LAW ENFORCEMENT DIGEST
November 2022

COVERING CASES PUBLISHED IN NOVEMBER 2022

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals**. The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court**. The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

TOPIC INDEX

CASES

WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [2018-2021] | [2022]

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

State v. Altman

No. 56249-9-II

Washington Court of Appeals Division II

November 15, 2022

TOPIC: Statutory Interpretation, Assault in the Third Degree, Definition of Weapon/Instrument

Factual Background

AW reported she was sexually assaulted by Altman. At trial, AW testified that Altman invited her to come to his house and watch TV on December 13, 2018. Once there, Altman got on top of AW, grabbed the back of her hair with one hand and used the other to grab her throat while forcefully kissing her, he then pulled her off the couch and dragged her across the room and dropped her onto her knees while holding on to her throat and hair and forced her to perform oral sex. Altman slapped her if she closed her eyes or did not look at him. Then, he picked her up with his hand on her neck and hair and dragged her across the room back to the couch and began having sex with her. He then grabbed her by the neck and hair and pulled her to the front of the living room and forced her to perform oral sex again.

AW said she experienced pain and could not say much during the sexual assault as Altman was squeezing her throat. After the assault, she noticed there was bruising on her neck and collarbone and her throat was sore. She went to the hospital for a physical sexual assault exam, and the nurse noticed redness and hemorrhages on the back of her throat.

Altman testified that he believed that sex with AW was consensual because AW did not “claw,” “fight back,” or “say no” during any kind of sexual contact or activity. Altman testified that he is a part of the “BDSM” (bondage, dominance, sadism, masochism) community, which he said values consent, and he testified he informed AW of his involvement.

> **NOTE:** Effective 7/29/19, RCW 9A.44.010(2) provides: "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” Washington law does not require a victim to say “no.”

The state charged Altman with Rape in the Second Degree, as well as Unlawful Imprisonment, Assault in the Second Degree for intentional strangulation, and Assault in the Third Degree (Assault 3) as a lesser alternative offense, all with sexual motivation.

The Court provided the jury with the following assault in the third degree instruction: "to convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about December 13, 2018, the defendant caused bodily harm to [A.W.]; (2) That the physical injury was **caused by a weapon or other instrument or thing likely to produce bodily harm**; (3) That the defendant acted with **criminal negligence**; and (4) That this act occurred in the State of Washington."

The jury found Altman not guilty of Rape 2, Assault 2, and Unlawful Imprisonment. The jury did find Altman guilty of the lesser alternative charge of Assault 3 with a special verdict that it was sexually motivated. The trial court imposed the standard sentence of 15 months of total confinement and 36 months of community custody. Altman filed a timely appeal.

Analysis of the Court

Altman argued his conviction for Assault 3 must be reversed because the evidence was insufficient to show he assaulted AW with an instrument or thing as required by the statute. The Appellate Court agreed. Courts review challenges to the sufficiency of the evidence by considering whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State.

Under RCW 9A.36.031(1)(d), a person is guilty of assault in the third degree if **"he or she with criminal negligence, causes bodily harm to another person by *means of weapon or other instrument or thing likely to produce bodily harm*."** The State relied solely on Altman's hands to support the lesser alternative of Assault 3. Therefore, the only issue on appeal was "whether a hand meets the statutory requirement of **other instrument or thing likely to produce bodily harm." Because the statute did not define the term of other instrument or thing, the Court was required to give the term or terms their plain and ordinary dictionary meaning. This is known as "plain meaning" in statutory interpretation.**

The Appellate Court relied on the prior case of *State v. Marohl*, 246 P.3d 177 (2010) where it applied Webster's Dictionary to **define *instrument* as "a means whereby something is achieved, performed, or furthered"** and a ***thing* as "an entity that can be apprehended or known as having existence in space or time."** In the *Marohl* case, the court held the "defendant made no effort to proactively use the floor to injure the victim, the defendant did not use the floor like a weapon," and "a bare arm may not be the instrument or thing that elevates an assault charge." [citation omitted]

Considering the definitions used in *Marohl*, **the Court determined in this case that *hands are not an instrument or thing*** under a "plain meaning" interpretation under Assault 3. The Court held that hands are an extension of a person, not a utensil, implement, or inanimate object. Because there was no evidence Altman used anything other than his hands when grabbing and squeezing AW's neck, the State failed to present sufficient evidence to support the essential element of "weapon or other instrument or thing likely to produce bodily harm" for Assault 3. As a result, there was insufficient evidence to support Altman's conviction for Assault 3.

The Court reversed and vacated Altman's conviction and remanded to the trial court to dismiss the Assault 3 conviction with prejudice.

Training Takeaway

While this case involved charges of sexual assault, the sole issue on appeal focused on statutory interpretation of the Assault 3 statute.

The evidentiary and factual issues related to the charges of Rape 2, Assault 2, and Unlawful Imprisonment at trial were not addressed and are beyond the scope of this case summary, except to note that the definition of Consent changed after the assault reported in this case.

> Under RCW 9A.44.010(2): "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."

Washington law does not require a victim to say "no" or to "fight back" as Altman testified in support of his defense that the sex was consensual. This definition of consent was not in effect at the time of this incident. It is unclear if the current statute would have altered the jury verdict at trial. Hands are an extension of a person, not a utensil, implement, or inanimate object and cannot be used to satisfy the terms "instrument" or "thing" for a charge of Assault 3 specifically and narrowly provided under RCW 9A.36.031(1)(d).

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State of Washington v. Flannery

No. 55628-1-II

Washington State Court of Appeals Division Two

November 22, 2022

TOPIC: Constitutionality of Order to Surrender Weapons (former RCW)

Facts Summary

The defendant, Flannery, was arraigned for second degree assault-domestic violence (DV) that did not involve a firearm or dangerous weapon. The State sought and was granted a no-contact order-DV under RCW 10.99(opens in a new tab). In addition, the State requested an order requiring Flannery to surrender all firearms and prohibiting Flannery from obtaining, owning, possessing, or controlling any firearms.

The trial court granted the State's proposed Order for Flannery to surrender any weapons (the "Order"). The Order "directed Flannery to either (1) immediately surrender any firearms or dangerous weapons in his possession or control . . . along with a sworn statement declaring he had done so or (2) immediately sign a different sworn statement declaring that he had not surrendered any of the legally prohibited items because he did not at the time possess any of those items." In the event he failed to comply with either of the requirements, "he could be found in contempt of court and/or be charged with a misdemeanor or felony."

Flannery failed to comply with the order to surrender. As a result, the State then filed a criminal charge against Flannery for non-compliance. Flannery moved to vacate the Order and new criminal charge by arguing the applicable statutes upon which the State relied which included former RCW 9.41.800, RCW 9.41.801 and RCW 9.41.804, violated his privilege against self-incrimination and right to be free from unreasonable searches or seizures. He argued that because it would have been unlawful for him to own a firearm when the no-contact order was issued, a later declaration of surrender would force him to incriminate himself. He also argued that his right to remain free from unreasonable search and seizure was violated as the order directed him to search his own home and seize any firearms to which he would then give to law enforcement without reasonable suspicion or probable cause.

The trial court ruled the statutory scheme requiring surrender was unconstitutional as it violated the privilege against self-incrimination and unreasonable searches. Consequently, it vacated the order to surrender and dismissed the criminal charge.

> ⓘ NOTE: The trial court specified that the unconstitutional statutory scheme consisted of former RCW 9.41.800(1)(a)-(b), (2)(a)-(b), (3)(c)(ii)(A)-(B), (4)-(5), and (7); former RCW 9.41.801(2) and (6); RCW 9.41.804 and .810.

The State appealed the trial court's findings. The Court of Appeals affirmed the trial court's ruling.

Analysis of the Court

Initially, the Court discussed its authority in addressing the constitutionality of laws. It stated: "because the legislature speaks for the people, we are hesitant to strike a statute unless we are 'fully convinced, after a searching legal analysis, that the statute violates the constitution.'" "Ultimately, however, it is for the judiciary to determine whether a given enactment violates the constitution." [citations omitted]

Under RCW 9.41.800, the court was authorized to issue protection orders that prohibited respondents from possessing firearms or weapons and order them to surrender such weapons. In 2021, the legislature changed the statutory scheme through House Bill 1320 and included an immunity provision for firearm surrender.

This immunity provision under RCW 9.41.801(9)(a), effective July 1, 2022, states:

> An order to surrender and prohibit weapons issued pursuant to RCW 9.41.800 must state that the act of voluntarily surrendering firearms or weapons, or providing testimony relating to the surrender of firearms or weapons, pursuant to such an order, may not be used against the respondent in any criminal prosecution under this chapter, chapter 7.105 RCW, or RCW 9A.56.310.

While the revisions in RCW 9.41.801 likely resolved the issues of unconstitutionality of the prior language, the Court ruled that the new, revised language was not **retroactive, but prospective (applying in the future).** In other words, the revision did not apply to the order to surrender in this case issued under RCW 10.99.

Generally, **Courts presume that a revised or new statute operates prospectively (from the date of enactment forward) unless (1) the Legislature explicitly provides for retroactivity, (2) the amendment is curative, or (3) the statute is remedial.**

- "Curative" means that it "clarifies or technically corrects an ambiguous statute."
- "Remedial" means that it "relates to practice, procedure or remedies, and does not affect a substantive or vested right."

The Court determined that the revisions were neither curative nor remedial. Additionally, it determined that the revisions did explicitly provide for retroactivity in this instance.

The Court explained:

> On the first prong of the retroactivity analysis, **the legislature did not explicitly provide for retroactivity. The retroactivity provision states that protection orders entered before the effective date are subject to the provisions of the act.** It does not state that surrender orders entered before the effective date are subject to the provisions of the act.
>
> Additionally, Flannery's no-contact order and corresponding firearm surrender order were issued pursuant to chapter 10.99 RCW, not one of the chapters listed in the retroactivity provision above. The relevant portion of chapter 10.99 RCW relates specifically to individuals who are charged with a crime involving domestic violence and states that courts authorizing pre-trial release shall determine if the defendant should have a no-contact order with the victim. RCW 10.99.040(2)(a). It provides that, in

issuing the no-contact order, the court shall consider the firearm surrender statutory provisions (RCW 9.41.800) and shall order the defendant to surrender firearms. RCW 10.99.040(2)(b).

In contrast, **the chapters listed in the retroactivity provision relate to protection orders issued after a victim petitions for them. Therefore, the legislature did not explicitly provide for retroactive application to Flannery's case.**

Essentially, the Court determined that because the legislature only explicitly referenced statutory provisions related to protection orders sought through petition of a victim and did not explicitly reference no-contact orders or orders to surrender issued by the court, the new language providing immunity from self-incrimination was not retroactive.

Upon determining that the new language in RCW 9.41.801 was not retroactive to the no-contact order and order to surrender in this case, the Court of Appeals addressed two constitutional issues: the Fifth and Fourth Amendments to the U.S. Constitution and Article I, sections 9 and 7, respectively, of the Washington State Constitution. First, **the Fifth Amendment and Article I, section 9 of the Washington Constitution guarantee that an individual cannot be compelled by the government to provide incriminating information against themselves.** The State argued a respondent's statements about compliance with firearm surrendering could not be used against an individual because of immunity and there was no constitutional violation when the State asked for information. Rather, the State asserted that a violation occurs only if these compelled answers are then used against a person during prosecution.

The Court disagreed with both arguments. The Court determined that there was no immunity as RCW 10.52.090 did not expressly provide immunity for individuals complying with firearm surrender orders and CrR 6.14 granted immunity only upon the motion of a prosecutor. Also, the Court disagreed that the privilege against self-incrimination can only be violated when the State used those compelled answers against an individual. The Court noted that the prosecution had the ability to and did impose a substantial penalty for Flannery's assertion of privilege against self-incrimination by filing criminal charges for non-compliance with the order to surrender.

Second, the Court addressed the **Fourth Amendment of the U.S. Constitution which protects people from unreasonable search and seizure by the government. Article I, section 7 of the Washington Constitution is more restrictive and "prohibits any invasion of an individual's right to privacy without authority of the law."** Basically, Flannery argued that by ordering him to search his home, seize any firearms, and surrender them under an order that makes such possession criminal constituted an unreasonable search and seizure. On appeal, the State argued that these constitutional protections are only violated when the prosecution seeks to use the "fruits" of an illegal search. The Court disagreed and held that a Fourth Amendment violation occurs at the time of an illegal search even if the fruits of an illegal search are not later used in prosecution.

The Second Division of the Washington State Court of Appeals decided in favor of Flannery by finding the trial court did not err in declaring the former firearm surrender statutory scheme unconstitutional as it violated the Fourth and Fifth Amendment as well as article I, Sections 7 and 9 of the Washington Constitution. The Court of Appeals also found the trial court did not err in vacating Flannery's surrender order and dismissing the criminal charge for noncompliance with that order.

Training Takeaway

In this case, some portions of Orders to Surrender Weapons (OTSW) issued pursuant to former RCW 9.41.800 -.804 were found to be unconstitutional. The legislature's 2021 amendments to the statutes including an immunity provision under RCW 9.41.801 likely cured the pre-2021 constitutional concerns, but those revisions were held to not be retroactive to OTSWs in this case, but only explicitly to protection orders.

NOTE:
This Court addressed specifically the unconstitutionality of the requirement to surrender weapons under an OTSW pursuant to RCW 10.99 and former RCW 9.41.800-.804.

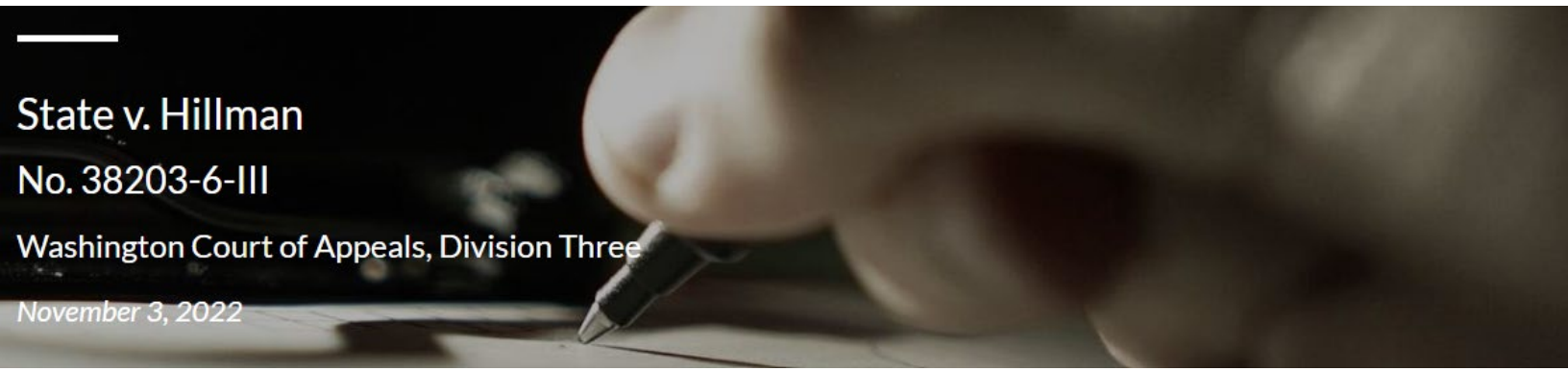
Additionally, **Flannery did not challenge, nor did the Court address, the constitutionality of any other provisions of former RCW 9.41.800 that, for example: (c) Prohibit the party from accessing, obtaining, or possessing any firearms or other dangerous weapons; (d) Prohibit the party from obtaining or possessing a concealed pistol license.**

RCW 9.41.800 expressly references the **doctrine of *severability*** applied in statutory construction. Basically, if a portion or section of any statute is unconstitutional, it can be "severed" or "separated" from all other sections or provisions. Simply, one rotten apple can be removed from a bushel of apples, instead of discarding the whole bushel.

The legislature recognized the application of severability in the footnotes in RCW 9.41.800 which provides, "**If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected."** See 2319-S2.SL.pdf (wa.gov)

> Please refer to guidelines from your respective agency or agency counsel in possible implications of this case on the enforcement of OTSWs or portions or provisions of these orders issued prior to July 1, 2022.

EXTERNAL LINK: View the Court Document



State v. Hillman

No. 38203-6-III

Washington Court of Appeals, Division Three

November 3, 2022

TOPICS: **Admissibility of Evidence – Authentication and Hearsay**

Facts Summary

Michael Hillman and James "Jamie" Hillman are two brothers who opened a flooring business named Factory Direct Flooring. Michael took on the day to day running of the business as well as the financial side while Jamie worked to build a website for internet sales. The business was struggling and after five years, Jamie terminated his involvement. After he left, Jamie began receiving contacts from the collection agencies who were looking to collect money from their company. Jamie was unaware of any outstanding debt and when he asked Michael about this, Michael said not to "worry about it" as he was "taking care of it."

Jamie began asking for copies of the documents at issue in the collections actions and discovered that his signature had been falsified. Various creditors then served him with lawsuits regarding the unpaid debt. Jamie asked for a copy of these documents as well and saw that they contained Michael's genuine signature but his own did not appear authentic. He suspected his brother of doing something wrong and decided to go to the police. Before doing so, he contacted Michael about this, and Michael told him that he would say Jamie "had given him permission to sign the documents." Jamie disagreed with ever giving permission and decided to go to the police.

The State charged Michael with nine counts of forgery, five counts of identity theft, four counts of theft, and one count of criminal impersonation in the first degree. Michael filed a motion in limine (a motion to not have evidence admitted into the trial) prior to the trial to exclude copies of the loan documents giving rise to the State's forgery and identity theft allegations. **He argued "the State lacked sufficient proof to authenticate the documents or to admit them over a hearsay objection." The trial court overruled the objection.**

The jury was unable to reach a verdict on 13 of the 19 counts but returned a guilty verdict on six total counts - five counts of forgery and one count of identity theft.

Michael filed a timely appeal.

Analysis of the Court

The Court of Appeals addressed Michael's challenge to the admissibility of the loan documents under the evidentiary rules of authentication and hearsay.

Admissibility of Evidence – Standard of Review

Michael argued the trial court improperly admitted the loan documents that formed the basis of his six convictions. He claimed that "the documents were not authenticated and constituted improper hearsay." The Court noted that it reviews trial court's evidentiary rulings for abuse of discretion under State v. Ellis and then it proceeded to address each of Michael's evidentiary claims, as follows.

II. Authentication

The Court said that "The rules for authenticating exhibits are set forth in Title 8 of the Rules of Evidence." The rules are "intertwined with the concept of relevance" and the "document's relevance turns on whether it can be authenticated as being what it purports to be." There is a relatively low bar for authenticating evidence as the proponent does not have to "rule out all possibilities inconsistent with authenticity" and there only needs to be "sufficient proof that would allow a reasonable juror to find in favor of authenticity."

> "However, in a forgery case, the authenticity requirement is different as "the charge depends on proving the document is not what it purports to be." "The proponent of the purportedly forged contract must be able to show the document is fake in a way that is relevant to the elements of the legal claims on trial.""

In this case, the State was tasked with authenticating loan documents that were signed by Michael but forged as to Jamie. For each of these documents, the State presented lay testimony that Michael's signature was legitimate, but Jamie's was not. Jamie and several of Michael's co-workers testified that Michael's signature appeared consistent with his genuine signature.

Additionally, Jamie testified that his signature was not genuine. The State also called a forensic handwriting examiner who testified as to the handwriting indicators and found there were indicators on each of the documents suggesting Jamie had not signed his own name and the signature had instead been signed by Michael. The State also presented circumstantial evidence tying the loan documents to Michael. Some of the documents contained personal information of the Hillman brothers including their address, phone numbers, and social security numbers which is information that would have been known to Michael but very few others. The State included Michael's statements to Jamie in the circumstantial evidence including Michael's initial expression of familiarity with the documents when he stated he would take care of the creditor phone calls and Michael's acknowledgment of his responsibility for the documents when Jamie told him he was going to the police.

The Court noted that the evidence produced by the State fell within established methods for authenticating written documents. Under Evidence Rule (ER) 901(b)(2), lay persons familiar with an individual's handwriting can authenticate a document signed by that individual. Under ER 901(b)(3), an expert witness can authenticate documents as attributable to a particular person. And under ER 901(b)(4), the proponent of a document can offer circumstantial evidence of authenticity such as distinctive characteristics combined with other circumstances.

Michael argued the "State did not present authentication evidence from a witness with knowledge about how the various documents were created." However, the **"testimony of a witness with knowledge is only one of a variety of nonexclusive methods for authentication."** Additionally, **a witness does not have to have been present at the creation of the document to authenticate its contents.** "The evidence presented by the State also tended to show the documents at issue were relevant to the crimes charged" as each of the documents contained Jamie's forged signature and was attributable to Michael as they contained indicators that Michael had forged Jamie's signature.

The Court found "the combined force of these two facts was relevant to helping the State prove the elements of forgery and identity theft." The Court also found that **the fact Michael was responsible for the documents bearing the forged name of Jamie was relevant to the first element of forgery (falsely making a written instrument) and the first element of identity theft (use of a means of identification of another person [such as SSN]).**

The Court pointed out a concern separate from Michael's authenticity claim that the State had other challenges in proving each of the crimes as both forgery and identity theft require proof of bad intent and the mere facts of this case did not necessarily show that. See Forgery RCW 9A.60.020 (requiring "intent to injure or defraud" another) and Identity Theft RCW 9.35.020 (requiring use of another's "means of identification or financial information . . . with the intent to commit" any crime). However, the Court noted that the State did produce enough evidence to show the documents were relevant to the case and the minimal burden of establishing authentication required nothing more. In other words, the Court limited its review to the admissibility of evidence, not to the merits of each element of the crimes of Forgery and Identity Theft, as those were not raised as issued on appeal.

III. Hearsay

Additionally, Michael argued "that even if the documents could be deemed authentic, they were nevertheless inadmissible due to prohibition against hearsay in Title 8 of the Rules of Evidence." The Court disagreed **as hearsay is "an out-of-court statement offered to prove the truth of the matter asserted." The Court found the six loan documents "do not qualify as hearsay because they were not authored or admitted for the truth of the matter asserted."**

They based this decision on three points.

- First, the "State did not proffer the documents to prove Michael and Jamie were in fact obliged to various companies at issue pursuant to terms of the documents."
- Second, "the State proffered documents to show they were false."
- Third, "the rule against hearsay does not apply in this circumstance."

Training Takeaway

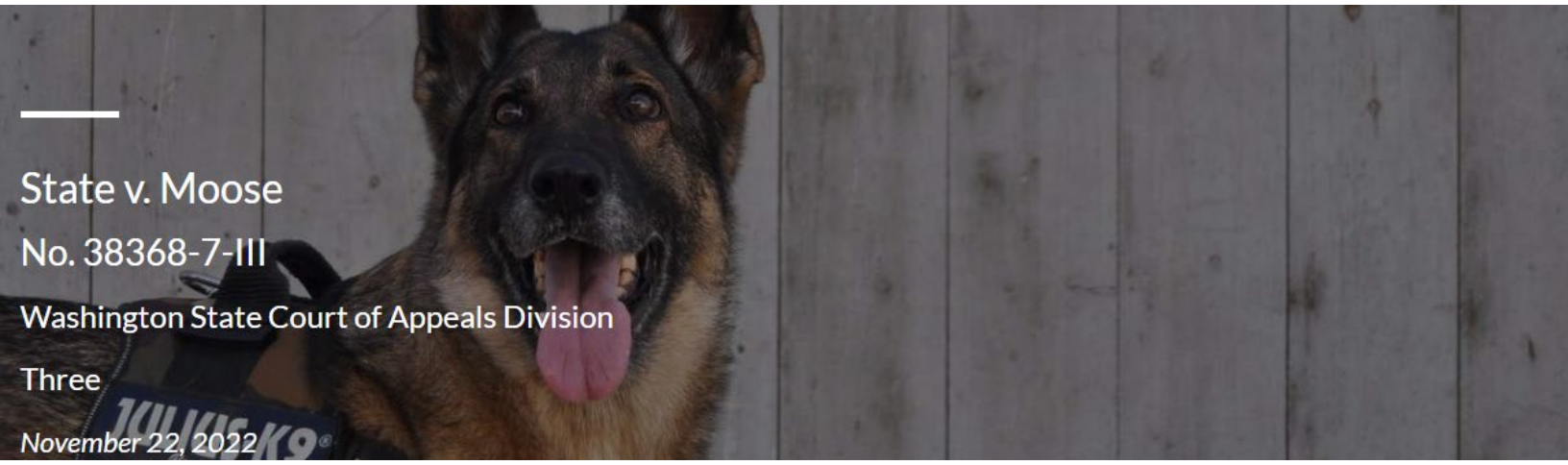
While the Rules of Evidence are specifically applied in Court or in pre-trial motion practice, law enforcement's basic familiarity with the Rules of Evidence can assist in the investigation and collection of evidence and later to aid the prosecution in proving the elements of a crime or crimes.

In this case, forgery and identity theft involve crimes of fraud and deception that present their own challenges

in investigation and proof. One brother alleged another brother (also former business partner) forged his signature and submitted personal information (e.g. SSN) apparently to secure loans that the brother defaulted upon and for which the innocent brother faced personal liability.

The State used the testimony of the injured brother, co-workers of the brothers, and an expert witness to authenticate the documents and the signatures/forgeries. The Court found that evidence admissible. Additionally, the Court found that a witness does not have to be present at the creation of a document to authenticate its contents. In investigating possible crimes of fraud involving identity theft and/or forgery, having laypersons or non-experts familiar with documents and another's signature can provide admissible evidence to corroborate or prove one or more elements of a crime.

EXTERNAL LINK: View the Court Document



State v. Moose

No. 38368-7-III

Washington State Court of Appeals Division Three

November 22, 2022

TOPICS: **General-specific rule, Harming Police Dog**

Facts Summary

One evening, the Yakima police department received a report of a man, Richard Moose, who was vehicle prowling in a closed car dealership parking lot. Once police arrived, he became agitated and hid between two cars, refusing to obey officer's requests to leave the property or come out and speak with them. Moose then used an aerosol can and butane lighter to create a fireball. Police were concerned about injuries or damages and contacted additional units and the fire department. Police then saw a sock hanging from the gas tank of one of the cars next to Moose. Moose continued to use the aerosol can and lighter and directed a fireball towards the sock on the car's gas tank. Police thought that Moose was attempting to ignite the sock and light the car on fire.

Because Moose continued to ignore the commands of the officers, the police decided to use K9 Officer Trex to take Moose into custody. Moose then shot a fireball at K9 Trex which caught the dog's head on fire. The K9 retreated and the fire extinguished itself, he then reengaged and subdued Moose. The fireball resulted in K9 Trex's whiskers and eyelashes being burnt off and the fur on his head being singed.

The State charged Moose with four offenses: attempted arson in the second degree under RCW 9A.48.030 and RCW 9A.28.020, harming a police or accelerant detection dog under RCW 9A.76.200, resisting arrest under RCW 9A.76.040, and attempted malicious mischief in the third degree under RCW 9A.48.090 and RCW 9A.28.020.

Under Washington law, the jury convicted Moose on all four counts, and he was sentenced to 46 months in prison and 18 months on community custody. Moose filed a timely appeal. Moose argued that his conviction for attempted malicious mischief in the third degree under the general statute must be vacated under the general-specific rule because a "statute criminalizing that offense is concurrent with the statute criminalizing arson in the second degree" under the specific statute.

The Court agreed to consider these arguments on appeal.

Analysis of the Court

The court addressed three issues on appeal, two of which will be addressed below: concurrent statutes and sufficiency of the evidence of harming a police dog.

> ⓘ NOTE: A person is guilty of criminal attempt if with intent to commit a specific crime, the person does an act that is a substantial step in furtherance of that crime.

Here, there appeared to be no dispute to the facts that using a butane lighter and aerosol can near a sock hanging on a car's gas tank satisfied the substantial step element in attempted malicious mischief and arson.

1. Concurrent Statutes

The Court had to determine if RCW 9A.48.090(1)(a) for Malicious Mischief in the Third Degree and RCW 9A.48.030(1) for Arson in the Second Degree are concurrent statutes for the purpose of the general-specific rule. The Court looked to the decision in *State v. Guang None Zheng* which held, **"if a special statute punishes the same conduct that is punished under a general statute, the special statute applies and the accused can only be charged under that statute." As such, "whenever two concurrent statutes govern the same subject matter and cannot be harmonized, the specific statute prevails unless it appears that the legislature intended to make the general act controlling." "The determinative factor is whether it is possible to commit the specific crime without also committing the general crime."**

The Court added that the **"statutes are concurrent if all the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute." Thus, "if there is any possible way for a person to violate the specific statute but not the general statute, the two statutes cannot be concurrent."**

In applying this rule, the Court analyzed the elements of both statutes under which Moose appeals. Under RCW 9A.48.090(1)(a) "[a] person is guilty of malicious mischief in the third degree if he or she: **knowingly and maliciously causes physical damage to the *property of another*."** Under RCW 9A.48.030(1) "a person is guilty of arson in the second degree if he or she **knowingly and maliciously causes a fire or explosion that *damages property."***

While both statutes have the same mental state of "knowingly and maliciously," the cause/harm are different. The Court found a person can commit the more specific offense of Arson in the Second Degree without also committing Malicious Mischief in the Third Degree [as] the person can cause a fire or explosion to their own property."

As a result, the court found the two statutes are not concurrent and affirmed Moose's conviction under both Malicious Mischief and Arson. The fact that he did not cause a fire to his own property was not relevant in statutory interpretation under the General-Specific rule and the determination of whether the statutes were concurrent. While both statutes involved the same conduct because they were determined to not be concurrent, the Court agreed with the trial court's decision and rejected Moose's argument.

2. Sufficiency of Evidence of Harming Police Dog

Moose argued the State failed to prove each element of RCW 9A.76.200 Harming Police Dog beyond a reasonable doubt. This statute requires proof that a **person maliciously injured a police dog [or police horse] that the person knows or has reason to know is a police dog.** This statute did not expressly define "maliciously." In another part of the RCW, 9A.4.110(2), **Maliciously is defined as "with evil intent, wish or design to vex, annoy, or injure *another person*."** Because the definition requires the injury being done to another person, not a dog, Moose argued that it was impossible for the State to prove the "malicious" element for his actions that caused burns to K-9 Officer Trex.

The Court found Moose's claim involved "a manifest error of constitutional magnitude." Additionally, the Court found Moose's suggestion to how the RCW should be read would render the entire statute meaningless as the State is not required to prove he harmed another person to prove he harmed a police dog and found the evidence at trial was sufficient to sustain a conviction.

Training Takeaway

Under the **general-specific rule**, you must charge the most specific crime and cannot charge a specific and general crime for the same act if those statutes are concurrent.

For example, if a person steals a gun worth $800, the general statute is theft in the second degree which is a class C felony as it was taken with the intent to deprive the owner and its value is over $750. But, the more specific statute is Theft of a Firearm which is a class B felony, because specifically a firearm was taken and the value of the firearm is not material. Under this general-specific rule, the thief would be charged with Theft of a Firearm, not Theft in the Second Degree or both.

- "Maliciously" extends to police dogs for the purpose of RCW 9A.76.200, ruling it is a felony to maliciously harm a police dog.
- Maliciously is defined under RCW 9A.04.110(12) as "an evil intent, wish, or design to vex, annoy, or injure another person" and RCW 9A.76.200 defines harming a police or accelerant detection dog as maliciously harming a police dog.

While maliciously states the harm is done to another person, the Court found the State was not required to prove the defendant harmed another person to prove they harmed a police dog. That would be preposterous.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – November 2022

TOPICS

1. Constitutionality of Order to Surrender Weapons (OTSW) under former RCWs
2. Statutory Interpretation and Plain Meaning of "Instrument" under Assault 3
3. Admissibility of Evidence – Authentication and Hearsay
4. General-specific rule
5. Harming a Police Dog

CASES & REFERENCES

1. State v. Altman, No. 56249-9-II (November 15, 2022)
    a. RCW 9A.36.031
    b. RCW 9A.44.010
2. State of Washington v. Flannery, No. 55628-1-II (November 22, 2022)
    a. RCW 10.99
    b. RCW 9.41.800
    c. 7.105 RCW
    d. RCW 9A.56.310
    e. 2319-S2.SL.pdf (wa.gov)
3. State v. Hillman, No. 38203-6-III (November 3, 2022)
    a. RCW 9A.60.020
    b. RCW 9.35.020
4. State v. Moose, No. 38368-7-III (November 22, 2022)
    a. RCW 9A.48.030
    b. RCW 9A.28.020
    c. RCW 9A.76.200
    d. RCW 9A.48.090

WA Legal Updates

For further reading, the following training publications are authored by Washington State legal experts and available for additional caselaw review:

- Legal Update for WA Law Enforcement authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** by WA Association of Prosecuting Attorneys [2018-2021] | [2022-present]