Law Enforcement Digest

MAY 2011

Law enforcement officers: Thank you for your service, protection and sacrifice.

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LAW ENFORCEMENT DIGEST CO-EDITOR, JOHN WASBERG, IS RETIRING; CURRENT CO-EDITOR, SHANNON INGLIS, WILL CONTINUE AS THE LED EDITOR

Effective May 1, 2011, Assistant Attorney General, John Wasberg, is retiring from the Attorney General's Office after 35+ years as an Assistant Attorney General and 32+ years as the Law Enforcement Digest's editor (from 1978 through 1999) and co-editor (from January 2000 through this LED issue). Assistant Attorney General, Shannon Inglis, who has been co-editor of the LED since January of 2000, will be the editor of the LED. Mr. Wasberg will continue to provide some volunteer assistance to AAG Inglis on the LED.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

SIXTH AMENDMENT CONFRONTATION: CRAWFORD-DAVIS STANDARD CLARIFIED IN FAVOR OF STATE IN CASE INVOLVING ONGOING-EMERGENCY STATEMENTS BY DYING SHOOTING VICTIM IN GAS STATION PARKING LOT; OBJECTIVE LOOK AT PURPOSES OF BOTH THE VICTIM AND THE QUESTIONING OFFICERS REQUIRED – In Michigan v. Bryant, 131 Ct. 1143 (2011), the U.S. Supreme Court rules 6-2 that statements that a dying shooting victim gave in serial questioning by several police officers while the victim was dying in a gas station parking lot (where he had driven after being shot) were, under an objective look at the totality of the circumstances, admissible under the U.S. Constitution's Sixth Amendment confrontation clause even though the declarant was dead and therefore not available for cross examination at the time of trial. The majority opinion concludes that the statements from the victim in this ongoing-emergency situation – which statements, among other things, addressed his condition and identified the shooter and location of the shooting – were not "testimonial" out-of-court statements under the Sixth Amendment right-to-confrontation tests of Crawford v. Washington, 124 S. Ct. 1354 (2004) **May 04 LED:20** and Davis v. Washington, 126 S. Ct. 2266 (2006) **Sept 06 LED:03**.

The Crawford-Davis test has been interpreted by lower courts as focusing primarily on four admissibility factors to determine if law enforcement officer questioning of a witness or victim is primarily to deal with an ongoing emergency, or instead if the statements of the witness or victim generally are to be deemed inadmissible "testimonial," out-of-court statements. Those four factors are: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the

statements were necessary to resolve a present, on-going emergency, or instead to learn what had happened in the past; and (4) whether the interrogation efforts are formal or informal.

The Bryant majority opinion concludes that the mortally wounded man's identification and description of the shooter and the location of the shooting were not testimonial statements because they had a "primary purpose," as did the police questioning, to enable police assistance to meet an on-going emergency. The majority opinion clarifies that to make the "primary purpose" determination, the Court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs, and must consider the parties' (both victim and police) statements and actions. The statements and actions of both the declarant and interrogators provide objective evidence of the interrogation's primary purpose, the majority opinion explains. The existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An assessment of whether an emergency threatening the police and public is ongoing must consider the threat to the victim, to the first responders and to the general public, the majority opinion concludes. Informality, here police questioning of a dying victim in a gas station parking lot to learn his condition and the circumstances of the shooting (as opposed to more formal questioning in a different setting), is also an important factor in determining whether the statements are "testimonial."

Justice Scalia writes a stinging solo dissent. He indicates that it is absurd for the majority opinion to conclude that the primary purpose of the police questioning in this case was to: (1) deal with an ongoing emergency and to protect the police and general public, and not (2) merely investigate a recently committed crime. Justice Scalia urges, as he has in past decisions regarding the confrontation clause, that the Court instead adopt a very simple and broadly exclusionary view of the Sixth Amendment confrontation clause.

Justice Ginsburg writes a much shorter and more temperate dissent. She does state, however, that she agrees with the general principles asserted by Justice Scalia.

Result: Reversal and vacation of Michigan Supreme Court decision that reversed the conviction of Richard Perry Bryant of second-degree murder and being a felon in possession of a firearm; case remanded to the Michigan courts to determine if the statements of the dying victim are admissible under Michigan's hearsay rules.

LED EDITORIAL NOTE: LED entries on appellate court decisions interpreting the Sixth Amendment confrontation right in the past five years are: State v. Price, 158 Wn.2d 630 (2006) Jan 07 LED:07 (where a pivotal issue was whether a child victim's hearsay statements were admissible, questions that the deputy prosecutor asked of the child victim on direct examination in this child molestation case, and the child's answers, were sufficient testimony to satisfy the confrontation clause requirement that defendant have opportunity to cross examine witness, even though child claimed no recollection of crime in her testimony at trial); State v. Ohlson, 162 Wn.2d (2007) Feb 08 LED:05) (statements by assault victim to police moments after assault during ongoing emergency were not testimonial); Giles v. California, 128 S. Ct. 2678 (2008) Sept 08 LED:02 (forfeiture-by-wrongdoing doctrine held to violate defendant's right of confrontation unless there is proof of the defendant's motive to make the missing witness unavailable, thus apparently impliedly overruling State v. Mason, 160 Wn.2d 910 (2007) Oct 07 LED:10); Melendez-Diaz v. Massachussetts, 129 S. Ct. 2527 (2009) Sept 09 LED:02 (defendant's right to confront in a drug trafficking case was violated when a lab analyst's certificate of analysis of alleged cocaine was admitted into evidence without giving the defendant the opportunity to cross examine the analyst); State v. Koslowski, 166 Wn.2d 409 (2009) Sept 09 LED:12 (statements to police by robbery victim held inadmissible because there was no "ongoing emergency" at the time of the police questioning, and

instead the primary purpose of police questioning was investigation to put together a case); State v. Pugh, 167 Wn.2d 825 (2009) April 10 LED:15 (see Comment 2 below).

LED EDITORIAL COMMENTS: (1) Dying declaration hearsay rule not addressed in Bryant constitutional analysis: The Bryant majority opinion and Justice Ginsburg's dissent both note that the prosecutor did not put on evidence in the trial court sufficient to meet the dying declaration hearsay rule for criminal cases. In Washington, and we presume in Michigan, the dying declaration exception requires proof in a homicide case that, at the time of uttering the statement, the declarant (1) believed that his or her death was imminent and (2) was addressing the cause or circumstances of the declarant's impending death – see Washington's ER 804(b)(2)). Accordingly, there was no basis for the U.S. Supreme Court in this case to address an issue that the Court's 2004 decision in Crawford left open. That unresolved question is whether the pre-constitutional dying declaration rule inherited from the English roots of the U.S. judicial system is not subject to confrontation clause restrictions.

(2) Washington independent constitutional confrontation rights: In State v. Pugh, 167 Wn.2d 825 (2009) April 10 LED:15, in addition to addressing the U.S. Constitutional Sixth Amendment confrontation right issue, the Washington Supreme Court addressed article I, section 22 of the Washington constitution, which like the Sixth Amendment protects a criminal defendant's right to confront witnesses. Pugh declared that the Washington constitutional protection of confrontation rights is in some circumstances greater than the federal constitution's protection, and hence that the Washington constitution is more restrictive on admission of hearsay in criminal prosecutions.

In analysis of the State constitutional protection of the right to confrontation, the Pugh Court ruled that an E-911 tape reporting a domestic violence attack was admissible, but only because the victim's statements fell within what is known as the res gestae doctrine as it existed at the time of adoption of the Washington constitution. The res gestae doctrine requires, per Beck v. Dye, 200 Wash. 1 (1939), that the statement or declaration: (1) relates to the main event and explains, elucidates, or in some way characterizes that event; (2) is a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) is a statement of fact, and not the mere expression of an opinion; (4) is a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) is made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation (though it need not be made exactly contemporaneous with the event); and (6) is made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

The statements on the E-911 tape in Pugh met this test for admissibility, the Pugh majority held. Our guess is that the circumstances of the Bryant case would be held by the Washington Supreme Court to meet the Pugh test for confrontation rights under article I, section 22 of the Washington constitution.

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BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) DEADLY FORCE CASE MUST GO TO JURY ON A NEGLIGENCE THEORY WHERE, AMONG OTHER THINGS, NO OFFICER GAVE WARNING BEFORE FATAL SHOOTING – In Hayes v. County of San Diego, ___F.3d ___, 2011 WL 982472 (decision filed March 22, 2011), a 3-judge Ninth Circuit panel rules 2-1 that the facts alleged by a surviving beneficiary support

sending a case for jury trial on a theory (among others asserted by the plaintiff family members of the deceased) of negligent use of deadly force by law enforcement officers under Fourth Amendment standards. The dissent argues that as a matter of law there was no negligence in the fatal shooting by the officers, and therefore the case should not go to a jury.

The Hayes majority opinion is troubling in its apparent lack of recognition of the danger posed to the law enforcement officers who fired the fatal shots. The officers were on a domestic dispute call, and, after entering the dimly lit home and making their way with aid of a flashlight, they were suddenly confronted by a slowly advancing, unknown, reportedly suicidal man, holding a knife (though arguably not holding the knife in an attack mode), 6 to 8 feet away from one of the officers.

This brief LED entry will not discuss the extensive factual allegations and lengthy legal analysis in Hayes. Officers, particularly trainers, may wish to read the case on the Ninth Circuit opinions' website [http://www.ca9.uscourts.gov/] and to consider what the officers might have done differently, starting with what intelligence the officers might have attempted to gather before entering the home. We note as to the Hayes case that one of the many facts considered to be relevant by the majority judges was the failure of the officers to give any warning (for example, "drop the knife or I'll shoot") before shooting. The Fourth Amendment requires a warning – if feasible – before using deadly force or force that may result in serious injury. The majority opinion determines that among the several fact questions the jury is to decide is whether the officers should have given a warning before shooting. On the failure-to-warn question, the majority opinion discusses the Ninth Circuit opinion in Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) **June 01 LED:05**.

Result: Reversal in part of U.S. District Court (Southern District of California) order that granted summary judgment on all issues to the County of San Diego and its defendant officers; case remanded for trial on deadly force negligence issue.

(2) CIVIL RIGHTS ACT LAWSUIT: OFFICERS' FORCIBLE ENTRY OF HOME OF DRIVER WHO MINUTES EARLIER HAD BEEN INVOLVED IN MINOR CAR COLLISION HELD NOT JUSTIFIED BY POSSIBILITY THAT OTHER DRIVER'S BELIEF SHE HAD SMELLED ALCOHOL WAS ACTUALLY EVIDENCE OF FIRST DRIVER BEING NEAR DIABETIC COMA – In Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2009) (decision filed July 16, 2009), a 3-judge Ninth Circuit panel concludes under the summary judgment review standard that accepting as true the factual allegations of the plaintiff, Mr. Hopkins, there was no justification for officers to forcibly enter Hopkins' residence without a warrant to check on his welfare or to investigate him for DUI.

Officers responded to a call to police from a driver reporting a minor motor vehicle collision with Hopkins. They talked to the other driver in front of Hopkins' house. She told them of the minor accident, Hopkins' non-cooperation with her, the smell of what she believed to be alcohol on his breath, her belief that he was somewhat unsteady and may be intoxicated, and the fact that she had seen him go inside his house moments earlier. One officer knocked loudly and announced his presence, but there was no response. The officers then forcibly entered and ultimately found Hopkins in a bedroom. He was awake and apparently intoxicated (but not near a diabetic coma).

Hopkins was subsequently charged in a California state court with DUI and misdemeanor hit and run. All charges, however, were later dropped after the forcible house entry was held to have violated the Fourth Amendment for lack of exigent or emergency circumstances. Hopkins then sued in federal court under the federal Civil Rights Act.

Among the theories put forward in the officers' defense in the civil rights lawsuit was that at the time of entry they believed it was possible that Hopkins was possibly in or near a diabetic coma, thus necessitating an immediate check on his welfare. They had been trained that non-experts sometimes misinterpret the diabetic fruity smell on a person's breath as being alcohol. As to this theory, the Ninth Circuit panel notes that it is just too speculative (and too encouraging of forced entries of homes) to leap from a citizen's report of the odor of alcohol on a person's breath to the conclusion that the person might be on the brink of a diabetic coma and in need of immediate assistance. The Ninth Circuit also concludes that the possibility of dissipation of alcohol in Hopkins' body did not constitute exigent circumstances justifying warrantless entry of his residence; there was time to get a search warrant.

Result: Affirmance, for the most part, of U.S. District Court (Northern District of California) decision; case remanded for trial. NOTE: On remand, the U.S. District Court granted summary judgment to Hopkins on the issues described above.

LED EDITORIAL NOTES: 1. Our delayed digesting of this case: This Ninth Circuit opinion was filed in 2009. Ordinarily, we try to present decisions in the LED no later than a year after issuance of the decisions. We will continue in that endeavor.

2. Other relatively recent LED entries on issues of warrantless exigency/emergency entry to arrest DUI suspects:

State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) July 09 LED:20 (Probable cause as to DUI, plus the scientific fact that alcohol dissipates in the body over time, held not to add up to exigent circumstances supporting reaching through doorway to arrest man suspected of being intoxicated and of having driven drunk about one hour earlier)

State v. Wolters, 133 Wn. App. 297 (Div. II, 2006) July 06 LED:17 (Exigent circumstances were present (1) where DUI suspect would not take his hands out of his pockets upon officer-attempted seizure just outside suspect's residence to investigate officer-witnessed likely DUI, and (2) where suspect then fled into his home. Under all of the circumstances, the officer was justified in making a forcible warrantless residence entry to arrest the fleeing DUI suspect)

LED EDITORIAL COMMENT STATING THE OBVIOUS: When in doubt about justification to make an unconsenting forcible entry, apply for a search warrant.

(3) CIVIL RIGHTS ACT LAWSUIT: ACTION UNDER 42 U.S.C. SECTION 1983 MAY NOT BE PURSUED IF SUIT INDIRECTLY CHALLENGES VALIDITY OF CRIMINAL CONVICTION – In Szajer v. City of Los Angeles, 632 F.3d 607 (9th Cir. 2011) (decision filed February 11, 2011), a 3-judge Ninth Circuit panel rules that under the Civil Rights Act precedent of Heck v. Humphrey, 512 U.S. 477 (1994) and Ninth Circuit decisions applying Heck v. Humphrey, the plaintiffs in this civil case are not allowed to sue for constitutional violations where the police actions under attack led to their convictions.

In the introduction to its opinion, the Ninth Circuit panel provides the following brief summary of the factual and procedural background of the case. We excerpt here from the brief summary:

> This is a civil rights action filed by Helene and Zoltan Szajer . . ., owners and operators of the "L.A. Guns" gun shop in West Hollywood, against the City of Los Angeles ("City"), the Los Angeles Police Department ("LAPD"), and a number of individual LAPD officers . . . . Following a "sting" operation wherein the Szajers purchased illegal firearms from the LAPD, officers searched the Szajers' gun shop and their personal residence, pursuant to a warrant obtained by LAPD Detective Michael Mersereau. The searches resulted in the discovery of illegal

> firearms and ammunition in both the gun shop and residence. As part of a plea agreement, the Szajers pled no contest to one count of possession of an illegal assault weapon found in their home.
>
> The Szajers then filed this civil action, alleging that the LAPD executed an illegal search at the gun shop. The Defendants filed a motion for summary judgment, which the district court granted . . . .

Result: Affirmance of U.S. District Court (Central District of California) order granting summary judgment to the Los Angeles Police Department.

(4) CIVIL RIGHTS ACT LAWSUIT: JAIL INMATE IN BEATING CASE ENTITLED TO TRIAL BASED ON CLAIM OF INDIVIDUAL SUPERVISORY LIABILITY OF LOS ANGELES COUNTY SHERIFF UNDER EIGHTH AMENDMENT ON A DELIBERATE INDIFFERENCE THEORY – In Starr v. Baca, ___F.3d ___, 2011 WL 477094 (2011) (decision filed February 11, 2011), a 3-judge Ninth Circuit panel rules 2-1 that a jail inmate's allegations regarding a vicious assault – initially, by inmates, and then followed by a stomping by a deputy sheriff acting as a corrections officer – are sufficient to take a case to a jury for individual liability against the Los Angeles County Sheriff on a theory of supervisory liability. The inmate-plaintiff's theory is that the Sheriff as the ultimate supervisor of the jail is responsible as an individual under the Eighth Amendment for unconstitutional conditions of confinement based on alleged deliberate indifference by the Sheriff.

The majority opinion summarizes as follows its rationale for concluding that the case for individual liability contains sufficient allegations of fact to go to a jury trial:

> First, Starr's complaint specifically alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca. The complaint specifically alleges that Sheriff Baca was given notice of all of these incidents. It specifically alleges, in addition, that Sheriff Baca was given notice, in several reports, of systematic problems in the county jails under his supervision that have resulted in these deaths and injuries. Finally, it alleges that Sheriff Baca did not take action to protect inmates under his care despite the dangers, created by the actions of his subordinates, of which he had been made aware. These allegations are neither "bald" nor "conclusory." Rather, they are sufficiently detailed to give notice to Sheriff Baca of the nature of Starr's claim against him and to give him a fair opportunity to defend against it.
>
> Second, the allegations in Starr's complaint are plausible. They may or may not ultimately be proven by evidence. But the question is not truth or even probability. [The applicable federal court rule] "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to support the allegations.

[Citations omitted]

The dissenting opinion indicates that the allegations appear to support a Civil Rights Act lawsuit against the Sheriff in his official capacity, which is the same as suing the Sheriff's Department on the ground of official policy or longstanding custom and policy. But the dissent argues that the claim for individual liability of the Sheriff is based on conclusory theoretical claims that do not meet the standards under Civil Rights Act case law. Establishing individual liability requires establishing specific facts – not mere conclusions and abstract theories – showing deliberate

indifference by the Sheriff in his individual capacity. Among other things, the dissent points out the following:

> When we cease to look at the Los Angeles Sheriff's Department (LASD) as an abstraction and look at the reality, we see good reasons for requiring facts before permitting lawsuits against the Sheriff himself: the agency is gigantic. The LASD is the largest Sheriff's Department in the world. It covers 3,171 square miles, 2,557,754 residents, and by contract 42 of the 88 incorporated cities in Los Angeles County. The Department employs 8,400 law enforcement officers and 7,600 civilians and is responsible for 48 courthouses and 23 substations. The Men's Central Jail alone houses a revolving population of 5,000 inmates. In addition, the Department operates the Twin Towers Correctional Facility, the Mira Loma Detention Facility, the Pitchess Detention Center, and the North County Correctional Center. Persons charged with or convicted of crimes are in over one hundred different locations. The layers of administration and management between what happens in a jail are many and they are complex. To infer that specific incidents which occur in a jail are necessarily known by the Sheriff is to engage in fallacious logic. None of this complexity absolves the Department of responsibility for respecting the constitutional rights and general well-being of its charges, but it does show how inappropriate it is to sue the Sheriff individually unless in terms of causation the Sheriff can be personally tied to the actionable behavior at issue. Just being a disappointing or even an insufficiently engaged public servant is not enough. Those issues are for the ballot box and the County Board of Supervisors, not the courts.

Result: Reversal of U.S. District Court (Central District of California) order dismissing inmate's claim of individual supervisory liability against Los Angeles County Sheriff Baca based deliberate indifference to unconstitutional conditions of confinement; case remanded for trial.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) OFFICER'S TESTIMONY THAT DEFENDANT WAS "EVASIVE" DURING INTERROGATION DID NOT VIOLATE FIFTH AMENDMENT RIGHT TO SILENCE; BUT REMARK DID VIOLATE SIXTH AMENDMENT BY INVADING PROVINCE OF JURY; THAT ERROR, HOWEVER, WAS CURED BY TIMELY TRIAL COURT JURY INSTRUCTION – State v. Hager (Timothy Edward), ___ Wn.2d ___, 2011 WL 825740 (2011), the Washington Supreme Court addresses constitutional issues involving admissibility law enforcement officer testimony that may suggest the officer's opinions about a defendant's guilt.

Such law enforcement testimony indicating an officer's opinion that a defendant is guilty may violate a criminal defendant's rights under the U.S. Constitution's Fifth Amendment right to silence or Sixth Amendment right to jury trial. In this case involving prosecution of Hager for rape of a child, the trial court denied defendant's motion for a mistrial after testimony in which a police detective described defendant's answers to law enforcement questioning prior to arrest as "evasive." This remark was in direct violation of the trial court's order prohibiting such characterization, though there is some question (though legally irrelevant) whether the officer was aware of the court order.

The Court of Appeals in Hager reversed the child rape defendant's conviction on grounds that the officer's testimony that defendant was "evasive" violated defendant's Fifth Amendment right to silence, and that this violation was not cured by the trial court's immediate curative instruction

to the jury not to consider the officer's characterization of the defendant. State v. Hager, 152 Wn. App. 134 (Div. II, 2009) **Oct 09 LED:22**.

The Washington Supreme Court holds in Hager that, because the detective's remark was not a comment on defendant's silence, but instead was a comment on something defendant said, the remark did not infringe upon defendant's Fifth Amendment right to silence/privilege against self-incrimination. Furthermore, an 8-1 majority of the Court rules that, although the comment did violate both (1) the trial court's order prohibiting such characterization and (2) defendant's Sixth Amendment right to jury trial by invading the province of the jury in expressing an opinion about defendant's credibility, any harm was cured by the trial court's prompt instruction to the jury not to consider that part of the officer's testimony. Therefore, rules the 8-1 majority, the trial court did not err by denying defendant's motion for a mistrial.

Justice Sanders dissents, arguing that there was no way to cure the violation with an instruction to the jury. He asserts the general proposition that a bell once rung cannot be un-rung. **NOTE:** Justice Sanders lost his re-election bid in November of 2011, but he is acting as a temporarily appointed Supreme Court Justice on this and a number of other cases that were pending in the Supreme Court prior to the election.

Result: Reversal of Court of Appeals decision that reversed the Pierce County Superior conviction of Timothy Edward Hager for first degree rape of a child.

LED EDITORIAL NOTE: We have not always reported on Washington appellate court decisions on the Fifth and Sixth Amendment issues relating to law enforcement officer testimony or other evidence from the State that may suggest the view that the defendant is guilty. Three of the decisions that we did report are State v. Lewis, 130 Wn.2d 700 (1996) May 97 LED:03; State v. Easter, 130 Wn.2d 228 (1996) Jan 97 LED:03; and State v. Demery, 144 Wn.2d 753 (2001) Dec 01 LED:15.

LED EDITORIAL COMMENT: We recognize that we have not provided much guidance in this LED entry. Officers and prosecutors preparing for officer testimony should, in relevant circumstances, consult regarding the Fifth and Sixth Amendment limits on law enforcement officer testimony relating to defendants' demeanor during out-of-court questioning and other law enforcement contacts.

(2) "TRUE THREAT" REQUIREMENT OF FIRST AMENDMENT FREE SPEECH PROTECTION REQUIRES SPECIAL JURY INSTRUCTION IN HARASSMENT PROSECUTION – In State v. Schaler, 169 Wn.2d 274 (2010), the majority opinion of the Washington Supreme Court holds that the jury in this prosecution for harassment, RCW 9A.46.020, should have been instructed on the First Amendment free speech standard for "true threats," and that the instructional error was not harmless. But the majority opinion also concludes over the lone dissent of Justice Sanders that the evidence of true threats in the case is sufficient for the case to be retried.

Because the First Amendment limits the criminal harassment statute to proscribing true threats, the statute must be read to reach only those instances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person. This standard requires the defendant to have the mental state of negligence as to the result of the probable induced fear of the hearer. The jury in a harassment case therefore must be instructed on the concept of "true threat," which is a statement made under such circumstances that a reasonable person making the statement would foresee that the statement would be interpreted by the hearer of the statement as a serious expression of intention to inflict bodily harm upon or to take the life of another person. This is an objective test. The subjective intent of the speaker to do or not do the harm is irrelevant.

The prosecution in the Schaler case was based on defendant's statements to a crisis counselor (after his call to a crisis hotline and police transport to the crisis counselor during which defendant shared some of his thoughts with the officer as well) that he had a dispute with two of his neighbors, that for several months he had been thinking about killing those particular neighbors, that he had dreamed about it, and that he currently wanted to do it. Defendant Schaler argued on appeal that his statements were not true threats, as constitutionally required, because he was describing his mental state to a mental health specialist, and thus his words were a cry for help. He argued that a reasonable person in his position would not foresee that a listener would take his statements in this context as a serious expression of intent to kill the neighbors.

But the Supreme Court majority opinion notes that his demeanor did not suggest his words were idle talk or a joke. And the opinion recognizes that a jury could reasonably conclude from the evidence that a reasonable speaker in defendant's position would have foreseen that his statements would be interpreted as a serious expression of intention to take the lives of his neighbors. Therefore, the majority opinion concludes that defendant was lawfully prosecuted for felony harassment for his statements to the crisis counselor about his plan to kill his neighbors.

The Supreme Court concludes, however, that a true threat instruction should have been given to the jury in this case, and that the omission of such a true threat instruction was not harmless in light of the evidence that: (1) defendant never explicitly said that he would kill the neighbors, (2) his behavior at the time was erratic, (3) he was contradictory in some of his statements, and (4) his statements took place in the context of a mental health evaluation that occurred in a hospital while he received medical treatment. Thus, a jury could plausibly conclude that a reasonable speaker in defendant's position would not have foreseen that his statements would be interpreted as a serious expression of intention to take the neighbors' lives. What a reasonable person making the statements would have foreseen in these circumstances was a fact question for a properly instructed jury to resolve, the majority opinion concludes.

Justice Sanders writes a solo opinion that concurs in the majority's reversal of Schaler's conviction, but dissents from the order remanding for retrial. Justice Sanders argues that the harassment statute is in need of a drastically constricting free speech construction, that the Supreme Court should have held as a matter of law that none of Schaler's statements constituted a true threat, and therefore that there was no fact question to present to a jury. Justice James Johnson dissents from the reversal of Schaler's conviction, arguing, among other things, that the trial court's failure to give a true threat instruction was harmless error.

Result: Defendant wins his appeal; reversal of Court of Appeals decision (145 Wn. App. 628 (Div. III, 2008) **Sept 08 LED:21**) that affirmed the Okanogan County Superior Court conviction of Glen Arthur Schaler for felony harassment based on a threat to kill; case remanded for re-trial with proper jury instructions.

LED EDITORIAL NOTE: The Schaler majority opinion addressed the following LED-reported Washington Supreme Court decisions analyzing the true threat standard: State v. J.M., 144 Wn.2d 472 (2001) Dec 01 LED:15 (recently suspended middle school student's statements that he planned to shoot the school principal and other staff was a true threat and was punishable as harassment without need for proof that the defendant knew or reasonably should have known that the threat would be communicated to the proposed victim); State v. Kilburn, 151 Wn.2d 36 (2004) (Oct 04 LED:05) (middle school student's joking statement that he was going to get a gun and shoot everyone at the school was not a true threat); and State v. Johnston, 156 Wn.2d 355 (2006) March 06 LED:04 (drunken statement that defendant was "going to blow this place up" was not a true threat).

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WASHINGTON STATE COURT OF APPEALS

OFFICER DID NOT IMPROPERLY EXCEED THE SCOPE OF TRAFFIC STOP WHEN WITH JUSTIFICATION HE CHECKED ON NO-CONTACT ORDER PROTECTING PASSENGER

State v. Pettit, ___Wn. App. ___, 2011 WL 1238912 (Div. II, 2011)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> [A law enforcement officer] stopped Michael S. Pettit because his car had a loud exhaust, generated by a "coffee can" muffler, which RCW 46.37.390(1) and (3) prohibit. A record check disclosed that Pettit was named in a no contact order issued for the protection of a 16-year-old girl, Michelle Whitmarsh.
>
> Pettit's front seat female passenger appeared to be about 16. [Court's footnote: *There was also a woman and a young child in the rear passenger seats. The woman appeared to be in her mid-twenties.*] [The officer] returned to Pettit's car and asked the passenger for her name. She told him that she was Samantha M. Wright and that her birth date was October 21, 1989. [Court's footnote: *That would have made her almost 20 years old, because the stop occurred on April 2, 2009.*] [The officer] ran a check on that name and found no record. He did obtain more information from dispatch about Michelle Whitmarsh, who was described as having brown hair, hazel eyes, and a tattoo on her left hand. He also discovered that Whitmarsh was listed as missing and that there was a warrant for her arrest.
>
> When [the officer] returned to Pettit's car, he discovered that his young female passenger had the letter "M" tattooed on her left hand. After he confirmed that Whitmarsh's tattoo was an "M," he arrested Pettit for violation of the no contact order. He also took Whitmarsh into custody. The entire encounter took 11 minutes.
>
> Pettit moved to suppress Whitmarsh's identity. When the court denied that motion, he went to trial without a jury on stipulated facts. The trial court convicted him as charged and sentenced him to six months in jail.

ISSUE AND RULING: Did the officer improperly exceed the scope of the traffic stop in investigating the no-contact order? (ANSWER: No)

Result: Affirmance of Kitsap County Superior Court conviction of Michael S. Pettit for violation of a domestic violence no-contact order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Pettit argues that [the officer] had no legal basis for questioning his passenger and, therefore, the trial court erred in refusing to suppress the evidence obtained from that questioning. We disagree.
>
> Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision prohibits law enforcement officials from requesting identification from passengers for investigative purposes unless there is an independent basis that justifies that request. State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**. One such independent basis is an articulable suspicion of criminal activity. Rankin; State v. Allen, 138 Wn. App. 463 (2007) **July 07 LED:21**. In

order to satisfy that requirement, the officer must be able to identify specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. A traffic stop does not become an unlawful seizure simply because the officer inquires into matters unrelated to the justification for the stop, so long as those inquiries "do not measurably extend the duration of the stop". Arizona v. Johnson, 129 S. Ct. 781 (2009) **March 09 LED:03** [**See the LED Editorial Comment below regarding this citation to the U.S. Supreme Court's Arizona v. Johnson decision**].

Pettit relies on Allen. In that case, the officer stopped a car driven by Peggy Allen for a traffic infraction. She had a male passenger, defendant Ryan Allen. A records check indicated that Peggy Allen was the protected person in a no contact order. The officer, however, had no information about the person against whom the order had been entered; he did not even know whether that person was male or female. Nevertheless, he asked the passenger for identification. Both the passenger and the driver said that the passenger's name was Ben Haney. There was no record for that name, but further questioning of the driver disclosed that the passenger was Ryan Allen and that the no contact order had been entered against him. We held that the officer had no reason to ask for the passenger's name because the officer had no reason to suspect that the passenger was the person named in the no contact order.

This case is materially distinguishable from Allen. First, [the officer] knew that the no contact order protected a 16-year-old girl named Michelle Whitmarsh from Pettit and that Pettit's front seat female passenger appeared to be sixteen. These facts were sufficient to support a rational inference warranting the officer's initial request for the passenger's identification to determine whether she was the person whom the no contact order sought to protect. Pettit's female passenger provided a birth date that was not consistent with her apparent age, justifying the subsequent records check, which then led to the corroborating physical description, including the identifying tattoo on her left hand. The additional investigation was brief and did not significantly extend the duration beyond that of a typical traffic stop. [Court's footnote: *[The officer] testified that such stops generally last from 10 to 15 minutes.*]

Second, in Allen, it was the appellant who was the passenger, not the driver, as here. On appeal, passenger Allen challenged the question put to him, as well as to the questioning of the driver. Our decision was based on the questioning of Allen, himself; and our holding focused on the questioning of the passenger appellant, who had standing to challenge the officer's questioning of him. Here, in contrast, Pettit challenges the questioning, not of him, but of his passenger Whitmarsh. But he lacks standing to challenge his passenger's questioning. See State v. Shuffelen, 150 Wn. App. 244 (Div. I, 2009) **Feb 11 LED:15**.

Third, here, the protected person was a minor, who had been reported missing. The legislature has found that the potential for physical and psychological trauma to missing children, including runaways, is "extreme." RCW 13.60.100. The risks involved can create exigent circumstances, justifying warrantless searches. See State v. Sadler, 147 Wn. App. 97 (2008) **Jan 09 LED:18** (information that 14-year-old runaway, possibly involved in sadomasochistic sex, was in home of significantly older male, justified entry into the home); State v. Raines, 55 Wn. App. 459 (1989) (warrantless entry justified when premises may contain persons in danger of harm or information about location of threatened victim). Here, an earlier court had found good cause to issue a no contact order against Pettit for

> the protection of a minor female; that minor was missing and her description was consistent with Pettit's passenger.
>
> These exigent circumstances warranted [the officer's] brief detention to determine the identity of the minor female passenger in Pettit's car.

[Some citations omitted]

LED EDITORIAL COMMENT: The Pettit Court includes a citation to the U.S. Supreme Court's Fourth Amendment interpretation in Arizona v. Johnson, 129 S. Ct. 781 (2009) March 09 LED:03 in support of its conclusion that asking the driver about the identity of her passenger was not an unlawful expansion of the traffic stop because it did not "measurably extend the stop's duration." The Pettit Court was conclusory on this question and did not address Washington decisions such as State v. Cantrell, 70 Wn. App. 34 (Div. II, 1993) Oct 93 LED:21 that seem to suggest that one must look at both the scope of the investigation (i.e., whether non-traffic matters are being investigated without reasonable suspicion) and the duration of the investigation to determine if a lawful stop has been turned into an unlawful seizure. In our commentary in the March 2009 LED, we questioned whether Arizona v. Johnson meets Washington constitutional requirements. Also, in the March and April 2005 LEDs, we explored this area of law in our follow-up discussion of the U.S. Supreme Court decision in Illinois v. Caballes, 125 S. Ct. 834 (2005) March 05 LED:03, April 05 LED:02. Washington case law is not so clear on this point regarding expanding the scope of investigation as the Pettit decision suggests. Ideally, officers will be able to point to reasonable suspicion as to other criminal matters - - as it appears the officer had in Pettit - - where a traffic stop turns into an investigation of non-traffic matters.

LOCOMOTIVE HELD TO BE "RAILROAD CAR" AND, IN ANY EVENT, A "BUILDING" UNDER SECOND DEGREE BURGLARY STATUTE AND RELATED RCW 9A DEFINITIONS

State v. Johnson, ___ Wn. App. ___, 247 P.3d 11 (Div. II, 2011)

Facts and Proceedings below: (Excerpted from Court of Appeals majority decision)

> On July 28, 2008, [a police officer] caught Bradley Johnson removing copper from a locomotive in the Puget Sound Pacific Railroad yard in Elma, Washington. A jury found Johnson guilty of second degree burglary, in violation of RCW 9A.52.030, as charged.

ISSUE AND RULING: Is a locomotive a "railway car" and, as such, a "building" as defined in RCW 9A.04.110(5)? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, Judges Quinn-Brintnall and Hunt in the majority, and Judge Van Deren dissenting)

Result: Affirmance of Grays Harbor County Superior Court conviction of Bradley J. Johnson for second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

> A person commits the crime of second degree burglary when, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a "building." RCW 9A.52.030(1). The term "building" has a particularized meaning. As defined in RCW 9A.04.110(5), "'Building,' in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods." (Emphasis added.)

Johnson argues that the term "railway car" does not include a locomotive. We disagree.

Understandably, whether a locomotive falls within the statutory definition of "any railway car" is an issue of first impression. First, we observe that under the plain language of RCW 9A.04.110(5), the entering or remaining with an intent to commit a crime in "any . . . railway car" (emphasis added) is a violation of RCW 9A.52.030. "Any" refers to "one, some, or all indiscriminately of whatever quantity" or "the maximum or whole of a number or quantity." Webster's Third New International Dictionary 97 (2002).

Applying these principles, the term "any . . . railway car" includes a locomotive of the sort at issue here. Although Webster's Dictionary does not define "railway car," it does define "railroad car": "[A] vehicle adapted to the rails of a railroad . . . and used for carrying passengers and mail, baggage, freight, or other things." Webster's Third New International Dictionary 1876 (2002) (emphasis added). A locomotive is a vehicle that is designed to travel on railroad tracks and it carries many "things" including but not limited to an engine, fuel to propel the locomotive and other railway cars, and a conductor, and thus qualifies as a "railway car."

In addition, a locomotive also meets the definition of a railway car as articulated by our Supreme Court in a previous version of the statute. Our Supreme Court appeared to limit the definition of "railway car" by excluding flatcars in an earlier version of the statute in State v. Petit, 32 Wash. 129, 130-31, 72 P. 1021 (1903):

> [Flat] cars, it seems to us, do not come within the definition given by the statute, which evidently had relation to box cars, or some kind of a car that is enclosed so that an entry can be made. Under the ordinary understanding of the words "break and enter" it is difficult to see how a person could break and enter a flat car loaded with wheat upon which a canvas is laid. (Emphasis added.)

The Petit court's analysis suggests that the determination of whether something is a "railway car" is whether a structure, which can ride on railroad tracks, is enclosed and can be entered. But the legislature's subsequent codification of a new definition of "building," including the addition of a "fenced area," undermines Petit's implied enclosure element. Laws of 1975, 1st Ex. Sess., ch. 260. Regardless, a locomotive is a fully-enclosed structure that travels on railroad tracks and, therefore, qualifies as a "railway car" under the Petit court's analysis.

Moreover, even if a locomotive is not a railway car, it still qualifies as a "building" for the purposes of second degree burglary. Here, the trial court instructed the jury that, "The term 'building,' in addition to its ordinary meaning, includes any railway car." When analyzing the general understanding of "building" under the burglary statute, Washington courts have determined that structures or premises that are (1) enclosed, (2) large enough to enter, and (3) able to accommodate a human being, definitively qualify as a "building." State v. Miller, 91 Wn. App. 869 (Div. II, 1998) **Feb 99 LED:14** [storage unit of apartment building held to be a separate building]; State v. Deitchler, 75 Wn. App. 134 (1994) **Nov 95 LED:19** [evidence locker held not to be a separate "building"]. Here, the locomotive was fully enclosed with outside doors that allowed access to an interior area that could accommodate a human being. Therefore, the locomotive at issue here

also qualified as a "building," under its ordinary meaning, as defined by the legislature in the second degree burglary statute.

Accordingly, under the plain language of the statutory definition of "building," which includes "any . . . railway car," a locomotive is a railway car and building under RCW 9A.04.110(5) for purposes of second degree burglary. RCW 9A.52.030(1). Johnson's claim that evidence showing he unlawfully entered the locomotive with the intent to steal copper is insufficient to prove that he entered a "building" as defined in RCW 9A.04.110(5) and, therefore, is insufficient to support the jury's verdict finding him guilty of second degree burglary fails.

DISSENT: Judge Van Deren's dissent argues that a locomotive is neither a "railway car" nor a "building" under Title 9A RCW.

KNOWINGLY POSSESSING A STOLEN, UNSOLICITED, UNACTIVATED CREDIT CARD TAKEN WITHOUT PERMISSION FROM A TRASH CAN INSIDE ANOTHER'S HOME IS SECOND DEGREE POSSESSION OF STOLEN PROPERY UNDER RCW 9A.56.010(1)(c)

State v. Rose, ___Wn. App. ___, 246 P.3d 1277 (Div. III, 2011)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

Douglas Rose was arrested September 16, 2008. A search incident to arrest produced methamphetamine and what appeared to be an unactivated credit card in the name of Ruth Georges. In addition to Ms. Georges' name, the plastic card had an account number, a sticker with activation instructions, and a magnetic strip on the back.

Mr. Rose was charged with possession of stolen property in the second degree and possession of a controlled substance. Ms. Georges testified that Mr. Rose had visited her apartment the morning of the arrest. She stated that the credit card was hers; she had received it in a mail solicitation. A $30 fee was required to activate the card. Ms. Georges did not intend to activate the card, so she placed it in a cigar box and put that box in the trash. She did not give Mr. Rose permission to have the card and was unaware that he had it.

Following a bench trial the court found Mr. Rose guilty of second degree possession of stolen property under RCW 9A.56.010(1) and possession of a controlled substance.

ISSUES AND RULINGS: 1) Where the victim had tossed the unsolicited, not-yet-activated credit card in a trash container inside her residence, and the card was taken by another person without permission from the trash container, does the card qualify as having been stolen for purposes of the possessing stolen property statute, or instead is it excluded from "stolen" status because it is "abandoned property"? (ANSWER BY COURT OF APPEALS: The card qualifies as having been stolen)

2) Does the not-yet-activated credit card constitute an "access device" for purposes of the second degree possessing stolen property statute, RCW 9A.56.160(1)(c)? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Benton County Superior Court conviction of Douglas Craig Rose for second degree possession of stolen property.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Stolen Property

Mr. Rose argues that the trial court erroneously relied upon State v. Askham, 120 Wn. App. 872 (Div. III, 2004) **June 04 LED:18**, in concluding that the credit card he took from the garbage was stolen. He claims that Ms. Georges abandoned the card by placing it in a trash can located in her apartment, though he cites no authority for that proposition.

A person commits second degree possession of stolen property if he possesses a stolen access device. RCW 9A.56.160(1)(c). "'Stolen' means obtained by theft, robbery, or extortion." RCW 9A.56.010(14). "'Theft,'" in turn, means to "wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). The "property of another" is an item in which another person has an interest, and over which the defendant may not lawfully exert control absent permission. State v. Longshore, 141 Wn.2d 414 (2000). Specific criminal intent may be inferred from defendant's conduct where it is plainly indicated by a logical probability.

This case is factually similar to Askham on this point. There the defendant used credit card information he found in another's garbage. This court determined that by removing credit card information from the trash without permission, the defendant deprived the credit card's owner of its authorized use. The defendant's actions amounted to theft of an access device under RCW 9A.56.040(1)(c).

Similarly here, the taking of the card from the garbage amounted to theft just as much as obtaining the account information from the garbage did in Askham. Askham is controlling in this case. Sufficient evidence supports the trial court's findings and conclusion that the card was stolen from Ms. Georges.

Access Device

Mr. Rose next argues that the trial court incorrectly relied upon State v. Clay, 144 Wn. App. 894 (Div. I, 2008) **Aug 08 LED:23** for its conclusion that the unactivated credit card received by mail solicitation was an access device.

"Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument. RCW 9A.56.010(1). A credit card may be an access device despite being unactivated, as long as it is capable of activation and use within the meaning of the statute.

In Clay, the defendant was convicted of second degree possession of stolen property for possessing a stolen, unactivated Mervyns card that was intended as a replacement card for an existing account. He argued that the State had failed to prove that the card could "be used" to obtain anything of value because the card was unactivated. The court rejected his argument on the grounds that the statutory definition of "access device" did not require the stolen card to have been in the owner's possession, nor did it require that the card be activated. The court found sufficient evidence to uphold Clay's conviction because no evidence

> was offered to prevent a rational juror from concluding that the card could have been activated or used by someone else within the meaning of the statute.
>
> Mr. Rose attempts to distinguish this case from Clay in two ways: (1) this case does not involve an existing credit account, and (2) the card in question could not have been used by its owner to obtain anything of value, and was more akin to an application. Washington courts have not directly addressed whether an unactivated credit card received in a mailed solicitation is an access device.
>
> . . . .
>
> A plain reading of RCW 9A.56.010(1) shows the card in question here to be an access device because it was capable of being used in the manner described by the statute, i.e., to purchase items of value. See Clay. When viewed most favorably to the State, there is sufficient evidence to support the trial court's conclusion that the card in question was an access device under RCW 9A.56.010(1) and Clay. The record demonstrates that the card was capable of establishing, and then accessing, a credit account. The card had Ms. Georges' name on it, a sticker that gave instructions how to activate the card, an account number, and a magnetic strip. Though a payment of $30 was required to both activate the card and establish an active credit account, the record shows that upon activation the card was capable of acquiring items of value. Finally, as in Clay, nothing in the record would prevent a rational trier of fact from concluding that the card could be activated by someone other than its owner. That intermediate steps or other "access devices" may have been required is irrelevant. The statute does not limit the definition of access devices to cards requested by the owner, nor does it exclude inert cards merely because they have yet to be activated. Accordingly, we hold that the card in question is an access device because it was capable of activation, then use in the manner prescribed by RCW 9A.56.010(1).

[Footnotes, some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) RCW 46.61.024(1)'S FELONY ELUDING "WILLFULLY" ELEMENT MEANS THAT STATE MUST PROVE DEFENDANT KNEW PURSUING VEHICLE WAS POLICE VEHICLE – In State v. Flora, ___ Wn. App. ___, 2011 WL 856936 (Div. I, 2011), the Court of Appeals rules that the defendant in a felony eluding prosecution is entitled to a new trial because the jury was not instructed – as he had timely requested at trial – that in order to convict him, the jury must find, among other things, that defendant knew that the vehicle pursuing him was a police vehicle.

On a dark and rainy night, a Swinomish tribal police officer stopped behind a car that had pulled over on the shoulder of State Route 20 after the officer had followed it a short way without activating lights or siren. The driver of the other car, Mr. Flora, got out of his car and started to walk back toward the patrol car with his fists clenched. The officer was part-way out of his patrol car at this point and ordered Mr. Flora to get back in his car.

Mr. Flora did get back in his car, but he then drove off quickly, going 70 miles per hour in a 55 m.p.h. zone. The officer turned on his siren and emergency lights. Within a mile, Mr. Flora turned left through a red light, pulled into a parking lot, and ran away. The officer had stopped at the red light and was not able to apprehend Mr. Flora until later, after identifying him from a photograph.

Mr. Flora's defense at trial was that he did not know that the car pursuing him was a police car. He pointed to the following evidence to support his theory: (1) it was a dark and rainy night; (2) the license plate on the police vehicle was not a Washington plate; (3) the police markings on the Swinomish PD car are only on the sides, and he had approached from the front; and (4) the officer had a female passenger in the car (she was a civilian participating in a ride-along program).

The Court of Appeals opines that the word "willfully" in RCW 46.21.024(1)'s phrase, "willfully fails or refuses to immediately bring his or her vehicle to a stop," means knowingly, which includes a requirement that the State prove the defendant's knowledge that a pursuit vehicle was a police vehicle. Under the record in this case, the Court of Appeals holds, the evidence is sufficient to support defendant's requested jury instruction that would allow the defendant to argue his contention (notwithstanding the lights and siren of the pursuing vehicle) that he did not know that the pursuing vehicle was a police vehicle.

Result: Reversal of James C. Flora's Skagit County Superior Court conviction of felony eluding; remanded for new trial in which jury will be instructed on the definition of "willfully."

(2) ASSAULT ON LAW ENFORCEMENT OFFICER IS ASSAULT THREE EVEN IF ASSAILANT DOES NOT KNOW THE VICTIM IS AN OFFICER – In State v. Williams, 159 Wn.2d 298 (Div. I, 2011), the Court of Appeals rejects defendant's argument, among others, that the evidence in his case is insufficient to support his conviction for assault three after he stabbed a law enforcement officer with medical scissors during his arrest.

RCW 9A.36.031(1)(g) makes it third degree assault to "assault[] a law enforcement officer . . . who was performing his or her official duties a the time of the assault." One of the defendant's theories of defense was that he did not know that the person he was stabbing was a law enforcement officer. The Court of Appeals responds as follows that the record does not support the theory, and that, in any event, it is irrelevant whether or not the defendant knew his victim was a law enforcement officer:

> Williams's briefing also suggests that there was insufficient evidence that he knew that the person he assaulted was a law enforcement officer. Both officers testified that Williams looked behind him at the uniformed officers approaching him. Officer [A] testified that Officer [B] yelled, "Seattle Police" before Officer [A] made physical contact with Williams. Thus, there was evidence indicating that Williams knew the person he assaulted was a police officer. Such evidence was unnecessary in any event: "Under the plain meaning of RCW 9A.36.031(1)(g), knowledge that the victim was a police officer in the performance of official duties is not an element of the crime of third degree assault." State v. Brown, 140 Wn.2d 456 (2000) **Aug 00 LED:07**.

Result: Affirmance of King County Superior Court conviction of Taliferro B. Williams for assault in the third degree.

(3) COURT OF APPEALS FINDS INADEQUATE SUPPORT FOR, AND THEREFORE SETS ASIDE, JURY'S FINDING OF SENTENCE-ENHANCING GANG AGGRAVATOR – In State v. Bluehorse, 159 Wn. App. 410 (Div. II, 2011), the Court of Appeals rules in a drive-by shooting case that there was insufficient evidence to support the jury's sentencing-enhancement finding that the defendant was motivated in doing the shooting to, per RCW 9.94.535(3)(s)(1) to maintain gang membership or (2) to advance in the hierarchy of the gang. It was not enough, the Court of Appeals rules, for the State to present what the Court of Appeals characterizes as only generalized gang-behavior testimony from a law enforcement expert. Such generalized evidence does not support a jury's finding that a particular defendant had the statutory gang-related motive for the particular shooting.

Result: Reversal of sentencing enhancement for Timothy J. Bluehorse on his Pierce County Superior Court conviction for drive-by shooting; case remanded for resentencing.

LED EDITORIAL COMMENT: Officers may wish to discuss with their local prosecutors the question of what particularized evidence is needed to support a finding of gang motivation for sentencing enhancement. The case law is a bit murky, we think.

(4) MEDIA-DUBBED "SOUTH HILL RAPIST" LOSES CHALLENGE TO HIS COMMITMENT AS A SEXUALLY VIOLENT PREDATOR – In In re the Detention of Kevin Coe, ___ Wn. App. ___, 2011 WL 1108657 (Div. I, 2011), the Court of Appeals rejects the arguments of Kevin Coe (referred to in some media accounts as Spokane's "South Hill Rapist"), who, after he had served 25 years in prison for one count of first degree rape, was determined in a civil commitment proceeding to be a sexually violent predator (SVP) under RCW 71.09.060.

The State's psychological expert (Dr. Amy Phenix) opined that Mr. Coe suffers from a mental abnormality or personality disorder making him likely to engage in acts of sexual violence if not confined. Mr. Coe contended on appeal that the trial court erred in admitting: (1) other expert testimony (including from Professor Robert Keppel and from Tamara Matheny, a "highly skilled" analyst from the Washington Attorney General's Office) regarding Mr. Coe's unique combination-of-behavior "signature," from which those experts concluded that he had committed many specified sexual offenses other than the underlying single rape on which he was convicted; (2) evidence of many unadjudicated offenses identified from a statistical database; (3) testimony by some of the unadjudicated offense victims; and (4) the psychological expert's opinion that was partly based on the first three purported admission errors.

The Court of Appeals rejects each of these challenges by Mr. Coe to the evidence, as well as his other arguments on appeal.

Result: Affirmance of Spokane County Superior Court judgment on jury verdict committing Kevin Coe, a/k/a Fredrick Harlan Coe, as a sexually violent predator.

(5) WILDLIFE TRAFFICKING STATUTE HELD NOT TO CONTAIN VALUE-AGGREGATION RULE – In State v. Yon, 159 Wn. App. 195 (Div. III, 2010), the Court of Appeals rules that the wildlife-trafficking provisions of RCW 77.15.260 (which put the threshold for felony wildlife trafficking at $250) do not contain an implicit value-aggregation rule.

Defendant Yon bought two bear gallbladders for $400 on one occasion. He bought two more bear gallbladders for $400 on another occasion. Because there is no evidence that any of the gallbladders was individually worth $250 or more, his convictions for felony wildlife trafficking cannot stand, Court of Appeals rules.

Result: Reversal of Spokane County Superior Court convictions of Jason M. Yon for first degree wildlife trafficking; case remanded to Superior Court, presumably for resentencing based on four convictions for second degree wildlife trafficking (gross misdemeanors).

(6) EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION OF SPECIAL EDUCATION TEACHER FOR FOURTH DEGREE ASSAULT AGAINST STUDENT – In State v. Jarvis, ___ Wn. App. ___, 246 P.3d 1280 (Div. II, 2011), the Court of Appeals rules that the following facts, as described by the Court of Appeals, are sufficient to support a special education teacher's conviction for fourth degree assault:

> Jarvis was a special education teacher at Drum Intermediate in the University Place School District. On January 10, 2008, the school held a lock-down drill. The teachers had been notified of the drill that morning. Although there were no

> written rules, the established procedure for Jarvis's class required the students and teachers to wait inside the bathroom during this drill.
>
> C.B., a student with Down Syndrome and limited verbal communication abilities, believed the drill was an earthquake drill and hid under his desk. Tina Hansen, a teacher's aide, tried to coax C.B. out from under the desk, but he refused. Hansen decided the best course of action was to stay with C.B. in the classroom. Jarvis approached and yelled at C.B. to come out from under the desk. When C.B. did not obey, Jarvis threw the desk off of him then dragged C.B. by his wrist and ankle approximately twenty-five feet across the floor to the bathroom as he screamed hysterically and tried to resist. When C.B. grabbed onto the bathroom door jamb, Jarvis jerked C.B. free and swung him into the bathroom, where he slid seven to eight feet across the tile floor.

Defendant argued on appeal that the evidence did not show "criminal intent" because she did not hit, punch, kick or do other things that would indicate that she was not merely attempting to move the child to the proper area for the drill. The Court of Appeals rejects her argument under the following analysis:

> "Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury." Jarvis argues that "intent" requires some element of malice or ill will. She cites no authority for this proposition. In fact, the intent required for assault is merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act. It is uncontroverted that Jarvis intended to drag C.B. The evidence that Jarvis's touching was intentional was sufficient to demonstrate the element of intent. Jarvis's claim on this point fails.

[Citations omitted]

Result: Affirmance of Pierce County Superior Court conviction of Karen Jarvis for fourth degree assault.

(7) PROXIMATE CAUSE ELEMENT OF CONTROLLED SUBSTANCES HOMICIDE, RCW 69.50.415(1), EXPLAINED IN DECISION AFFIRMING CONVICTION – In State v. Christman, ___Wn. App. ___, 2011 WL 909356 (Div. III, 2011), the Court of Appeals rejects defendant's argument that he should not have been convicted of controlled substances homicide where he gave the overdose victim only one of the three substances that together caused the victim's death.

Under RCW 69.50.415(1), delivering a controlled substance that is used by the person to whom it was delivered, resulting in the death of the user, is punishable as controlled substances homicide. In his appeal, defendant contended that in order to prove the results-in-death element of this crime, the State was required to prove that the user's death was proximately caused by the drug he delivered and, given evidence that other substances – methamphetamine and alcohol – contributed to the death, the evidence was insufficient. Defendant argued in the alternative that the statute establishing the crime is unconstitutionally vague in failing to clearly identify how a defendant's delivery of drugs must relate to the cause of death.

The Court of Appeals holds: (1) that proximate cause is indeed a required element of controlled substances homicide; (2) that the statute establishing the crime is not unconstitutionally vague in its causation elements; and (3) that the evidence in this case is sufficient to support the

conviction. The evidence is sufficient, the Court holds, because there can be multiple proximate causes of a result. So it does not matter that alcohol and methamphetamine were also proximate causes of the victim's death.

Result: Affirmance of Grant County Superior Court conviction of Corey (NMI) Christman for controlled substances homicide.

LED EDITORIAL NOTE: There was evidence in this case that would support the conclusion that the methadone that defendant supplied to the victim was in sufficient quantity to have alone caused his death. That evidence does not appear, however, to have been pivotal to the multiple-proximate-cause ruling of the Court of Appeals.

(8) RCW 9A.40.060(2)'S PHRASE, "COURT-ORDERED PARENTING PLAN," RECEIVES PRO-STATE INTERPRETATION IN CUSTODIAL INTERFERENCE CASE – In State v. Jose R. Veliz, Jr., ___Wn. App. ___, 2011 WL 782300 (Div. III, 2011), the Court of Appeals rules for the State in defendant's appeal from his conviction for custodial interference in the first degree where he took his four-year-old daughter out of the country for four months in violation of an order for protection.

Veliz's primary argument was that an order for protection does not constitute a "court-ordered parenting plan" within the meaning of RCW 9.41.060(2), the statute establishing felony custodial interference. After lengthy analysis, the Veliz Court concludes that the statutory phrase "encompasses any valid court order that establishes a minor child's parents' rights to residential placement and/or visitation, including the order for protection in this case." The Court determines that the evidence that Veliz took his child to Mexico for four months, and, when arrested upon his return had a false identification card in his possession (albeit along with his true identification papers) was sufficient to support his conviction. The analysis includes discussion of State v. Pesta, 87 Wn. App. 515 (Div. I, 1997) **March 98 LED:19**.

Result: Affirmance of Franklin County Superior Court conviction of Jose R. Veliz, Jr., for first degree custodial interference.

(9) STATE CRIMINAL STATUTE THAT IS NOT ADOPTED BY CITY OR INCORPORATED BY REFERENCE IN CITY'S CODE MAY NOT BE PROSECUTED IN CITY'S MUNICIPAL COURT – In City of Auburn v. Gauntt, ___Wn. App. ___, 2011 WL 907016 (Div. I, 2011), the Court of Appeals rules against the City of Auburn, holding that a State criminal statute that is neither specifically adopted in a city's municipal code nor incorporated by reference in that code may not be prosecuted in the city's Municipal Court.

Result: Affirmance of King County Superior Court decision reversed the Auburn Municipal Court conviction of Dustin B. Gauntt for marijuana possession and use of drug paraphernalia (the City had adopted ordinances prohibiting marijuana possession and use of drug paraphernalia, but the City had not adopted the mandatory minimum penalties for these crimes as provided by the Washington criminal statute under which he was charged).

(10) SIXTH AMENDMENT RIGHT TO CONFRONTATION: IN PROSECUTION FOR VIOLATION OF NO-CONTACT ORDER, IT WAS OK TO ADMIT CERTIFIED COPY OF ALLEGED VICTIM'S DRIVER'S LICENSE AS EVIDENCE OF HER IDENTITY – In State v. Mares, ___Wn. App. ___, 2011 WL 906905 (Div. I, 2011), the Court of Appeals rejects defendant's Confrontation Clause challenge to admission into evidence of a certified copy of the alleged victim's driver's license as evidence of her identity.

The Mares Court distinguishes the U.S. Supreme Court decision in Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) **Sept 09 LED:02**, in which the Supreme Court ruled that a criminal defendant's right to confront witnesses against him includes the right to cross examine a lab analyst. The Melendez-Diaz majority opinion concluded that defendant's right to confront was violated when a lab analyst's certificate of analysis of alleged cocaine was admitted into evidence without giving the defendant the opportunity to cross examine the analyst. In part, the Mares Court's explanation why this case is different is as follows:

> The Court in Melendez-Diaz held the drug analysis certificates were quite plainly affidavits prepared specifically for litigation and were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." Further, in preparing the certificates, the analysts likely knew that the certificate's sole purpose was as prima facie evidence that the substance in the defendant's possession was cocaine. The Court concluded the analysts were testimonial witnesses against the defendant and he had the right to question their motives and methods at trial. Quoting [Crawford v. Washington, 124 S. Ct. 1354 (2004) **Sept 06 LED:03**], the Court said, "'To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'"
>
> The Court distinguished the analysts' certificates from a certificate authenticating an existing official record. Although prepared for use at trial, a certificate of authenticity is not testimonial because it attests only to the existence of a particular public record and does not interpret the record nor certify its substance or effect. Thus, a records custodian may authenticate or provide a copy of an otherwise admissible record but may not create a record for the sole purpose of providing evidence against a defendant.
>
> Mares contends the certification in this case did more than merely authenticate the driver's license. He contends it also implicitly asserted that the records custodian performed a search to find the records for Brittany Knopff and then analyzed the results to determine whether the "Brittany Knopff" she found was the "Brittany Knopff" in this case.
>
> We reject this argument. Business and public records are generally admissible absent confrontation because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial. The certification here attests only to the authenticity of a public record. It offers neither an interpretation of the record nor any assertions about its relevance, substance, or effect. The custodian did not attest that the license belonged to any particular "Brittany Knopff," nor that the person pictured on the license was the victim of a crime. Other witnesses made those assertions, and Mares had a full opportunity to confront them.
>
> The license was admissible as a public record, and the custodian who authenticated the copy provided no testimonial statements in doing so.

[Footnotes, some citations, and some quotation marks omitted]

Result: Affirmance of King County Superior Court conviction of Brian Christopher Mares for violation of a no-contact order with aggravating circumstances.

(11) ENROLLED MEMBER OF YAKAMA NATION WHO DROVE CAR ON PUBLIC HIGHWAY ON YAKAMA RESERVATION – UNTIL HE VEERED OFF INTO A CANAL – IS SUBJECT TO BLOOD DRAW REQUIREMENT OF THE IMPLIED CONSENT STATUTE, RCW 46.20.308 – In State v. Yallup, ___Wn. App. ___, 2011 WL 839682 (Div. III, 2011), the Court of Appeals rules the Washington's implied consent law applies against an enrolled member of the Yakama Nation who, while drunk, drove his car off a state highway into a canal located on the Yakama Indian Reservation. After arresting defendant at a hospital, a WSP Trooper had blood drawn based on the implied consent statute, RCW 46.20.308. The blood alcohol test yielded a .27 reading.

The Yallup Court rejects defendant's arguments that he based on (1) federal Public Law 280 relating to the states' authority over Indians under state legislative schemes, and (2) his right to travel under the treaty with the Yakama Nation. Both arguments fail, the Court of Appeals holds, because the implied consent statute is primarily a criminally-based statute rather than a civil regulatory scheme.

Result: Affirmance of Yakima County Superior Court conviction of Elon Alex Yallup for (1) felony DUI, (2) driving without a required interlock device, (3) second degree driving while license suspended or revoke.

(12) EVIDENCE IN PROSECUTION OF CONFIDENTIAL INFORMANT FOR SEVERAL CRIMES SUPPORTS JURY INSTRUCTION ON RECKLESSNESS EXCEPTION TO DURESS DEFENSE UNDER RCW 9A.16.060(3) – In State v. Healy, 157 Wn. App. 502 (Div. I, 2010), the Court of Appeals holds that the evidence in the case supports the trial court's jury instruction on the recklessness exception of RCW 9A.16.060(3) to the affirmative defense of duress.

Under RCW 9A.16.060(3), the defense of duress is not available if defendant intentionally or recklessly placed himself in a situation in which it was probable that he would be subject to duress. In this prosecution for burglary and other felony offenses, the defendant testified that he committed burglary under the duress of his alleged accomplices after they concluded that he was acting as a confidential informant. However, for several years prior to his becoming a confidential informant, the defendant had been connected to unlawful activity and strife with his alleged accomplices.

The Healy Court notes that when defendant agreed to become a confidential informant against these people, he became, according to his own testimony, the object of the accomplice's hostility again. The alleged duress from the accomplices was threatened arson and violence against defendant's mother. At that point, the Court of Appeals asserts, the defendant had the opportunity to ask law enforcement to pursue charges against the accomplices, to perhaps wear a wire to obtain proof of their threatening conduct, or to terminate his work as an informant. He declined to do so. The Healy Court concludes that the jury could have concluded on these facts that defendant was reckless both (1) in agreeing in the first place to be a confidential informant against these criminals known to sometimes be antagonistic (though the Court notes that not all CI's would automatically be deemed reckless such as to permit the State to argue this to a jury), and (2) in not doing things that might have eliminated or alleviated the duress. The Court of Appeals thus rules that under this evidence the trial court did not abuse its discretion in instructing the jury on both the duress defense and the recklessness exception to the duress defense.

Result: Affirmance of King County Superior Court conviction of Martin John Healy for two counts of second degree burglary, and one count each of possession of a stolen vehicle, malicious mischief in the first degree, and attempted second degree burglary.

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NEXT MONTH

The June 2011 LED will include Part One of the 2011 Washington Legislative Update, along with entries on court decisions of interest.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO 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.supremecourtus.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 "Decisions" and then "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 current through 2007, 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]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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