Law Enforcement Digest

SEPTEMBER 2012

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

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) AREA NEAR HOME'S SIDE ENTRY DOOR LOCATED ON LEFT WALL OF CARPORT HELD PROTECTED PRIVATE AREA UNDER FOURTH AMENDMENT; COURT RULES THAT FEDERAL BORDER PATROL AGENT UNLAWFULLY WENT INTO THAT PRIVATE AREA RATHER THAN GOING TO FRONT DOOR TO CONTACT RESIDENT – In U.S. v. Perea-Rey, 680 F.3d 1179 (9th Cir., May 31, 2012), a 3-judge Ninth Circuit panel rules that federal border patrol agents violated a defendant's Fourth Amendment rights when, without a warrant, consent, or exigent or emergency circumstances, they went into his carport, seized two people in the carport, and ordered persons inside the house to come out.

U.S. border patrol agents followed a suspected undocumented alien, Pedro Garcia, after watching him climb a Mexico-U.S. border fence and enter the United States. Garcia eventually got into a taxi. The agents followed Garcia's taxi. They continued to follow him after he got out of the taxi, went through a gate to a sidewalk that leads to the front door of a house, and knocked on the front door. Heriberto Perea-Rey opened the front door and apparently directed Garcia to go around to a side door located in the left wall of a carport.

Viewed from the front, the carport has a full right side wall (the Ninth Circuit decision includes photos of parts of the exterior of the property in an appendix). The carport shares its left wall

with the residence. An entry door is located in the left wall of the carport approximately 10 feet into the carport. The back of the carport opens into a fenced backyard. The driveway into the carport has a gate to the wrought-iron fence that fully surrounds the house. The driveway gate was closed at all relevant times in this case. The carport was used by the resident to store two vehicles, some tools, a hand-truck, and some building supplies. Daylight does not reveal much of the interior of the carport from outside the property. Thus, a passerby cannot see the side entry door from outside the driveway gate during daylight hours.

A border patrol agent went immediately into the carport when he saw the suspect go inside. The agent saw the suspect and another man standing near the side entry door inside the carport. The agent seized the two men and held them while waiting for backup agents to arrive. When backup arrived, the agents ordered others inside the house to come outside. After several persons came out of the residence into the carport, the agents entered and searched the residence without a search warrant or consent.

The issue in this case was admissibility of evidence obtained by the agents before the agents made their concededly unlawful warrantless entry into the interior of the residence from the carport interior. The Ninth Circuit panel concludes that the agents unlawfully entered the carport.

The federal government's main argument in support of entry of the carport was that the carport door was a normal means of access to the home that was open to casual visitors, and therefore that the agents could lawfully go into that area. The Perea-Rey Court acknowledges the Fourth Amendment principle that law enforcement officers can go into areas that are normal means of access to a home even though those areas constitute "curtilage" of the home. However, the panel concludes that in this case, while this principle would have allowed the agents to go to the front door, it does not support their approach to the side door that was located in the somewhat-enclosed carport.

Result: Reversal of U.S. District Court (Southern District of California) convictions (three counts) of Heriberto Perea-Rey for harboring undocumented aliens in violation of federal law.

LED EDITORIAL COMMENT: The question of whether, without a search warrant, officers seeking to contact persons in a home may approach a side door, rather than the front door, of the home, is a highly fact-specific question, and is also a question as to which appellate court results are unpredictable. We think it might make a difference if officers first knock at the front door, and then, getting no response, go to a side or back door, though case law can be found to support the idea that officers do not have to select a primary access route, so long as more than one route is impliedly open to the casual visitor. Our reading of the Perea-Rey opinion, however, is that the panel believed that only the front door of the residence was impliedly open to casual visitors to the home. Of course, in cases where, as here, officers have probable cause to search a residence, seeking a search warrant is the safest legal approach.

Those wishing to do legal research on this issue may want to start with Professor Wayne LaFave's Search and Seizure treatise (Fourth Edition), section 2.3(f) "Protected areas and interests – Residential premises – Entry of adjoining lands." Section 2.3(f) of the LaFave treatise is cited in passing in a footnote in the Perea-Rey decision. For two Washington appellate court cases in this subject area, see State v. Seagull, 95 Wn.2d 898 (1981) (where officer investigating a car accident in the area had been told that the residents often could not hear knocking at the home's north porch, he acted reasonably when he walked around the house on a pathway to knock at the south porch, so what he

saw along the way was a lawful open view observation); State v. Ross, 141 Wn.2d 304 (2000) Sept 00 LED:02 (officers who went late at night to a back driveway and sniffed at a detached garage of a house with no attempt or intent to try to contact the resident violated the privacy rights of the resident even though the back driveway area near the garage was an area impliedly open to casual visitors to the residence – the sniffing activity was not "legitimate police business" for purposes of the rule that allows officers to go where casual visitors are impliedly allowed to go).

(2) COURT AFFIRMS CONVICTION FOR MAKING A FALSE STATEMENT WITH RESPECT TO INFORMATION REQUIRED TO BE KEPT BY A FEDERALLY LICENSED FIREARMS DEALER WHERE DEFENDANT ANSWERED THAT HE WAS THE ACTUAL BUYER OF FIREARMS, WHEN HE WAS NOT – In United States v. Johnson, 680 F.3d 1140 (9th Cir., May 29, 2012) the Ninth Circuit Court of Appeals affirms the defendant's conviction for making a false statement with respect to information required to be kept by a federally licensed firearms dealer where the defendant completed Bureau of Alcohol, Tobacco, and Firearms (ATF) Form 4473 and answered "yes", that he was the "actual buyer" of the firearms, where in fact he turned around and immediately delivered the firearms to another individual (on several separate occasions).

Result: Affirmance of United States District Court (Arizona) conviction of Timothy Russell Johnson of making a false statement with respect to information required to be kept by a federally licensed firearms dealer.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) FOR PURPOSES OF FIRST DEGREE ARSON STATUTE, RCW 9A.48.020, "VALUED AT" REFERS TO MARKET VALUE, NOT VALUE FOR INSURANCE PURPOSES; COURT FINDS SUFFICIENT EVIDENCE TO ESTABLISH MARKET VALUE OF MOBILE HOME EQUAL TO OR GREATER THAN $10,000 – In State v. Sweany, ___ Wn.2d ___, 2012 WL 2925683 (July 19, 2012), the Washington Supreme Court agrees with arson defendants, unanimously holding that "valued at ten thousand dollars or more" in the first degree arson statute refers to market value, not value for insurance purposes. The Supreme Court goes on, however, to hold that there is sufficient evidence in the record that the mobile home that the defendants burned had a market value of ten thousand dollars or more.

Leysa and Leah Sweany (mother and daughter) were convicted of first degree arson for intentionally setting their mobile home on fire in order to collect insurance. There are four alternative means by which first degree arson can be committed. This appeal involved only one of those alternatives, the insurance-proceeds means of committing arson in the first degree under RCW 9A.48.020(1). That alternative provides:

> (1) A person is guilty of arson in the first degree if he or she knowingly and maliciously: . . . . (d) Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

[Emphasis added]

The defendants contended on appeal that the State failed to prove beyond a reasonable doubt an essential element of arson in the first degree under subsection (1)(d) – market value equal to or greater than $10,000 value. They argued that "value" is the market value. The Court of Appeals rejected the defendants' argument on the "insurance value" versus "market value"

question. The Court of Appeals also held in the alternative that there was sufficient evidence of market value equal to or greater than $10,000. State v. Sweany, 162 Wn. App. 223 (Div. III, 2011) **Nov 11 LED:22**.

The Washington Supreme Court disagrees with the Court of Appeals on the "insurance value" vs. "market value" question. But the Supreme Court goes on to hold, as did the Court of Appeals in its alternative holding, that there is sufficient evidence in the record of market value equal to or greater than $10,000 to support the Sweanys' convictions. The Supreme Court explains as follows regarding the evidence of market value:

> Four aspects of testimony, taken together, amounted to sufficient evidence with respect to the market value of the property: (1) the asking price for the trailer in 2001 was $15,000; (2) the trailer sold for $10,500 in 2001; (3) Leysa Sweany believed the home was worth "[a] little bit more" than $10,000 at the time of the fire; and (4) the manager of the manufactured/mobile home community testified that values for manufactured and mobile homes built prior to 1995 sold for [sic] between $6,000 and $12,000. From these facts, a rational juror could have found that the State had proved, beyond a reasonable doubt, that the market value of the property was $10,000 or more.

Result: Affirmance of Court of Appeals decision that affirmed the Benton County Superior Court convictions of Leysa Lynn Sweany and Leah Lynn Sweany for first degree arson.

(2) PUBLIC RECORDS ACT LAWSUIT: A FEDERAL STATUTE, 23 U.S.C. § 409, PROTECTING LOCATION-SPECIFIC COLLISION DATA DOES NOT APPLY TO COLLISION RECORDS COLLECTED BY THE WASHINGTON STATE PATROL PURSUANT TO RCW 46.52.060 – In Gendler v. Batiste, 174 Wn.2d 244 (April 12, 2012) the Washington State Supreme Court holds that collision records collected by the Washington State Patrol pursuant to RCW 46.52.060 are not protected by 23 U.S.C. § 409 (which provides that reports compiled or collected for the purpose of identifying collision locations shall not be subject to discovery or admitted into evidence in an action for damages) and therefore not exempt from public disclosure, even though the records are stored in a database shared with the Washington State Department of Transportation (WSDOT) and may only be retrieved as a result of WSDOT's analysis of the records (which is conducted in order to comply with federal highway laws).

The Court also rejects the argument that the Court was incorrect in holding in Guillen v. Pierce County, 144 Wn.2d 696 (2001), reversed by Pierce County v. Guillen, 537 U.S. 129 (2003), that collision records prepared by law enforcement officers pursuant to RCW 46.52.070 are subject to public disclosure in the first place, rather than being exempt under RCW 46.52.080.

Result: Affirmance of Court of Appeals affirmance of Superior Court order granting summary judgment in favor of plaintiff.

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WASHINGTON STATE COURT OF APPEALS

PUBLIC DUTY DOCTRINE PRECLUDES SUIT BY WIDOW OF INTOXICATED PEDESTRIAN WHO WAS RUN OVER BY A DRUNK DRIVER 1.5 HOURS AFTER OFFICER CONTACTED PEDESTRIAN AND TOLD HIM (1) TO STAY OFF BUSY DIVISION STREET, AND (2) IF HE HAD TO BE ON THE STREET, TO WALK FACING TRAFFIC

Weaver v. Spokane County, ___ Wn. App. ___, 275 P.3d 1184 (Div. III, May 8, 2012)

Facts: (Excerpted from Court of Appeals opinion)

> On February 8, 2008, at approximately midnight, [a Spokane County Deputy] saw Mr. Weaver walking on the snow berm covering the sidewalk along Division Street in Spokane, Washington. Mr. Weaver was having a hard time maintaining his balance on the snow piles and stepped off the snow to walk in the street. [The Deputy] also observed at least two cars change lanes to avoid hitting Mr. Weaver. [The Deputy] could not tell if Mr. Weaver was stumbling because of intoxication or because of the difficulty of walking on a snow berm. Mr. Weaver was wearing dark or mixed-color clothing.
>
> [The Deputy] stopped Mr. Weaver and looked at Mr. Weaver's identification. Mr. Weaver asked [the Deputy] why he was being mean to him and harassing him, [the Deputy] told Mr. Weaver that he was concerned for Mr. Weaver's safety because he was walking in the lanes of traffic. Mr. Weaver responded that he was having a hard time walking in the snow, pointed to the snow, and asked [the Deputy] what he expected Mr. Weaver to do.
>
> During the conversation, [the Deputy] noticed that Mr. Weaver was obviously intoxicated. Mr. Weaver's eyes were bloodshot and watery, and Mr. Weaver was weaving slightly from side to side. [The Deputy] did not smell alcohol on Mr. Weaver.
>
> According to [the Deputy], Mr. Weaver had no problems communicating. [The Deputy] asked Mr. Weaver where he was headed. Mr. Weaver told him that he was headed home and said home was downtown. Downtown was about five miles away. [The Deputy] told Mr. Weaver that he was heading the wrong way. Mr. Weaver then indicated that he was heading somewhere else and pointed east toward a neighborhood called Wedgewood. When asked a second time where he was headed, Mr. Weaver gave [the Deputy] the same information. Mr. Weaver was not confused about where he wanted to go.
>
> [The Deputy] then advised Mr. Weaver to stay off Division Street because it was too busy. Mr. Weaver said okay. [The Deputy] also told Mr. Weaver that if he had to walk on the roadway, he should walk facing traffic. [The Deputy] saw Mr. Weaver leave the roadway. Mr. Weaver started walking through a parking lot and continued eastbound behind a building. Mr. Weaver headed toward Wedgewood. He did not appear to be stumbling as he walked away. The contact between [the Deputy] and Mr. Weaver lasted less than five minutes. [The Deputy] did not give Mr. Weaver a breathalyzer test or a sobriety test because Mr. Weaver had not violated any laws that would require tests.
>
> [The Deputy] chose not to follow Mr. Weaver after he left the roadway and disappeared behind a building because "[Mr. Weaver] appeared in possession of his faculties, other than being, in my opinion, under the influence of alcohol. He said he was going down that way. He told me he would stay off the street, I let him walk away." [The Deputy] stated that he was concerned for Mr. Weaver's safety because he was walking in the roadway, not because he was intoxicated.
>
> About one and one-half hours after [the Deputy] spoke with Mr. Weaver, a drunk driver struck Mr. Weaver on Division Street about 100 yards from where [the

> Deputy] first encountered Mr. Weaver. Immediately before the impact, a witness saw Mr. Weaver walking southbound in the northbound curb lane of Division Street. The drunk driver hit Mr. Weaver as Mr. Weaver began walking westbound across Division Street, directly in front of the oncoming vehicle. Based on the testimony, Mr. Weaver was walking facing traffic prior to being struck.

Proceedings below: Mr. Weaver died from his injuries seventeen months later, and his estate sued the county for negligence for failing to take Mr. Weaver into protective custody. The trial court dismissed the lawsuit holding that the public duty doctrine bars the claim.

ISSUE AND RULING: Does the public duty doctrine bar the lawsuit by Mr. Weaver's estate? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Pend Oreille County Superior Court order granting summary judgment in favor of county and dismissing plaintiff's lawsuit.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under the public duty doctrine, "'no liability may be imposed for a public official's negligent conduct unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one).'" Taggart v. State, 118 Wn.2d 195, 217 (1992) (internal quotation marks omitted) (quoting Taylor v. Stevens County, 111 Wn.2d 159, 163 (1988)).
>
> There are four exceptions to the public duty doctrine. Bailey v. Town of Forks, 108 Wn.2d 262, 268 (1987). . . . . These exceptions include the (1) failure to enforce, (2) legislative intent, (3) special relationship, and (4) rescue doctrine. Bailey, 108 Wn.2d at 268. "If one of these exceptions applies, the government will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs."
>
> The Estate contends that an individual duty can be established through each of the exceptions to the public duty doctrine.
>
> 1. Failure to Enforce Exception. Failure to enforce applies "where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intends to protect." Bailey, 108 Wn.2d at 268. "The statute must create a mandatory duty to take specific action to correct a violation." Smith v. City of Kelso, 112 Wn. App. 277, 282 (2002). The failure to enforce exception is to be construed narrowly.
>
> The Estate contends that RCW 70.96A.120(2) created a mandatory duty for Spokane County to take into protective custody those persons who are incapacitated or gravely disabled by alcohol and in public. The Estate argues that because Mr. Weaver fit into this class, Spokane County had a duty to take him into protective custody.
>
> The legislature enacted chapter 70.96A RCW as a comprehensive statute to provide a continuum of treatment for alcoholism and chemical dependency.

RCW 70.96A.010, .011. RCW 70.96A.120(2) provides, in applicable part, that a person who appears to be incapacitated or gravely disabled by alcohol or other drugs and who is in a public place or who has threatened, attempted, or inflicted physical harm on himself, herself, or another, shall be taken into protective custody by a peace officer and as soon as practicable, but in no event beyond eight hours, brought to an approved treatment program.
. . .

The minimum threshold for alcohol commitment requires more than just a danger. In re Treatment of Mays, 116 Wn. App. 864, 872 (2003) (referencing RCW 70.96A.140(1), which uses the same statutory definitions of incapacitated and gravely disabled by alcohol as RCW 70.96A.120(2)). Under the "gravely disabled" standard, the potential for harm must be "'great enough to justify such a massive curtailment of liberty.'" Statutes that involve a significant deprivation of liberty must be strictly construed.

The Estate relies heavily on Bailey to establish that a threshold duty exists under RCW 70.96A.120. We find Bailey factually distinguishable. The officers in Bailey had actual knowledge of a statutory violation prior to their obligation to enforce RCW 70.96A.120.

Here, based on the undisputed facts, [the Deputy] had no knowledge of a statutory violation under RCW 70.96A.120(2). While RCW 70.96A.120(2) would have required [the Deputy] to take Mr. Weaver into protective custody if Mr. Weaver was incapacitated or gravely disabled by alcohol, the undisputed facts and all reasonable inferences therefrom do not indicate that Mr. Weaver appeared in such a state. [The Deputy] testified that Mr. Weaver acted as if he was in possession of his faculties and did not appear to be confused. Mr. Weaver did not have difficulty communicating, and he appeared to know where he wanted to go.

Mr. Weaver was not gravely disabled as a matter of law because the facts do not show that he was in danger of physical harm resulting from a failure to provide for his health and safety. . . .

The facts do not show a likelihood that serious harm would come to Mr. Weaver.
. . .

Significantly, mere intoxication does not bring Mr. Weaver into the class of individuals protected by RCW 70.96A.120(2). RCW 70.96A.120(2) expressly addresses particular individuals who are incapacitated or gravely disabled by alcohol and other drugs and who are in a public place. The statute does not apply to all persons who are simply intoxicated. RCW 70.96A.120(2) involves a significant deprivation of liberty because it allows an officer to take a person into protective custody against the person's will. Therefore, RCW 70.96A.120(2) must be strictly construed. It should not be loosely read to include all persons who exhibit signs of intoxication.
. . .

Because Mr. Weaver does not fit the definition of incapacitated or gravely disabled by alcohol, [the Deputy] did not have knowledge of a statutory violation

and did not have a duty to act under RCW 70.96A.120(2). The failure to enforce exception does not apply.

2. Legislative Intent Exception. The legislative intent exception applies when the terms of a regulatory statute demonstrate a clear legislative intent to identify and protect a particular class of persons. Johnson v. State, 164 Wn. App. 740, 748 (2011) (quoting Honcoop v. State, 111 Wn.2d 182, 188 (1988)), review denied, 173 Wn.2d 1027, 273 P.3d 982 (2012). "The requirement is not that the class be small or narrow, but that it be 'particular and circumscribed.'" Yonker v. Dep't of Soc. & Health Servs., 85 Wn. App. 71, 79, 930 P.2d 958 (1997) (quoting Donaldson v. City of Seattle, 65 Wn. App. 661, 667 (1992)). The standard for a statute to identify "a particular and circumscribed class of persons" for the legislative intent exception is more stringent than that required for the failure to enforce exception.
. . .

The Estate contends that the legislature in RCW 70.96A.120(2) expressed a clear intent to protect those who are incapacitated or gravely disabled by alcohol and who are in a public place.

In stating the purpose of chapter 70.96A RCW, the legislature stated that "the use of alcohol and other drugs has become a serious threat to the health of the citizens of the state of Washington. . . . Therefore, a comprehensive statute to deal with alcoholism and other drug addiction is necessary." RCW 70.96A.011. The policy established by chapter 70.96A RCW is that alcoholics and intoxicated persons should not be subjected to criminal prosecution because of their consumption of alcohol but, instead, be provided continuum treatment within the funds available. RCW 70.96A.010.

In considering the plain language of chapter 70.96A RCW, the chapter does not reference a clear legislative intent to protect a particular group of persons. Instead, the statute's purpose is to protect the health of all of the citizens of the state of Washington. As in Moore, while chapter 70.96A RCW and RCW 70.96A.120(2) mention a particular group, alcoholics, this language is not enough to consider this group a particular and circumscribed class of persons. The legislature clearly intended to protect and provide services for the citizens of Washington as a general class of persons. The legislative intent exception does not apply to Mr. Weaver.

3. Special Relationship Exception. The special relationship exception applies when "'(1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.'" The plaintiff must specifically seek an express assurance and the government agent must unequivocally give that assurance. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 789 (2001). "Neither implied nor inherent assurances are sufficient."
. . .

Here, there is no evidence to show that Mr. Weaver specifically sought an express assurance from [the Deputy] that walking facing traffic would protect him from harm. The testimony of [the Deputy] shows that he stopped Mr. Weaver

and warned him to stay off Division Street. The instruction to walk facing traffic was not an assurance of safety but, at most, a recitation of traffic laws as a way to lessen the potential for harm.

Nor does the evidence support a conclusion that Mr. Weaver was justified in relying on the supposed promise by [the Deputy]. [The Deputy's] warning that Division Street was too busy should have alerted Mr. Weaver not to reenter the street. In fact, Mr. Weaver's decision to leave Division Street infers that he understood the hazards of walking on that roadway. As in Alexander, any reliance on [the Deputy's] suggestion to walk facing traffic would not be justified because Mr. Weaver was aware of the potential harm. The special relationship exception does not apply.

4. Rescue Doctrine Exception. The rescue doctrine exception creates a duty when a governmental agent undertakes a duty to aid or warn a person in danger, the government agent fails to exercise reasonable care, and the person to whom the aid is rendered relies on the offer to render aid. "Integral to this exception is that the rescuer, including a state agent, gratuitously assumes the duty to warn the endangered parties of the danger and breaches this duty by failing to warn them."

The record does not support the conclusion that [the Deputy] gratuitously undertook a duty to aid or warn Mr. Weaver. [The Deputy's] advice to walk facing traffic was not a gratuitous promise of safety but a recitation of the law. [The Deputy] warned Mr. Weaver to stay off Division Street because it was too busy. [The Deputy] did not fail to exercise reasonable care. The rescue doctrine exception does not apply.

[Some citations omitted]

A BOMB THREAT MADE BY A PSYCHIATRIC PATIENT CONSTITUTED A TRUE THREAT UNDER WASHINGTON'S OBJECTIVE TEST EVEN THOUGH THE FOLLOW-UP INVESTIGATION REVEALED THAT THE PATIENT CLAIMED TO HAVE A "COSMIC" SECURITY CLEARANCE AND LACKED CAPACITY TO CARRY OUT THE THREAT

State v. Ballew, 167 Wn. App. 359 (Div. I, March 26, 2012)

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

In October 2009, a man, later identified as Ballew, called 911 and asked to speak with [an officer] of the Port of Seattle Police. [The officer] was not on duty, and the dispatcher would not give Ballew [the officer's] personal phone number. Ballew told the dispatcher that he would only speak to [that officer]. Ballew then stated that he had five friends who had placed bombs in and around the Seattle–Tacoma Airport and hung up.

Authorities traced the call to Harborview Medical Center's psychiatric ward. The dispatcher also contacted [the officer], who identified the caller as Ballew. Several days earlier, [the officer] spoke with Ballew at the airport when Ballew attempted to buy an airline ticket with a promissory note.

> Within an hour of Ballew's call, [an officer] who was trained in explosives, arrived at Harborview where Ballew was involuntarily committed. After gaining Ballew's permission to speak with him, the officer interviewed Ballew in his room.
>
> The officer asked him whether he had made the 911 call. At first, Ballew denied doing so. He then claimed he could not remember if he made the phone call.
>
> Eventually, Ballew answered [the officer's] questions. He said the explosives hidden at the airport ranged from the size of a shoebox to a bar of soap. He also said the explosives could not be detected by electronic devices or trained dogs. He would not say where his friends had placed the explosives at the airport.
>
> Ballew also told [the officer] that he was in the Air Force for 53 years and that he had "cosmic [security] clearance," which, according to Ballew, was much higher than top secret clearance. Based on this interview, [the officer] determined that Ballew's threat was not credible.
>
> The State charged Ballew with one count of a threat to bomb or injure property based on RCW 9.61.160. At his jury trial, Ballew did not raise an insanity defense. Moreover, he did not testify. But he argued, based on his mental health status, that a reasonable person would not have considered his statements to be true threats. The jury convicted Ballew as charged.

ISSUE AND RULING: Where on its face, the wording and context of the making of a threat is such that a reasonable person making the statement would foresee that the statement would be interpreted as a serious expression of intention to take the action in question, does the threat meet the First Amendment test for "true threat" even though the person uttering the threat lacked the mental capacity and lacked other capacity to carry out the threat? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court conviction of James S. Ballew for threatening to bomb or injure property.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> "True threats" are an unprotected category of speech. "A true threat is 'a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.'" The State has a significant interest in restricting speech that communicates a true threat, in order to protect "'individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.'" The speaker of a "true threat" need not actually intend to carry out the threat. Instead, it is enough that a reasonable speaker would foresee that the threat would be considered serious.
>
> Only "true" threats may be proscribed. "The First Amendment prohibits the State from criminalizing communications that bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole." The supreme court has held that the bomb threat statute, RCW 9.61.160, can only reach "true threats."
> . . .

> Washington uses an objective true threat test. In State v. Kilburn, 151 Wn.2d 36 (2004), the supreme court stated that "[w]e have adopted an objective test of what constitutes a 'true threat'" based upon how a reasonable person would foresee the statement would be interpreted. In State v. Johnston, the supreme court affirmed this rule, explaining that Washington has adopted an objective standard for determining what constitutes a true threat.
>
> Most recently, in State v. Schaler, 169 Wn.2d 274 (2010) the supreme court again defined true threat using an objective, not a subjective, test. It stated:
>
> > A true threat is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person."

[Footnotes and some citations omitted; emphasis added]

LED EDITORIAL NOTE: The following Washington Supreme Court decisions analyzing the true threat standard have been reported in the LED: 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 in light of the context of the utterance); State v. Johnston, 156 Wn.2d 355 (2006) March 06 LED:04 (drunken statement that defendant was "going to blow this place up" may or may not have been a true threat and must be reviewed by a jury in light of the context of the utterance); State v. Schaler, 169 Wn.2d 274 (July 29, 2010) May 11 LED:10 ("true threat" requirement of the First Amendment's free speech protection may require a special jury instruction in a harassment prosecution).

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COMPLIANCE CHECK BY LIQUOR CONTROL BOARD USING AN UNDERAGE, UNDERCOVER AGENT WAS NOT A SEARCH; ALSO, BAR'S ENTRAPMENT AND OUTRAGEOUS GOVERNMENT CONDUCT CHALLENGES FAIL – In Dodge City Saloon v. Liquor Control Board, ___ Wn. App. ___, 2012 WL 1690780 (Div. II, May 15, 2012) the Court of Appeals holds that a compliance check by the Liquor Control Board was not a search under the Fourth Amendment or article I, section 7 of the Washington State Constitution.

The compliance check consisted of the following:

> . . . C.M., an investigative aide then 17 years old, carried his Washington State identification card and his vertical driver's license. *[Court's Footnote: Washington State issues vertical licenses to individuals under 21 years old.]* Both cards showed his date of birth as in October 1990. [A] Liquor enforcement officer . . . searched C.M. before the compliance check, mistakenly saw only the identification card, and allowed C.M. to proceed. Under the supervision of several liquor enforcement officers, including [a] liquor enforcement officer . . . ,

> who was waiting inside the bar to observe in an undercover capacity, C.M. presented his identification card to Dodge City's bouncer, Jeffrey Hilker. Hilker inspected the card with a black light, told C.M. to pay a five dollar cover fee, and stamped C.M.'s hand. C.M. entered Dodge City and remained inside for three minutes.

The Court's analysis of the search issue is as follows:

> The United States Supreme Court has explicitly recognized that "[a]n owner or operator of a business . . . has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable." New York v. Burger, 482 U.S. 691, 699 (1987). "This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes." But the Court has also recognized that regulatory inspections of commercial premises held open to the public, as opposed to commercial premises or portions of such premises restricted to all but employees or owners, is not a search and does not require a warrant. See, e.g., See v. City of Seattle, 387 U.S. 541, 545 (1967) ("administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure") (emphasis added); see also Marshall v. Barlow's Inc., 436 U.S. 307, 315 (1978) ("[w]hat is observable by the public is observable, without a warrant, by the Government inspector as well").
>
> In this case, the Liquor Board's actions did not constitute a search for Fourth Amendment purposes because the Liquor Board did not violate Dodge City's privacy interests. Dodge City had no reasonable privacy interest in areas of its licensed premises that it actively invites the public to enter. Even if, as Dodge City argues, it had a subjective reasonable expectation of privacy to exclude persons under 21 years old, which it did not, Dodge City lost that interest when it voluntarily admitted C.M. onto the premises. United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) ("Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost."). Thus, the Liquor Board's officers did not conduct a "search" when they entered the public portions of Dodge City's premises and observed only what members of the public could also observe. Likewise, the Liquor Board's officers did not conduct a "search" when they observed C.M.'s entry into Dodge City from a public street. Accordingly, because there was no "search" in this case, the Liquor Board's actions do not implicate constitutional considerations and Dodge City has no "search" on which to base a Fourth Amendment or article I, section 7 unreasonable search and seizure claim.

[Footnote and some citations omitted]

The Court of Appeals also rejects the bar's entrapment and outrageous conduct defenses to the Board's use of an underage undercover agent. The Court holds that neither of those types of defenses is permitted in civil administrative proceedings. The Court holds further that, even if such theories of defense could be pursued in civil administrative proceedings, the facts in this case and the law on entrapment and outrageous conduct do not support the theories.

Result: Affirmance of Clark County Superior Court decision, affirming a Liquor Control Board decision that the Dodge City Saloon allowed an underage person into an area off limits to persons under 21 years of age.

(2) PUBLIC RECORDS ACT LAWSUIT: FEDERAL REGULATION REQUIRING MARINE EMPLOYERS TO KEEP DRUG AND ALCOHOL TEST RESULTS CONFIDENTIAL IS AN "OTHER STATUTE" EXEMPTION UNDER THE PUBLIC RECORDS ACT – In Freedom Foundation v. Washington State Department of Transportation, ___ Wn. App. ___, 276 P.3d 341 (Div. II, May 10, 2012), the Court of Appeals holds that 49 C.F.R. § 40.321, which directs marine employers to keep drug and alcohol test results confidential, is an exempting "other statute" under RCW 42.56.070(1) of the public records act (PRA).

The Washington State Department of Transportation (WSDOT) operates Washington State Ferries. Following a ferry accident in Seattle, plaintiff Freedom Foundation made a PRA request for accident investigation reports. WSDOT produced the reports, which included that mandatory drug and alcohol testing of the ferry's crew was conducted following the accident, but redacted individual test results and other information pursuant to 49 C.F.R. § 40.321, which directs marine employers to keep such test results confidential.

The federal enabling statute, 49 U.S.C. § 533, directs the secretary of transportation to prescribe regulations that establish a program requiring public transportation operations that receive financial assistance to conduct post accident drug and alcohol testing of employees under certain circumstances, such as accidents. It also directs that such regulations provide for the confidentiality of test results, and the federal regulation, 49.C.F.R. § 40.321, prohibits the release of individual test results without the employee's consent.

Relying in part on Ameriquest Mortgage Co. v. Washington State Office of the Attorney General, 170 Wn.2d 418 (2010), the Court of Appeals holds that 49 C.F.R. § 40.321 and its enabling federal statute qualify as an "other statute" exemption under RCW 42.56.070(1), and that the trial court properly granted summary judgment to WSDOT.

Result: Affirmance of Thurston County Superior Court order granting summary judgment to WSDOT.

(3) PUBLIC RECORDS ACT LAWSUIT: ATTORNEY FEE INVOICES THAT EXCEED COUNTY'S DEDUCTIBLE, AND THUS COUNTY NEVER RECEIVES, ARE NOT PUBLIC RECORDS – In West v. Thurston County, ___ Wn. App. ___, 275 P.3d 1200 (Div. II, May 8, 2012) the Court of Appeals holds that attorney fee invoices billed by outside counsel, that exceed the county's deductible, are not public records where the county never received the invoices and was not responsible for paying them.

The Court of Appeals describes the factual background as follows:

> Thurston County contracts with the Washington Counties Risk Pool for self-insurance coverage. The Risk Pool "is a public agency created by interlocal agreement in 1988, to provide coverage for liability exposures of counties." The County has a $250,000 deductible under the Risk Pool agreement. The Risk Pool has the contractual right to appoint defense counsel to represent the County in matters that the self-insurance agreement covers. The Risk Pool-appointed defense counsel sends attorney fee invoices to the Risk Pool for payment, which the Risk Pool satisfies; if the County has not yet reached its $250,000 deductible, then the Risk Pool forwards these invoices to the County with requests for

> reimbursement. After the County meets its deductible, however, the Risk Pool no longer sends invoices to the County, which, at that point, is not responsible for paying them.

[Footnote omitted]

RCW 42.56.010(2) defines public record as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function [1] prepared, [2] owned, [3] used, or [4] retained by any state or local agency regardless of physical form or characteristics."

In the present case, the Court holds that the invoices exceeding the deductible amount are not public records because the records were not prepared, owned, used or retained by the county.

Concurrence: Judge Quinn-Brintnall concurs in the result only without separate opinion.

Result: Affirmance of Mason County Superior Court order that invoices exceeding the deductible are not public records.

LED EDITORIAL COMMENT: While the first appeal in this case was pending, see West v. Thurston County, 144 Wn. App. 573 (Div. II, May 8, 2008), the Legislature adopted RCW 42.56.904 relating to attorney invoices.

(4) UNDER APPROPRIATE CIRCUMSTANCES GANG RELATED EVIDENCE MAY BE INTRODUCED TO ESTABLISH MOTIVE; HOWEVER THE PRESENT CASE DID NOT PRESENT SUCH A CIRCUMSTANCE – In State v. Mee, ___ Wn. App. __, 275 P.3d 1192 (Div. II, May 8, 2012), the Court of Appeals holds that under appropriate circumstances gang related evidence may be introduced to establish motive to commit first degree murder by extreme indifference. However, because the gang related evidence in the present case had little probative value and was highly prejudicial the trial court erred in admitting it. But given the overwhelming evidence of guilt, the defendant was not prejudiced.

Result: Affirmance of Pierce County Superior Court conviction of Michael Anthony Mee for first degree murder.

(5) HEIGHTENED PROOF REQUIREMENT OF PERJURY SATISFIED WHERE EVIDENCE OF THE KNOWINGLY FALSE STATEMENT IS RECORDED PRIOR TO THE HEARING AT WHICH THE PERJURY IS SUBSEQUENTLY COMMITTED – In State v. Singh, ___ Wn. App. ___, 275 P.3d 1156 (Div. III, May 3, 2012) the Court of Appeals concludes that "the purposes behind the heightened proof requirements for perjury are satisfied when the evidence of the knowingly false statement is recorded prior to the hearing at which the perjury is subsequently committed."

The Court explains the heightened proof requirement for perjury as follows:

> First degree perjury is committed "if in any official proceeding" a person "makes a materially false statement which he knows to be false under an oath required or authorized by law." Former RCW 9A.72.020(1) (1975). A "[m]aterially false statement" is one "which could have affected the course or outcome of the proceeding." RCW 9A.72.010(1).

Heightened Proof. As recognized by the trial judge, the standard of proof in perjury proceedings is higher than in other criminal cases. The testimony of one witness or circumstantial evidence alone is insufficient to convict. State v. Wallis, 50 Wn.2d 350, 353 (1957). Instead, sufficient evidence requires;

> "'There must be the direct testimony of at least one credible witness, and that testimony to be sufficient must be positive and directly contradictory of the defendant's oath; in addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.'"

State v. Rutledge, 37 Wash. 523, 528 (1905). The direct testimony must come "from someone in a position to know of his or her own experience that the facts sworn to by defendant are false." Nessman v. Sumpter, 27 Wn. App. 18, 24 (1980). Corroboration is required only on the knowledge of falsity element of the crime.

[Some citations omitted]

In this case, police had tape recordings of the defendant's conversations with her incarcerated brother. On the tape recordings the defendant and her brother discussed the brother's upcoming trial, the witnesses, facts, and the testimony of the witnesses. At the brother's criminal trial the defendant testified that she had not discussed any of these things with her brother. The state subsequently charged the defendant with perjury based on her "replying 'no' to ever talking to the [brother] about witnesses in the case and facts of the case and testimony of the witnesses." The state offered the tape recordings as corroborating evidence (of the detective's testimony) to satisfy the heightened proof requirement.

The Court of Appeals concludes that "the purposes behind the heightened proof requirements for perjury are satisfied when the evidence of the knowingly false statement is recorded prior to the hearing at which the perjury is subsequently committed. In such circumstance, the recorded evidence can both provide a basis for the witness's testimony and corroborate that testimony."

Result: Affirmance of Spokane County Superior Court conviction of Jasmine N. Singh for perjury.

(6) FURNITURE THAT VICTIM STRUCK WHEN SHE WAS THROWN BY DEFENDANT IS NOT "INSTRUMENT OR THING LIKELY TO PRODUCE BODILY HARM" FOR PURPOSES OF THIRD DEGREE ASSAULT STATUTE – In State v. Shepard, Jr., ___ Wn. App. ___, 275 P.3d 364 (Div. III, May 1, 2012) the Court of Appeals holds in a 2-1 opinion that furniture that the victim's body struck when she was thrown by defendant does not fall within the definition of an "instrument or thing likely to produce bodily harm," as an element of third-degree assault.

The defendant and his ex-girlfriend were drinking together at her home. The defendant became angry and threw her. She struck an armoire. He threw her again and she struck a dresser and a child's playpen. The assault resulted in serious injuries including bruises to her face, head, and body.

A person commits assault in the third degree when he or she: "With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d) (emphasis added).

The question before the Court of Appeals is whether the defendant used the furniture as a "weapon or other instrument or thing likely to produce bodily harm." The Court relies on State v. Marohl, 170 Wn.2d 691 (2010) **Feb 11 LED:07** where the victim was injured when the defendant and victim fell to a casino floor. Three of the observations made in Marohl relied on by the Court of Appeals are: 1) "Only assaults perpetrated with an object likely to produce harm by its nature or by circumstances fall within the subsection's [RCW 9A.36.031(1)(d)] purview"; 2) "Thus, an 'instrument or thing likely to produce bodily harm' under RCW 9A.36.031(1)(d) must be similar to a weapon"; and 3) "RCW 9A.36.031(1)(d) makes no reference to the defendant's use of an 'instrument or thing likely to produce bodily harm.' . . . The casino floor was not within the scope of RCW 9A.36.031(1)(d)."

The Shepard Court concludes that, as with the casino floor in Marohl, the furniture that the victim struck was not a "weapon or other instrument or thing likely to produce bodily harm" for purposes of the third degree assault statute."

Dissent: Judge Korsmo dissents arguing that under the facts of this case, where the defendant repeatedly threw the victim onto pieces of furniture, the evidence was sufficient for the jury to conclude that he used it as a "weapon or other instrument or thing likely to produce bodily harm." Judge Korsmo also takes issue with the majority's apparent conclusion that the item must be in the fundamental nature of a weapon before it can be treated as such, which Judge Korsmo argues is not Marohl's holding.

Result: Reversal of Cowlitz County Superior Court conviction of Desmond Bernard Shepard, Jr. for third degree assault.

(7) VICTIM'S OUT OF COURT STATEMENTS WERE ADMISSIBLE UNDER THE DOCTRINE OF FORFEITURE BY WRONGDOING WHERE THE DEFENDANT CLEARLY ENGAGED IN CONDUCT DESIGNED TO PREVENT THE VICTIM FROM TESTIFYING AT TRIAL – In State v. Dobbs, 167 Wn. App. 905 (Div. II, May 1, 2012) the Court of Appeals holds that where the defendant intentionally engaged in misconduct to prevent the victim from testifying at trial, the victim's out of court statements are admissible under the doctrine of forfeiture of confrontation rights by wrongdoing.

The Court's analysis, in part, is as follows:

> The doctrine of forfeiture by wrongdoing holds that a criminal defendant waives his Sixth Amendment confrontation rights if the defendant is responsible for the witness's absence at trial. State v. Mason, 160 Wn.2d 910, 924 (2007), cert. denied, 553 U.S. 1035 (2008) **Oct 07 LED:10**. Once the State shows that the defendant's conduct is the reason for the witness's absence, the State may introduce the witness's out-of-court statements. Id. To apply this doctrine, the State must prove the causal link between the defendant's conduct and the witness's absence by clear, cogent, and convincing evidence. Id.
>
> . . .
>
> A. Prior Acts

Dobbs argues that the trial court could consider only those actions he took after the State initiated criminal proceedings. We disagree.

There is no rule that the trial court may consider only acts occurring after the defendant is charged in deciding whether the forfeiture doctrine applies. Dobbs cites no such case and the Supreme Court suggests that the trial court can consider prior events:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Giles v. California, 554 U.S. 353, 377 (2008) **Sept 08 LED:03**. Dobb's argument fails.

B. Evidence of Wrongdoing

Dobbs argues that the State did not prove that his actions were designed to prevent C.R. from testifying. We disagree.

Here, the evidence showed that Dobbs engaged in repeated and persistent acts of violence against C.R. and that his violence escalated as time progressed. First there were verbal threats and arguing; then tire slashing; then a drive-by shooting; and, finally, he entered her apartment without permission while wielding a gun. Dobbs's text messages, telephone calls, and note showed that he was not afraid of the police, that he told C.R. she would die if she continued to cooperate with them, and that his friends would "reap a world of trouble and pain" on her. Even after his arrest, he pleaded with her not to press charges, and then threatened her, saying, "[Y]ou'll regret it." This is substantial evidence that Dobbs intentionally engaged in misconduct to keep C.R. from testifying. The trial court did not err in finding that the doctrine of forfeiture by misconduct applied.

[Some citations omitted]

The Court also holds that where out of court statements are admitted under the doctrine of forfeiture by wrongdoing, the state does not need to establish independent exceptions to the hearsay rule for each statement admitted into evidence.

Result: Denial of personal restraint petition of Timothy J. Dobbs. Affirmance of Cowlitz County Superior Court convictions of stalking, felony harassment, intimidating a witness, drive-by shooting, unlawful possession of a firearm, and obstructing law enforcement.

(8) EVIDENCE IS INSUFFICIENT TO SUPPORT SECOND DEGREE THEFT CONVICTION WHERE ONLY TESTIMONY RELATES TO ORIGINAL PURCHASE COST NOT TO CURRENT CONDITION OR MARKET VALUE – In State v. Erhardt, ___ Wn. App. ___, 276 P.3d 332 (Div. II, May 1, 2012) the Court of Appeals upholds a burglary conviction but sets aside a theft conviction. The Court holds that the state presented insufficient evidence of second degree theft where the only testimony related to the retail price of the items, and as to some items that had been used for several years their condition was not established such that the jury could reasonably determine their market value at the time of the crime.

The key part of the Court's analysis on the sufficiency of evidence of third degree theft is as follows:

> Ehrhardt also argues that the evidence was insufficient to convict him of second degree theft because the State failed to prove that the items over which Ehrhardt exerted unauthorized control had a value of more than $750, an element of second degree theft. Ehrhardt argues that Glaze's [the victim's] testimony as to the value of the items was not sufficient because Glaze testified only as to their cost. He argues that the State provided insufficient evidence of the condition of the items at that time that would enable the jury to determine their market value. We agree.
>
> "Value" for the purposes of theft means the market value of the property at the time and in the approximate area of the theft. Market value is the price that a well-informed buyer would pay to a well-informed seller.
>
> Evidence of retail price alone may be sufficient to establish value. And evidence of the price paid for an item is entitled to great weight. But such evidence must not be too remote in time. Also, value need not be proved by direct evidence. Rather, the jury may draw reasonable inferences from the evidence, including changes in the condition of the property that affect its value. Evidence other than market value, such as replacement cost, is inadmissible unless it is first shown that the property has no market value.
> . . .
>
> Here, Glaze testified that the air compressor and pressure washer were essentially new, enabling the jury to find that their original cost was their current market value. And Glaze testified that the items in the stereo wiring box were worth $100 at that time because there were only "bits and parts and pieces" left. This was testimony about the contemporaneous value of the items, and was sufficient for the jury to find their market value.
>
> However, Glaze did not testify about the condition of the rotary hammers and nail guns. Glaze's testimony suggested that all of these tools had been used for professional construction for approximately three years. And Glaze testified only as to what the tools "cost," not what they were then worth in their used condition.
>
> . . . [T]he State presented no direct evidence and insufficient circumstantial evidence of the condition or depreciation of the tools from which the jury could infer their market value. Nor did the State present evidence that the tools had no market value, which would have permitted the State to rely on evidence of their replacement cost.

> The pressure washer, air compressor, and stereo wiring were worth $399 all together. But there was insufficient evidence whether the rotary hammers and nail guns were worth more than $351, the amount necessary to reach the $750 threshold for second degree theft under RCW 9A.56.040(1)(a). Thus, there was insufficient evidence to show that the property over which Ehrhardt exerted unauthorized control had a market value greater than $750 as RCW 9A.56.040(1)(a) and .010(21) require. We therefore reverse Ehrhardt's second degree theft conviction and remand for the charge to be dismissed with prejudice.

[Citations omitted]

Dissent: Judge Quinn-Brintnall dissents on the theft issue on the grounds that the evidence was sufficient to establish value.

Result: Reversal of Kitsap County Superior Court conviction of Joseph O. Erhardt for second degree theft; affirmance of conviction for second degree burglary.

(9) WHERE DEFENDANT KICKED OUT THE BACK WINDOW OF A POLICE CAR, PLACING THE CAR OUT OF SERVICE FOR A DAY, THERE IS SUFFICIENT EVIDENCE TO CONVICT HIM OF MALICIOUS MISCHIEF IN THE SECOND DEGREE – In State v. Turner, ___ Wn. App. ___, 275 P.3d 356 (Div. III, May 1, 2012) the Court of Appeals holds that there is sufficient evidence to convict the defendant of malicious mischief in the second degree where the defendant, following his arrest and placement in the back seat of a patrol car, kicked out a rear, passenger window of the car, putting the car out of commission for a day while the window was being repaired.

RCW 9A.48.080(1)(b) provides that:

> A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:
> . . .
>
> (b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

The defendant argued that the statute requires that service actually be interrupted, and that the state failed to prove this element because it did not show that the deputy was unable to perform his duties with out his particular patrol vehicle or that police service in general was impaired or interrupted. The Court rejects this argument, pointing out that the statute only requires that the defendant create a substantial risk of interruption or impairment. The Court explains:

> Police cannot use patrol cars with broken rear windows. Breaking a rear window in a patrol car necessarily causes the patrol car to be unavailable for some period of time. Here, the car was unavailable for a day. The jury here could then easily infer that not having the car available created a substantial risk of interrupting or impairing service to the public. The Grant County Sheriff's Department had one less patrol car available to use and the jury was free to conclude that having less patrol cars available may impair service to the public. There was substantial

evidence that Mr. Turner's actions "[c]reate [d] a substantial risk of interruption or impairment of service rendered to the public." RCW 9A.48.080(1)(b).

Dissent: Judge Sweeney dissents on the issue of ineffective assistance of counsel (not addressed in this LED entry).

Result: Affirmance of Grant County Superior Court conviction of Waymond Suvell Turner for second degree malicious mischief and third degree assault.

(10) WHERE EVIDENCE BEING SOUGHT RELATES TO OFF-RESERVATION OFFENSE OVER WHICH STATE HAS JURISDICTION, STATE COURTS HAVE AUTHORITY TO ISSUE SEARCH WARRANT FOR RESIDENCE LOCATED ON TRUST PROPERTY WITHIN EXTERIOR BOUNDARIES OF ESTABLISHED INDIAN RESERVATION – In State v. Clark, 167 Wn. App. 667 (Div. III, April 12, 2012) the Court of Appeals holds that Nevada v. Hicks, 533 U.S. 353 (2001) is dispositive of the issue in this case. Where the state has jurisdiction over the criminal offense, a superior court judge has authority to issue a search warrant for a residence on reservation trust land.

Result: Affirmance of Okanogan County Superior Court conviction of Michael Clark for first degree theft.

(11) UNIFORMED SEATTLE OFFICER WORKING TRAFFIC AT SEATTLE CONSTRUCTION SITE AND PAID BY THE CONSTRUCTION COMPANY HELD TO BE EMPLOYEE OF CONSTRUCTION COMPANY FOR WORKERS' COMPENSATION PURPOSES – In Gary Merlino Const. Co. v. City of Seattle, 167 Wn. App. 609 (Div. I, April 9, 2012) the Court of Appeals affirms a King County Superior Court decision holding that an off-duty Seattle PD officer injured while in Seattle PD uniform directing traffic at a construction site was the employee of the construction company that paid for the work, not the City of Seattle, for workers' compensation benefits.

The Court of Appeals' ruling focuses on the evidence relating to two issues: (1) who directed and controlled the construction-company-paid Seattle police officer who was injured while working traffic at a construction site in Seattle; and (2) whether the officer consented to such direction and control.

On the right of control issue, the Court of Appeals asserts that seven key factors are looked at to determine which would-be "employer" has control: (1) who controls the particular work to be done; (2) who determines the qualifications needed for the work; (3) who determines pay rate and hours of work, and who has payroll responsibility; (4) who has day-to-day supervision over the construction site work; (5) who controls work equipment; (6) who directs what work is to be done; and (7) who has training responsibility. The Court of Appeals concludes that, under the record in this case, factors 1, 2, 3, 4, and 6 favor making the construction company the employer, while factors 5 and 7 favor neither the construction company nor the City as the employer.

On the consent issue, the Court of Appeals concludes that the injured officer's testimony that he believed the construction company to be his employer, plus objective evidence of such consent, support the conclusion that the officer was employed by the construction company at the time of his injury.

Status: A petition for Washington State Supreme Court review is pending.

Result: Affirmance of King County Superior Court decision that affirmed the decision of the Washington Board of Industrial Insurance Appeals concluding that the injured officer was an employee of Gary Merlino Construction Company at the time of his injury.

LED EDITORIAL COMMENT: The ruling is limited to review of the administrative and superior court record and rulings in this particular case. Also, the Court of Appeals notes that the construction company and the Department of Labor and Industries waived certain arguments by not making those arguments in the administrative and superior court proceedings below. Nonetheless, the Gary Merlino decision does appear to take the view that generally officers paid by construction companies to direct traffic at construction sites should be held to be employees of the construction companies for Washington workers' compensation purposes.

(12) THREAT TO EXPOSE PUBLIC SERVANT'S WRONGDOING UNLESS MONEY IS PAID IS NOT FIRST AMENDMENT PROTECTED SPEECH – In State v. Strong, 167 Wn. App. 206 (Div. III, Mar. 15, 2012) the Court of Appeals holds that a threat to expose a public servant's wrongdoing is not entitled to First Amendment protection.

A county corrections officer developed a friendship with a female inmate that he maintained after the inmate was transferred and then released. The friendship violated the county's policy against fraternization with current or former inmates.

The corrections officer subsequently received two telephone calls, from a male, demanding $5,000 dollars, presumably in exchange for not reporting the violation. As it turned out the caller was the boyfriend of the former female inmate. The former female inmate was charged with being an accessory to first degree extortion.

She argued that a threat to expose something that is true, is not a "true threat" within the meaning of the First Amendment. The Court of Appeals rejects this argument, holding that the conduct at issue in this case was not entitled to First Amendment protection.

Result: Affirmance of Spokane County Superior Court conviction of Stephanie Anne Strong of being an accessory to first degree extortion.

(13) COMMON LAW "BORN ALIVE" RULE APPLIED: STATUS OF VICTIM IS DETERMINED AT TIME OF DEATH NOT TIME OF COMMISSION OF CRIME – In State v. Besabe, 166 Wn. App. 872 (Div. I, Mar. 5, 2012) the Court of Appeals holds that the status of a victim is determined at the time of death not at the time of commission of the crime. Thus, a baby who was delivered prematurely after the baby's mother was shot and who died two days later, was a person for purposes of the first degree murder statute.

The Court of Appeals notes that Washington's criminal code does not provide a definition that resolves the issue in this case, and that in some circumstances the common law (i.e., case law standards that have been developed historically independent of statutory provisions) allows the common law to supply the answer to criminal law issues. The Court then applies the common law "born alive" rule, which "prescribes that only one who has been born alive can be the victim of homicide." Under that rule, "[c]ausing the death of a fetus, whether viable or not, was not considered homicide at common law. If, however, the fetus was born and then died of injuries inflicted prior to birth, a prosecution for homicide could be maintained."

The Court explains that the overwhelming majority of jurisdictions dealing with the prosecution of a defendant for conduct harming a pregnant mother, causing the death of the subsequently

born child, affirm the defendant's conviction. No prior Washington criminal case adopts or applies the "born alive" rule. The Court of Appeals applies this majority common law rule, determining that the baby was a person as of the time he died, not when defendant shot his mother.

Result: Affirmance of King County Superior Court convictions of Robert Saquil Besabe of two counts of first degree murder and one count of attempted first degree murder.

(14) PUBLIC RECORDS ACT LAWSUIT: THE PUBLIC RECORDS ACT DOES NOT REQUIRE RECORDS TO BE DIVIDED INTO SEPARATE GROUPS BASED ON PRODUCTION DATE – In Double H, L.P. v. Department of Ecology, 166 Wn. App. 707 (Div. III, Feb. 23, 2012) the Court of Appeals affirms the trial court's grouping of records not timely and properly disclosed into a single group for penalty purposes, rejecting the requestor's argument that they be grouped based in part on production date.

The requestor, Double H, made a public records request, and a "refresher" request to the Department of Ecology. Ecology produced records responsive to the two requests over time, on nine occasions. The requestor sued Ecology for PRA violations and Ecology conceded certain violations. The requestor argued that for penalty purposes the records were produced in 16 groups. The trial court concluded that the records constituted a single group. The Court of Appeals affirms, noting that "The PRA does not require records be divided into separate groups based on production date." The Court explains:

> In sum, we conclude the trial court did not err by abusing its discretion in rejecting Double H's proposed multiple production groupings in favor of a single same-subject-based group. The trial court made a balanced, reasonable decision supported by tenable grounds when selecting the same-subject group: Avoid strained groupings to encourage agencies not to withhold records until fully assembled, promote early segmented record production, and undercut the risk of creating multiple penalty-increasing groups. In essence, the trial court in its discretion decided Ecology should not be punished more severely for its continuous review and release of records under the circumstances of this case.

Result: Affirmance of Yakima County Superior Court penalty award against the Department of Ecology.

(15) SPLIT COURT HOLDS THAT AUNT'S USE OF HER CAR TO INTERFERE WITH OFFICER'S ATTEMPT TO PULL OVER HER NEPHEW CONSTITUTED ASSAULT IN THE SECOND DEGREE, BUT IT DID NOT CONSTITUTE INTIMIDATING A PUBLIC SERVANT – In State v. Toscano, 166 Wn. App. 546 (Div. III, Feb. 7, 2012), a three-judge panel of the Court of Appeals agrees that the following facts support defendant's convictions for two counts of assault in the second degree, but a 2-1 majority holds that the facts do not support defendant's conviction for intimidating a public servant:

> This prosecution follows two near collisions between [a deputy sheriff] and Linda Kay Toscano in Warden, Washington, in the early morning of March 30, 2009. [The deputy] saw Michael Castoreno commit a traffic infraction and he turned on his emergency lights to stop him. Mr. Castoreno is Ms. Toscano's nephew. Mr. Castoreno did not stop and [the deputy] gave chase. Ms. Toscano backed her car out of a driveway at 912 Adams Street in Warden. [The deputy] drove south and Ms. Toscano drove north on the same street. Ms. Toscano drove left toward the middle of the street and toward [the deputy]; she refused to yield the right of

> way to him. [The deputy] has special training in emergency vehicle operation, including "evasive maneuvers and high speed patterns." He took evasive action to avoid colliding with Ms. Toscano. He had a couple seconds to react on the gravel road.
>
> [The deputy] encountered Ms. Toscano again. Mr. Castoreno turned right to another street. Ms. Toscano then "darted" into the intersection to block the intersection and directed her high beams at [the deputy], which made it difficult for him to see. [The deputy] again changed his course to avoid colliding with Ms. Toscano. [A second officer] saw Ms. Toscano's car pull into the intersection "like it was going to hit" [the deputy] and he saw [the deputy] swerve to avoid her. Mr. Castoreno pulled into the driveway of 912 Adams Street, got out of the car, and ran. Ms. Toscano pulled up to 912 Adams Street soon after. [The deputy] arrested Mr. Castoreno and Ms. Toscano. Ms. Toscano reported that she was looking for a missing dog.

Second degree assault conviction: Second degree assault means to "assault[] another with a deadly weapon." RCW 9A.36.021(1)(c). Common law, not the criminal code, supplies several definitions of assault. One of these definitions is "'putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm.'" This is the definition of assault at issue in this case. The Court of Appeals rejects Ms. Toscano's theories that the State failed to prove second degree assault on grounds that the State did not prove that Ms. Toscano had a specific intent to cause apprehension or that [the deputy] had apprehension of fear of future bodily injury. She loses her arguments (1) that simply being "in the way" of [the deputy] is not enough to show that she intended to cause him apprehension, and (2) [the deputy] only had fear in hindsight.

Intimidating a public servant conviction: To prove the crime of intimidating a public servant, the State must show that "by use of a threat, [the defendant] attempt[ed] to influence a public servant's vote, opinion, decision, or other official action as a public servant." RCW 9A.76.180(1). There are two elements to this crime: (1) intent to influence a public servant's official action and (2) communication of a threat. In State v. Montano, 169 Wn.2d 872 (2010) **Nov 10 LED:09** (holding that there was no evidence of intent to influence a law enforcement officer's actions in defendant Montano's heat-of-the-moment, angry threats against the officer immediately after being arrested). The majority opinion in Toscano concludes that there was insufficient evidence to support either element of the crime, asserting that Ms. Toscano's behavior (1) did not constitute "communication" and (2) also did not show intent to influence the officer within the meaning of RCW 9A.76.180(1).

Judge Brown dissents on the intimidating-a-public-servant issue, arguing as follows:

> I concur with the majority except for its holding that the facts do not support the conviction of intimidating a public servant. I believe the State produced sufficient factual evidence to permit the jury to decide whether Linda Kay Toscano's conduct constituted intent to influence [the deputy's] official action by threat. Ms. Toscano twice threateningly drove at [the deputy] to get him to quit pursuing her nephew. While Ms. Toscano's conduct was non-verbal, her actions, when viewed most favorably for the State, can reasonably be found threatening. Thus, I believe the question was properly left for the jury to decide. In sum, the trial court did not err in allowing the jury to decide whether Ms. Toscano's non-verbal conduct was intended as threatening communication to [the deputy].

Result: Affirmance of Linda Kay Toscano's Grant County Superior Court convictions for two counts of assault in the second degree; reversal of her conviction for intimidating a public servant (Ms. Toscano did not appeal her conviction for attempting to elude a pursuing police vehicle).

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NEXT MONTH

The October 2012 LED will include a discussion of the Washington Supreme Court decision in State v. Meneese, ___Wn.2d ___, 2012 WL 3131439 (August 2, 2012) where the Court rules that a search of a student at a public high school by a police officer acting as a school resource officer did not qualify as a "school search" for purposes of the school search exception to the warrant requirement of article I, section 7 of the Washington constitution, as well as discussions of the Court of Appeals decisions in: (1) State v. Pierce, ___ Wn. App. ___, 2012 WL 2913290 (Div. II, July 17, 2012) where the Court holds that the defendant's right under CrR 3.1 to be placed in contact with an attorney upon request was violated such that his incriminating statements in a subsequent interrogation session were inadmissible; (2) State v. Salinas, ___ Wn. App. ___, 2012 WL 2510952 (Div. II, July 2, 2012) where the Court holds that taking clothing from the person of a rape arrestee to determine if the clothing contains the rape victim's DNA is within the scope of a search of the person incident to arrest, and that constitutional decisions limiting searches of vehicles incident to arrest of recent vehicle occupants do not limit search of persons incident to arrest in this particular context; and (3) State v. Roden, ___Wn. App. ___, 279 P.3d 461 (Div. II, June 26, 2012) and State v. Hinton, ___Wn. App. ___, 2012 WL 2401673 (Div. II, June 26, 2012) where the Court rejects statutory and constitutional claims of privacy protection by senders of text messages that were recovered from electronic devices belonging to recipients whose rights were not at issue in the cases.

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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.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "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 (CJTC) 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 edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor 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 CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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