpose of arousing or gratifying the sexual desire of a person, anyone in a place where they have a reasonable expectation of privacy, or the intimate areas of another person whether in a public or private space.

"Photographs" or "films" are defined as, "the making of a photograph, motion picture film, videotape, digital image, or any other recording or transmission of the image of a person."

- **In a circumstance of multiple films (or images) made of the same victim, a defendant may be charged one count per each film made, rather than merely one charge per victim.**

The court held that each film, photograph, videotape, digital image, or other recording made is an individual unit, and therefore charging for each video made does not violate double jeopardy.

6 VOYEURISM; UNIT OF PROSECUTION

Voyeurism
State v. Mason, COA No. 34438-0-III (Feb. 6, 2018)
Division 3, Court of Appeals

TRAINING TAKEAWAY

SEXUAL GRATIFICATION:

Evidence of a crime is sufficient if any rational finder of fact could find beyond a reasonable doubt that the crime had occurred after examining the evidence presented (direct and circumstantial evidence being equally weighted), in the light most favorable to the non-moving party.

Here, the circumstantial evidence showed that the 5 films had all been made during the time of his stepsister's daily shower, the camera had been angled to capture more of the body after the first video (of her) captured only her shoulders and head, and that the filming was done in the bathroom – a space of private and personal activities where one is often undressed.

The defendant's attempted innocent explanation of his actions wasn't relevant to the court's determination of sufficiency on the sexual gratification element. The court found ample evidence to support the finding that the filming had been done with the intent of sexual gratification.

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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