Covering cases published in January 2024

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

The materials contained in the LED Online Training are for training purposes. All officers should continue to consult with their department legal advisor for guidance and policy as it relates to their particular agency.

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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.

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] | [2022-2023] [2024]

Case Review

The Washington State Judicial Opinions website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

Case Menu

This training includes four Washington cases and one Ninth Circuit case. The Washington cases include a number of issues of interest to a wide range of LE officers. They include admissibility of prior assaults on a domestic violence (DV) victim, the elements of residential burglary and third-degree assault, admissibility of common scheme or plan evidence in a sex abuse case, and social contact encounters with an individual later charged as a defendant. The federal case involves inventory searches incident to execution of a search warrant.

Case Menu

1. *State v. Johnson, 83738-9, Washington Court of Appeals, Division One (January 2, 2024)*
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4. *State v. Taylor, 39019-5, Washington Court of Appeals, Division Three (January 23, 2024)*
5. *Snitko v. United States, 22-56050, Ninth Circuit (January 23, 2024)*

General Disclaimer: The case digests presented here are owned by the Washington State Criminal Justice Training Commission. They are created from published slip opinions[1] and are general and may not apply to specific issues in specific cases or investigations. They are published as a research and training resource for law enforcement officers, investigators, detectives, supervisors, agencies, and other interested law enforcement-related parties.

The digests do not constitute legal advice, nor does their publication create or imply an attorney client relationship with any law enforcement agency or officer or party. All law enforcement personnel, parties, and agencies must review the actual published case opinions and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on the application of the opinions to specific issues in specific cases or investigations.

[1] Slip opinions are frequently revised after initial publication and after the creation of these case digests. In any specific case or investigation, it is necessary to review the final version of the opinion published by the Washington State Judicial Opinions website.

QUESTIONS?

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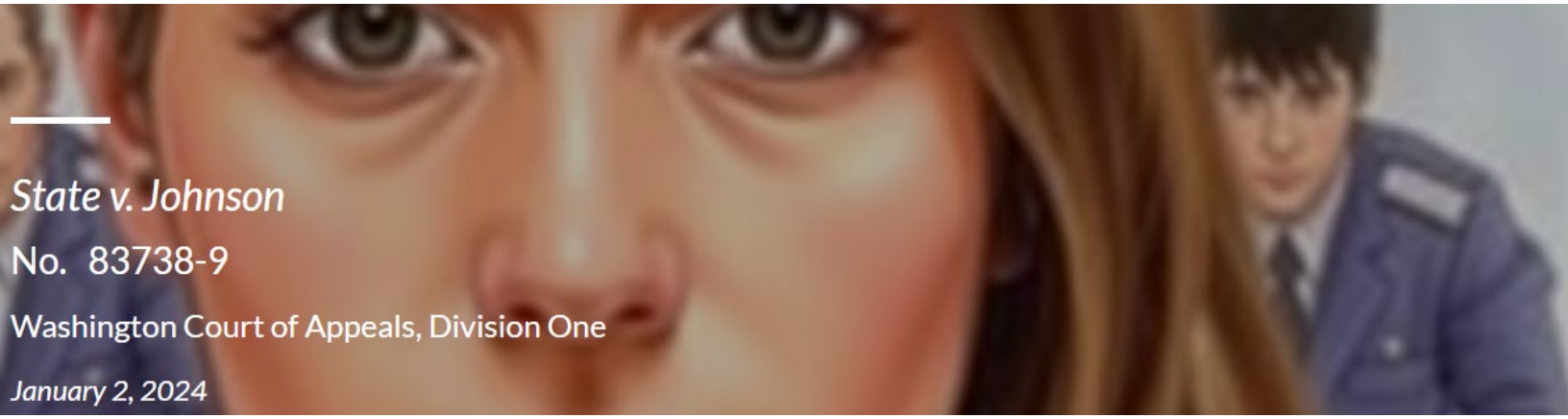
Note: You will see *Id* used throughout this LED. It is used to refer to the immediately preceding citation.



State v. Johnson, Washington Court of Appeals, Division One (January 2, 2024)

Factual Background

This case came before the court on an appeal from a domestic violence (DV) conviction for second-degree assault and felony violation of a no contact order. The court's discussion of the felony DV assault charges and prior assaults evidence will be specifically of interest to DV investigators and of general interest to all law enforcement.

The defendant and the victim were in a tumultuous, violent relationship. They began the relationship in early 2020. In August 2020 the defendant was arrested for a prior assault and a no contact order was issued. That order was in effect at the time of the assault that led to the charges in this case.

The assault incident that was the basis for the charges in this case began with the victim picking the defendant up from jail. The two of them spent a couple of days at the victim's apartment. The stay at the victim's apartment concluded with the defendant beating the victim after accusing her of stealing his COVID stimulus check. (The irony of these events was not commented upon by the court.) The beating was serious although the victim did not immediately realize just how serious.

EMT personnel responded to the victim's apartment twice. The first time they determined that she was not seriously injured. But after the first visit the victim began experiencing additional symptoms, including vomiting. The EMTs returned. This time either the victim or the defendant told them that she had used methamphetamine. This led the EMTs to transport her to the hospital.

The victim reported to the hospital staff that the cause of her symptoms was methamphetamine use. But a CT scan showed that she had a serious, traumatic brain injury, a subdural hematoma. She underwent brain surgery to remove the hematoma and was in the hospital for several days. To this point she had not reported the beating to the police.

The victim had a change of heart later. After talking to her mother about the seriousness of the injury, she reported the beating to the police. The defendant was subsequently charged with second-degree assault and felony violation of a no contact order.

The case proceeded to trial. During pre-trial proceedings the prosecution sought to admit evidence of prior assaults by the defendant on the victim. The evidence was offered as relevant to the victim's credibility. Because she had stated to medical personnel that the injury was due to methamphetamine use and she had delayed making the report to police, her credibility was subject to attack. The court heard testimony from the victim and ruled that the evidence would be admissible.

The victim also testified at trial. Her testimony included an account of the beating that led to the brain injury. The evidence of prior assaults was admitted consistent with the court's pretrial ruling. The jury was given a limiting instruction which informed them that the prior assaults could only be considered in connection with their deliberations on the victim's credibility.

The trial proceedings also included a ruling concerning a lesser degree assault charge. The prosecution wanted the jury to consider the charge, the defendant did not. The court sided with the prosecution and gave a lesser included fourth-degree assault instruction in case the jury did not reach a verdict on the original second-degree assault charge. The fourth-degree assault was elevated to a class C felony by a statute because of the defendant's prior assaults.

After deliberating, the jury convicted the defendant of the second-degree assault charge and the no contact order charge. It therefore did not return a verdict on the lesser degree fourth-degree assault charge. The defendant appealed the convictions.

Analysis of the Court

The defendant's appeal challenged the trial court's ruling concerning the fourth-degree assault charge. That issue is a constitutional due process issue. It stems from the due process requirement that, "Criminal defendants are generally entitled to notice of the charges they are to meet at trial and may be convicted only of the crimes charged in the information." *Johnson Slip Opinion, p. 5.* The defendant sought to rely on this due process principle even though he was not actually convicted of the lesser degree offense.

Lesser degree offenses are an exception to the due process notice requirement. A lesser degree offense can be submitted to a jury when (1) both crimes prohibit one type of offense; (2) the crime charged in the Information is divided into several degrees and the lesser degree is less serious than the charged offense; and (3) there is evidence that the defendant committed *only* the lesser degree offense. *Johnson Slip Opinion, p. 5*

The court analyzed each of these requirements as to the fourth-degree assault. Concerning the type of offense requirement, the court stated, "Comparing the conduct covered by each criminal statute, it is apparent that RCW 9A.36.021(1)(a) and RCW 9A.36.041(1) and (3) proscribe the same conduct. Both statutes proscribe acting with intent to achieve the same result: causing harmful contact to another." *Johnson Slip Opinion, p. 8*

After analyzing the type of offense requirement, the court turned to a discussion of the evidence. This discussion focused on whether there was evidence that the defendant committed *only* the fourth-degree assault. Bearing in mind that he was convicted of second-degree assault, this issue required the court to contemplate what findings the jury might have made if it had decided to convict the defendant of the fourth-degree charge.

The court resolved the issue mostly by reviewing the medical evidence. There was evidence that other aspects of the incident, other than the defendant hitting the victim repeatedly in the head, could have caused the subdural hematoma: "Dr. Eric Kinder also testified that he believed Trichler's symptoms might have been caused by her methamphetamine use, which could have raised her blood pressure enough to trigger 'a very rare kind of aneurysmal hemorrhage.' Dr. Amy Walker's testimony further supported this view; she noted that Trichler reported the headache's onset as coming immediately after using methamphetamine. And an emergency medical services (EMS) responder, Galen Wallace, testified that he changed his impression of Trichler at the second EMS visit to substance use because Trichler admitted to 'using methamphetamine and to drinking rum that day.' " *Johnson Slip Opinion, p. 9-10*

The court also discussed other arguments put forth by the defendant and rejected them. It then turned to the previous assaults evidence. The issue is commonly referred to in court as "ER 404(b)", which is the evidence rule that controls admissibility of such evidence.

The court stated the standard for admissibility as follows: "ER 404(b) provides that '[e]vidence of other crimes, wrongs, or acts is not admissible to

prove the character of a person in order to show action in conformity therewith.' But this evidence may be used for another purpose, such as proof of motive, plan, or identity. . . Evidence that a defendant previously assaulted a victim is generally inadmissible if the defendant assaults the same victim on a later occasion. . . However, such evidence may be admissible to 'assist the jury in judging the credibility of a recanting victim.' " *Johnson Slip Opinion, p. 13-14*

The victim in *Johnson* was like many victims in domestic violence (DV) cases. She made numerous inconsistent statements to EMTs and medical personnel. She only stopped minimizing and fabricating and admitted the truth after brain surgery and a discussion of the seriousness of the injury with her mother.

Despite her change of heart, all of her inconsistent statements were still available to impeach her. This in turn made the prior assaults, where she had also flip flopped, relevant to her credibility. The court stated: "After the first prior assault, Trichler decided not to report it to authorities, despite Johnson having strangled her until she was "out cold." And after the second prior assault, Trichler reported the incident to police but "ran off" before they arrived. She later wrote a letter to the trial court recanting her earlier report of assault." *Johnson Slip Opinion, p. 17.* Such incomprehensible conduct was markedly similar to the victim's conduct in this serious head injury case. Here she was in denial despite having sustained a brain injury that required brain surgery.

A DV victim's history can often (or perhaps usually) include flip flopping. Victims in a violent relationship commonly provide inaccurate or false statements about what their intimate partner did to them. The false statements can include everything from minimizing the severity of injury to outright denial that any injury occurred. The court cited a judicial manual[1] that is published on the Washington courts website. The chapter on domestic violence was cited in support of its opinion and is well worth reviewing for any law enforcement officer regularly engaged in investigating DV cases.

It is counterintuitive, but DV victims frequently act against their own self-interest. This case stands for the proposition that a track record of prior inconsistent conduct may well be admissible to explain inconsistent or seemingly bizarre conduct and statements by a DV victim.

[1] Anne L. Ganley, Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases(opens in a new tab), in DOMESTIC VIOLENCE MANUAL FOR JUDGES ch. 2, at 41 (2016).

Training Takeaway

There are two primary training takeaways from *Johnson*. The first is more relevant to the work of prosecutors because they are responsible for charging and jury instructions.

However, it is useful to note that booking assault charges can include both the charge that best fits the degree of injury, and other charges that also fit the crime. In a DV case where the injury is severe, but the victim denies that the perpetrator was the cause, law enforcement can include a fourth-degree assault charge and information about prior assaults on the same victim and thereby ensure that the case is reviewed by prosecutors and the court with the seriousness that it deserves.

The second takeaway is the ER 404(b) issue. It is well worth the effort for law enforcement to mine prior investigations for the kind of flip flopping that is so common with victims embroiled in a violent relationship. Prior statements where a victim minimized, but that led to a conviction in spite of the minimizing, are very helpful in evaluating the victim's credibility in case of recanting.

EXTERNAL LINK: View the Court Document

State v. Wixon, Washington Court of Appeals, Division Three (January 25, 2024)

Factual Background

This case came before the court on an appeal from convictions of residential burglary and third-degree assault. The primary issue on appeal was sufficiency of the evidence. That issue involves analysis of the elements of the two crimes in light of the particular facts in the case. The case is quite instructive as to what the evidence must include for both crimes.

The facts reported by the court were derived from the evidence introduced during a trial. The witnesses at trial included one eyewitness, the victim homeowner. The homeowner heard his dogs barking and went to investigate. He came upon the defendant trying to break into his home through a back door. The defendant had a crowbar and other tools and was caught in the act of trying to pry open the back door.

The back door was located inside a fenced backyard. The backyard was completely enclosed by a wood fence with no gaps. There were two secured gates. After the defendant was caught breaking in, he fled and attempted to get away through one of the gates. He had to kick the gate open but was unable to get away.

The homeowner gave chase and tackled the defendant at the gate. He held the defendant in a choke hold until the police arrived. The defendant tried to bite the homeowner but apparently did not cause significant injury.

The defendant was arrested. He was originally charged with first-degree burglary. The charge was reduced to residential burglary for trial. He was also charged with third-degree assault. That charge was premised on committing an assault with intent to prevent or resist lawful detention of himself. At trial the defendant was convicted of both the burglary and assault charge. On appeal he challenged the sufficiency of the evidence for both of those charges.

Analysis of the Court

The court began with the burglary charge. It first discussed the elements of residential burglary. The trial court had ruled that the evidence was sufficient even though the defendant had not successfully made entry into the residence. Review of that issue required the court to consider and apply two statutory definitions related to the burglary charge. See RCW 9A.04.110

The definitions were for "dwelling" and "building." The statute defined those terms as follows:

> "A 'dwelling' includes 'any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.' RCW 9A.04.110(7). A "'building,' in addition to its ordinary meaning, includes any dwelling, [or] fenced area.' RCW 9A.04.110(5)" *Wixon Slip Opinion*, p. 16[2]

The inclusion of 'fenced area' in the definition of "building" frequently leads to appellate issues in burglary cases. Since a fenced area is included in the definition of "building," a suspect can be charged with second-degree burglary for entering an area enclosed by a fence even though most people would think of burglary as entry into a structure. The *Wixon* case, however involved the term "dwelling," which is required for residential burglary.

The *Wixon* court reviewed several dwelling cases in addition to the statutory definition. The cases included an entry into a crawl space underneath a house, an entry into an attached garage, and an entry into a jewelry store which was downstairs from a residential apartment. In each of these cases, the courts had held that the entry could be sufficient for a residential burglary charge. That review brought the court to consider the fenced area attached to a single-family home.

The court held that the defendant's entry into the fenced area of a dwelling was not sufficient for the residential burglary charge. The court determined that the definitions distinguished between fenced areas appurtenant to "buildings" from fenced areas appurtenant to "dwellings." Entry into a fenced area would be deemed to be sufficient for second-degree burglary but not for residential burglary. *Wixon Slip Opinion*, p. 26

[2] In this digest of the *Wixon* case, the citations are to the version published in the public access section of the Washington Court's web site. At the time of writing the usual PDF version of the slip opinion was not available on the Washington Courts website.

Having resolved the burglary issue, the court next addressed the assault issue. The court started with the statute: "A person is guilty of third-degree assault if, "with intent to prevent or resist … lawful apprehension or detention of himself, … assaults another." RCW 9A.36.031(1)(a)." *Wixon Slip Opinion*, p. 30. The reference in the assault statute to "lawful apprehension or detention" led to a review of the citizen's arrest use of force statute: "Use of force may be lawful when "used by a person arresting [another] who has committed a felony [for the purpose of] delivering him or her to a public officer." RCW 9A.16.020(2)." *Wixon Slip Opinion,* p. 31

The court's analysis of the assault issue was in large part determined by its analysis of the burglary issue. This is because lawful use of force in this circumstance required that it be used to detain someone who committed a felony. The court acknowledged that even if the defendant had *not* committed residential burglary, he may have committed second-degree burglary by entering the fenced area. Nevertheless, the trial court's jury instructions did not reference second-degree burglary and therefore the prosecution had to rely on residential burglary. *Wixon Slip Opinion,* p. 32. Accordingly, the assault conviction could not stand.

Training Takeaway

When it comes to the elements of crimes, the details matter. The *Wixon* case is helpful to law enforcement because it involves close scrutiny of burglary, assault, and force used in a citizen's arrest. The case is well worth reading for that reason alone. The *Wixon* court overturned both the burglary and assault convictions. Its decision was based on a careful reading of the two statutes and the associated definitions.

For law enforcement, it must always be remembered that the final charging decision lies with the prosecution. An officer or detective will always want to get it right insofar as booking or referral charges are concerned. But all of law enforcement should feel free to consult with prosecutors concerning the reasons for pursuing a particular charge arising from a particular fact pattern. In this case, if the prosecution had charged both residential burglary and second-degree burglary, the defendant might well have been convicted.

EXTERNAL LINK: View the Court Document

State v. Gantt, Washington Court of Appeals, Division One (January 2, 2024)

Factual Background

This case came before the court on an appeal from an incest and child sexual abuse case. The defendant was convicted of five sexual abuse charges perpetrated against the older of two biological daughters. The appeal included constitutional challenges to the incest charge, sufficiency of the evidence challenges to the child rape and child molestation counts, and an evidentiary challenge related to the admission of sexual abuse evidence involving the defendant's younger daughter. The court rejected the challenges and upheld the convictions.

The sexual abuse of the older daughter began when she turned eleven years old. Coincidentally, at that time the defendant and the victim's mother separated. They shared custody without a formal parenting plan. Both daughters stayed part time with their mother and part time with the defendant.

During times when the two girls stayed with the defendant, and after the older daughter turned eleven years old, the defendant began having sexual contact with the older daughter. The abuse escalated to digital penetration and eventually to sexual intercourse. It continued for the next six years until the older daughter turned 17.

When she turned 17, the older daughter disclosed to a friend at school. The disclosure was connected to a suicide gesture. After the friend, she also disclosed to a school counselor. The school counselor then reported the abuse to law enforcement.

After the disclosure by the older daughter, the younger daughter also disclosed similar abuse by the defendant starting when she too turned eleven years old. Evidence concerning the abuse of the younger daughter was introduced in the trial of the defendant for abusing the older daughter. The evidence was offered to prove that the abuse of both victims was committed under a common scheme or plan.

At trial, the defendant argued that he was asleep and should not be convicted because he was unconscious. He claimed, therefore that he committed the sex acts without volition (meaning without intent or purpose or knowledge). The trial court gave an instruction which submitted the volition question to the jury for the child rape count. The trial judge reasoned that there was no need for the instruction as to the molestation and incest counts because they required that the state prove that the defendant did the acts while conscious for a specific purpose, namely sexual gratification. The jury appeared to have rejected the defendant's volition argument. It convicted him of the child rape count despite the "volitional act" instruction.

Analysis of the Court

The three issues of interest to law enforcement are: (1) The challenges to the constitutionality of the statute; (2) Sufficiency of the evidence; and (3) Common scheme or plan evidence.

The court began with the constitutional challenge. The defendant challenged the incest statute as "facially" unconstitutional. That challenge involved a claim that the statute is unconstitutional as applied to anyone, not just the defendant. The defendant also challenged the statute "as applied" to him. The court rejected both challenges.

The court began by articulating the standard that applies to facial challenges. "[A] successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *Gant Slip Opinion, p. 4.* The court noted that the defendant's arguments relied on recent Washington and U.S. Supreme Court decisions involving quite different criminal and regulatory statutes. The recent decisions included issues involving the criminalization of child rearing decisions, and criminalization of certain intimate acts between consenting, adult LGBTQ couples.

As to sexual assaults against his two daughters, the defendant asserted that the child rearing and LGBTQ cases recognized that "autonomy in matters of sexual intimacy is a fundamental right." He further argued that the standard to be applied must be strict scrutiny. *Gant Slip Opinion, p.5*

The court discussed and distinguished the prior decisions and the defendant's argument. It held that the prior decisions of the two supreme courts did not recognize a fundamental right to sexual intimacy. It stated, "We find no reason to disturb that holding, no less because a plethora of federal and state courts also agree that *Lawrence* did not establish such a fundamental right, and specifically so as to incest." *Gant Slip Opinion, p* 7

The court then went on to also hold that the incest statute passed the less strict rational basis test. "We find no reason to disturb those holdings and reaffirm that RCW 9A.64.020 supports the State's interest in prohibiting harm to children, who when placed in these situations are vulnerable to abuse, manipulation, and a coercive power dynamic within some families, which robs them of true agency and may subject them to profound emotional damage." *Gant Slip Opinion, p. 8*

After resolving the facial challenge, the court next addressed the "as applied" challenge. It rejected that challenge too.

For the as applied challenge, the defendant sought to expand the applicability of the *Blake*[3] drug possession decision. The defendant argued that *Blake* invalidated the drug possession statute because there was no required mental state in the former Unlawful Possession of a Controlled Substance (UPCS) statute. He claimed the incest statute had the same defect.

The court rejected the attempt to apply *Blake*. "Here, incest is one such statute, as it requires the State to show the defendant 'engage[d] in sexual intercourse with a person whom he or she knows to be related to him or her . . . as a descendant.' ... The statute, thus, requires both an activity and, going further, knowledge of the offending relationship, even if it is silent as to 'consent' or other facts, such as the descendant's age." The incest statute included a mental state and was thus distinguishable from *Blake.*

Having resolved the constitutional question, the court then turned to the sufficiency of the evidence. The defendant made a creative argument based on the older daughter's testimony. She testified that he was asleep when he started having sexual contact with her. He argued that if he was asleep there would be a lack of evidence of a sexual gratification purpose.

[3] The *Blake* decision held that Washington's UPCS statute was unconstitutional because it lacked a required mental state and therefore was held to criminalize innocent and criminal conduct alike. *See State v. Blake*, 197 Wn.2d 170 (2021). *Blake* and other published Washington court decisions can be accessed through a public access portal at the following link: Washington Court Decision Public Access.

The court rejected the argument with a commonsense response. The court pointed out that it was for the jury to determine what the victim meant when she gave the testimony. The jury could have reasonably determined that the defendant was pretending to be asleep. And the court also pointed out that as to the child rape count, the jury expressly rejected the defendant's claim that he was in fact asleep because it did not find that he lacked volition under the jury instruction given.

The next challenge was to the admission of evidence of abuse of the younger daughter. The court articulated the general standard for admission of evidence of this nature. "The prior acts and charged crimes must be 'markedly similar acts of misconduct against similar victims under similar circumstances' . . . '[which] are naturally to be explained as caused by a general plan of which they are the individual manifestations.' " *Gantt Slip Opinion, pp. 17-18*

The court then analyzed the relevance and prejudice of admitting the evidence of abuse of the younger daughter. It gave a succinct description of why the evidence was relevant:

> Moreover, there were numerous other striking similarities between K.G. and S.G.'s separate assault. Both victims were Gantt's biological daughters, not simply some kind of family relation. Both testified the abuse started when they were exactly 11 years old. Both testified the abuse began after their parents' separation. Both further testified the abuse occurred in circumstances where they were alone with Gantt. Both testified Gantt used false pretenses to start his abuse, claiming to be asleep for K.G. and applying lotion to prevent stretch marks for S.G. Both testified their abuse started with Gantt inappropriately touching their bodies before escalating to more intrusive contact. Both testified they were forced to share a bed with Gantt when they experienced the abuse. Gantt also discouraged both from reporting the abuse with threats that doing so would destroy the family. *Gantt Slip Opinion, p. 19-20*

In view of the strong probative value of the abuse of a second daughter – abuse perpetrated by the same methods used against the older daughter - the court declined to hold that there was error.

The *Gantt* opinion includes discussion of other issues, including prosecutorial misconduct and sentencing errors. The court found no reason to overturn the conviction or sentence on any of the asserted ground and upheld both the conviction and sentence.

Training Takeaway

For law enforcement the discussion in *Gantt* of the common scheme or plan evidence will be the most important takeaway. As is common in sex abuse investigations, disclosure of abuse by one sibling can lead to disclosure by others. For law enforcement, it cannot be overstated the importance of documenting not just that the abuse happened but how it was perpetrated. Comparison of what happened among multiple victims can support cross admissibility from victim to victim. Sex abusers all too often employ methods that worked for them in the past in order to continue deviant conduct.

As for the constitutional claims, it is of general interest that the statutes survived the constitutional challenges. Recent publicized court decisions may appear to have provided an opening to creative constitutional challenges. This case stands for the proposition that so far the courts have not recognized a constitutional right to autonomy in matters of sexual intimacy. One hopes that our courts continue to view such arguments with skepticism.

EXTERNAL LINK: View the Court Document

State v. Taylor, Washington Court of Appeals, Division Three (January 23, 2024)

Factual Background

This case came before the court on an appeal from a conviction for unlawful possession of a firearm (UPOF). The court addressed two issues that are of great interest to law enforcement in the published portion of the opinion. The first issue involves an alleged unlawful seizure of a suspect during a social contact, and the second involves the knowledge element of a UPOF charge. Both issues are well reasoned. The opinion is worth reading in its entirety.

The incident began as a patrol investigation of a shoplifting incident from a home improvement store. Store personnel reported that a suspect wearing jeans and a white sweatshirt left the store with merchandise. They reported the direction the suspect took. An officer responded to the call and went toward a field in the same direction the suspect had gone.

In the field, the officer found a vehicle but no suspect. He did not see stolen merchandise in the vehicle. He climbed a dirt mound to get an elevated view and found the defendant sleeping on top.

The encounter with the defendant began with the officer explaining the shoplifting call. The initial exchange included the statement that, "[Y]ou don't match the description or anything, but we just gotta, I just gotta get your name just so we have that in case we need to contact you again at some point." *Taylor Slip Opinion*, p. 3. The defendant provided identification, and the officer wrote down the pertinent information and returned the identification to the defendant. The officer also requested a records check via dispatch.

The officer completed the encounter by answering a question from the defendant. The defendant asked if it was OK for him to be there. The officer said that it was, as long as no one complained.

Sometime later, dispatch responded on the records check and informed the officer that the defendant had a felony warrant. The defendant was arrested on the warrant. Another officer looked in the vehicle and could see a rifle barrel and cartridges. These were seized by means of a search warrant.

The defendant was charged with unlawful possession of a firearm. He brought a suppression motion concerning the initial contact. He argued that the contact was an illegal seizure without a warrant and that all subsequent evidence was fruit of the poisonous tree. The trial court held a contested hearing and heard testimony from the officer and the defendant. The court also reviewed body cam footage and listened to the exchange between the defendant and the officer prior to the felony warrant arrest. The trial court denied the motion.

The defendant was convicted in a jury trial. On appeal he claimed that the prosecutor had committed misconduct by misstating the burden of proof for the knowledge element of the UPOF charge. That issue along with the suppression motion issue were the focus of the appellate court's opinion.

Analysis of the Court

The court began with the suppression issue. The court discussed first that there is a difference in Washington between an unlawful detention under the federal Fourth Amendment, and under the Washington Constitution. Officers who have taken these trainings in the past will be aware that such differences are unfortunately a reason to be cautious in relying on federal cases as good authority.

The *Taylor* court stated, "Because article I, section 7 of the Washington Constitution 'grants greater protection to individual privacy rights than the Fourth Amendment,' we evaluate whether a seizure occurred under the Washington Constitution." *Taylor Slip Opinion*, P.9. It is important for Washington law enforcement to recognize that the two constitutional provisions are not the same and that courts in Washington apply a more stringent standard in review of unlawful seizure claims.

The court next addressed the standard that applies in Washington. "A seizure occurs only 'when, in view of all the circumstances surrounding the incident, a reasonable person would have believed [they were] not free to leave' or 'free to otherwise decline an officer's request and terminate the encounter' due to an officer's use of 'physical force or a show of authority.' " *Taylor Slip Opinion*, p. 9.

The reasonable person part of this standard was further refined. "The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained." *Id.*

The court then turned to whether the encounter could be deemed a lawful social contact. It stated that in social encounters an officer need not provide an advisement of rights but also warned that, "the term 'occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention.' " *Taylor Slip Opinion*, p.10

In its review of the contact in this case, the *Taylor* court reviewed past cases involving social contacts. These included cases where the contact was held to be lawful. It found in its review that the mere request for identification is not sufficient for a contact to be deemed unlawful. But it also found that additional common circumstances can make an encounter unlawful: "Conversely, interactions that our Supreme Court has confirmed might indicate a seizure includes 'the threatening presence of several officers, the display of a weapon by an officer, physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' " *Taylor Slip Opinion*, p. 10

After its review of the standard and past cases, the court reviewed the officer's actions in *Taylor*. It found that the officer's actions did not constitute an unlawful seizure. "The audio-video of the encounter is helpful in this regard. It shows the encounter was brief and cordial. There was nothing in Officer Ayer's words or conduct that can be construed as displaying physical force or authority until the officer learned of Mr. Taylor's outstanding warrant." *Taylor Slip Opinion*, p. 11

It is important to know that the decision was not unanimous. The court majority voted to uphold the lawfulness of the encounter whereas the dissent would have applied a more onerous standard. The dissenting judge stated, "A seizure occurred when Ayers requested that Taylor tender his identification card and particularly when Officer Ayers employed the card to perform a warrant check. I would suppress evidence of a gun being inside the vehicle driven by Taylor." *Taylor Slip Opinion*, p. 28

The court also reviewed an allegation of prosecutorial misconduct. The issue is of interest to law enforcement because it turned on the precise definition of knowledge in unlawful possession of a firearm (UPOF) cases. The prosecutor stated, "So based on the circumstances, it's not required that you find that he

knew." This statement was made in the context of a closing argument focused on the knowledge jury instruction. That instruction includes the following phrase, which is referred to as a permissible presumption: "If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact." *Taylor Slip Opinion*, p. 6

Despite the plain text of the jury instruction, the burden of proof for knowledge requires proof beyond a reasonable doubt of actual knowledge. *Taylor Slip Opinion*, p. 19. Even though the jury is permitted to apply a presumption of knowledge based on the defendant's actions, a prosecutor cannot undermine the actual knowledge burden of proof in argument. Likewise, law enforcement should be aware that actual knowledge is required. The gold standard of proof of actual knowledge would be an admission from the defendant that he knew. Be sure to ask that question if a suspect voluntarily gives a statement in a UPOF case.

Training Takeaway

Both issues addressed in the published part of the opinion are important in routine law enforcement work. A prudent and cautious officer will need to know that the line between a lawful social contact and an unlawful detention lies in a gray area. From the discussion of the facts in this case, it appeared that the officer did not in fact consider the defendant a suspect in the shoplift. By all accounts, the defendant was treated like a potential witness up until the warrant was discovered. These circumstances made all the difference to the *Taylor* majority.

It is also worthwhile to know that there was a dissent. The rule advocated by the dissenting judge is not law for the time being. But it is not impossible that our Washington courts may adopt the rule at some point in the future.

It is also worthwhile to know that *Taylor* and numerous other Washington cases stand for the proposition that actual knowledge is required to be proved beyond a reasonable doubt in possessory crimes such as unlawful possession of a firearm. With that in mind, it is crucial for law enforcement to document admissions of knowledge, and if there are no spontaneous admissions, to ask the direct question and extract explicit admissions of knowledge even if the facts seem to conclusively show that the suspect must have had knowledge.

EXTERNAL LINK: View the Court Document

Federal cases should be reviewed by Washington law enforcement with caution. There are many issues of interest to Washington law enforcement, to include criminal procedure, search and seizure, application of evidence rules, and uses of force, and other constitutional issues, that are decided differently by Washington courts compared to their federal counterparts.

All law enforcement personnel, parties, and agencies must review the actual published case opinions in these cases and consult their agencies' legal advisors, union counsel, and local prosecutors for specific guidance on whether the application of federal cases should be applied to specific issues in specific cases or investigations.

Snitko v. United States, Ninth Circuit (January 23, 2024)

Factual Background

This case came before the court on an appeal from a dismissal in a civil rights action. The civil action arose from an investigation of a safe deposit box company. The company catered to both lawful and unlawful customers. The investigation included a federal search warrant which led to the seizure of innocent customers' property. The civil rights action by those customers challenged the lawfulness of the search warrant and the manner in which it was executed. The primary issue which is of interest to Washington law enforcement concerns inventory searches conducted during execution of a search warrant.

The Ninth Circuit's opinion included background on the investigative reasons for the investigation. The company's business included providing secure and anonymous safe deposit box services to individual clients. The safe deposit boxes were protected from theft and robbery by state-of-the-art biometric security measures. Anonymity was assured by not requiring identification information from its clients.

The safety and anonymity features of the safe deposit boxes attracted customers who used the company's services for unlawful purposes. Federal agencies conducted numerous investigations which indicated that the company was complicit in the unlawful activity. After the company was found to be implicated in a number of federal criminal investigations, the federal investigators decided to investigate the company itself and its owners.

The investigation led to an indictment for money laundering and other federal financial crimes. It also resulted in a search warrant that included authorization to seize and inventory the "nest of safe deposit boxes." The warrant also included a requirement that the FBI follow its standard policy for inventorying the boxes. But in addition to the standard policy, it also referenced a supplemental procedure created and tailored to this particular investigation. The procedure included provisions that facilitated civil forfeiture of safe deposit boxes valued at a threshold of more than $5,000.

The mass seizure of safe deposit boxes resulted in a number of innocent individuals having lost property stored in the boxes. Those losses in turn led to a federal civil rights action and class action litigation. The litigation proceeded through extensive court proceedings which resulted in many of the plaintiffs regaining their property. The culmination of the case in the trial court was dismissal based on the trial judge's determination that the search was conducted lawfully. The dismissal motion was the subject of the appeal to the Ninth Circuit.

Analysis of the Court

The constitutional doctrine at issue is derived from the Fourth Amendment warrant requirement. It is the constitutional exception that applies to inventory searches. The exception permits a law enforcement agency to inventory items lawfully within their custody for purposes of safety and safe keeping, as long as the search is pursuant to "standardized instructions" that apply across the board to all cases. The court began with a discussion of the standards for lawful inventory searches incident to execution of a search warrant.

Before reviewing the court's treatment of the inventory search issue, it is important for Washington law enforcement to know again that Washington law differs from federal law in this area. This summary will not cover all of the differences, but a provision of the criminal court rules is a starting place for specific search warrant execution requirements in Washington.

When executing a search warrant, Washington law enforcement must give notice and inventory all property seized:

> The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer. The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. *CrR 2.3(d)*

The federal inventory search standards have been instituted by the U.S. Supreme Court and circuit courts around the country. The *Snitko* court noted that federal standards for lawful inventory searches require that standard agency policies be followed. This is because, "The need for a 'standardized' policy is necessarily a feature of the inventory search doctrine because, if an inventory is conducted pursuant to a standardized policy, a court knows that such a search would have been conducted regardless of the degree of suspicion an officer has of a person's (or an automobile's) criminality." *Snitko Slip Opinion, p. 24*

While suspicion of criminal activity during an inventory does not necessarily invalidate an inventory search, pretext does. "However, if an agency is given the discretion to create customized inventory policies, based on the features of each car it impounds and each person detained, the ensuing search stops looking like an 'inventory' meant to simply protect property, and looks more like a criminal investigation of that particular car or person, i.e., more like a 'ruse.' " *Snitko Slip Opinion, p. 25-26*

The court applied these standards in its analysis of the lawfulness of the execution of the search warrant on the safe deposit box "nests." It held that the searches were unlawful. The defect in the search procedure was largely the result of following the supplemental inventory process that was created for this particular search and that facilitated the civil forfeitures.

The court stated, "A look at the record, and the Supplemental Instructions in particular, confirms that the search was criminal in nature. The instructions required agents to not only write a summary of the items found in the safe deposit boxes, but in a section discussing preservation of 'evidence,' told them to tag items with forfeiture numbers; send them to 'evidence control'; and take care to preserve 'drug evidence' for fingerprints." *Snitko Slip Opinion, p. 30*

Training Takeaway

An inventory during a search warrant execution serves many purposes. One purpose is to document the property seized so that it can be accounted for and returned to the rightful owner if not needed or no longer needed as evidence. Because an inventory search is not directly related to the investigation at hand, it is deemed constitutionally lawful when the agency follows standard procedures that apply across the board in all search warrant investigations. This is the primary takeaway from *Snitko*.

A law enforcement purpose of using the inventory for investigative purposes is fraught with peril. Evidence of criminal activity should be reviewed for probable cause and be the subject of a supplemental search warrant rather than rely on an inventory. Law enforcement should scrupulously follow agency inventory procedures for the purposes for which they are intended.

EXTERNAL LINK: View the Court Document

Cases & Reference

1. *State v. Johnson,* 83738-9, Washington Court of Appeals, Division One (January 2, 2024)
   - Johnson Slip Opinion
   - RCW 9A.36.021
   - RCW 9A.36.041
2. *State v. Wixon,* 38953-7, Washington Court of Appeals, Division Three (January 25, 2024)
   - Wixon Slip Opinion
   - See RCW 9A.04.110
3. *State v. Gantt,* 84445-8, Washington Court of Appeals, Division One (January 2, 2024)
   - Gantt Slip Opinion
4. *State v. Taylor,* 39019-5, Washington Court of Appeals, Division Three (January 23, 2024)
   - Taylor Slip Opinion
5. *Snitko v. United States,* 22-56050, Federal Ninth Circuit Court of Appeals (January 23, 2024)
   - Snitko Slip Opinion

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Case Review
The Washington State Judicial Opinions website provides free public access to the precedential, published appellate decisions from the Washington State Supreme Court and Court of Appeals.

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] | [2022-2023] [2024]