Covering cases published in October 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.

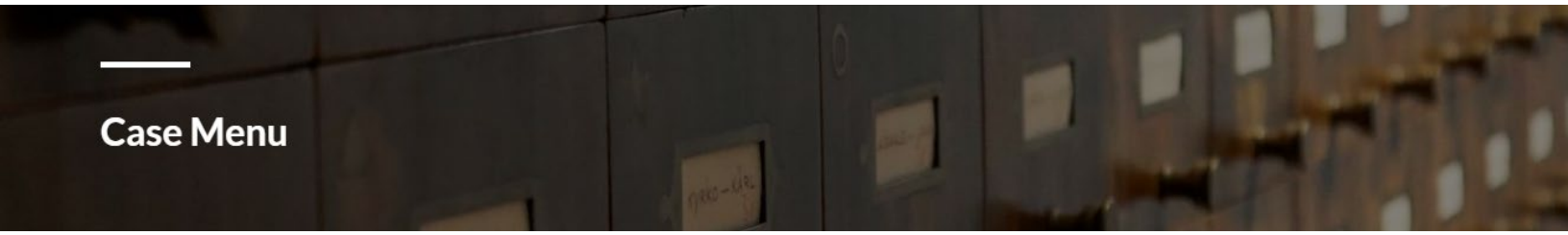
WASHINGTON LEGAL UPDATES

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

OVERVIEW

October was a limited month for advance sheet cases of interest to law enforcement. We have included five cases which discuss a number of important issues well worth reviewing. Unfortunately, four of the five cases are wholly unpublished, and one is only partially published. We have included a short disclaimer which explains the difference between published and unpublished.

The Ninth Circuit added to the lack of cases by publishing only 17 cases total. None of the 17 were of interest to Washington law enforcement. Maybe we should be grateful to be flying under the courts' radar for a change? In any event, the five cases presented include discussion of some very interesting and important legal standards. Published or not, they are well worth your time in reviewing.

CASE MENU

1. *State v. Chuprinov, 85145-4, Washington Court of Appeals, Division One (October 7, 2024)*
2. *State v. Kanta, 58434-4, Washington Court of Appeals, Division Two (October 1, 2024)*
3. *State v. Miller, 59438-2, Washington Court of Appeals, Division Two (October 22, 2024)*
4. *State v. Ownbey, 39470-1, Washington Court of Appeals, Division Three (October 22, 2024)*
5. *State v. Peterson, 86614-1, Washington Court of Appeals, Division Two (October 28, 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.

QUESTIONS?

- Please contact your training officer if you want this training assigned to you.
- Visit the ACADIS portal page for status, news and **resources** for organizations, officers and training managers news, updates, and links.

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

State v. Chuprinov, 85145-4 Washington Court of Appeals, Division One (Oct 7, 2024)

Factual Background

This case was partially published and came before the court on an appeal from convictions from child sex abuse charges. The published portion of the opinion addresses the right to remain silent. The issue was not related to alleged improper questioning or interrogation by law enforcement, but rather testimony and argument offered by the prosecution at trial. It is a case well worth reading because it addresses the gray area between a suspect's invocation of the right to remain silent, and a suspect's election to answer some but not all questions.

The case originated with a 15-year-old victim reporting sexual abuse by her stepbrother in 2020. Law enforcement made contact with the victim when she was found in a parking lot. The officers asked if she needed a ride home. She responded in tears and declined the ride. She went on to report that she had been sexually abused by her stepbrother for eight years.

The victim was interviewed by law enforcement. She gave details of the abuse and stated that it had started when she was eight years old and continued to the present time. The victim's family was a blended family. The father had children by his first wife, including the defendant. He later married his first wife's sister. The victim was a child of the marriage to the sister. The victim reported that the most recent incident had happened just a few days before the contact with law enforcement in the parking lot. At that time the defendant was living with the victim and her brothers and sisters.

The investigating officers served a search warrant and arrested the defendant. In the fact part of the opinion the court stated, "Chuprinov agreed to speak with law enforcement and admitted to having sex with M.S. When asked how many times he had sex with M.S., Chuprinov initially said ten, but then decreased the number to four times. He claimed the sex acts had started a few months before. Chuprinov also described some of the acts and where they took

place in the residence." *Chuprinov Slip Opinion, p. 3*. These statements were not the statements that were reviewed by the court in the appeal.

The defendant was charged with child rape first, second, and third degree. These charges reflected the victim's age during the eight years that the abuse continued. He was also charged with incest. During closing arguments at trial, the defense attorney acknowledged that the defendant had admitted to law enforcement that he committed the third-degree child rape. This was because of the story he told to law enforcement in which he settled on four times total that he had committed the abuse. The jury rejected the defendant's attempt to minimize the extent of the abuse and convicted the defendant of all four crimes.

The defendant appealed the convictions. The primary issue on appeal was alleged violation of the defendant's constitutional right to remain silent during the trial.

Analysis of the Court

The right to remain silent issue is in the published portion of the opinion. The primary difference between published and unpublished is that the published part of an opinion constitutes mandatory authority for courts and lawyers. Trial courts are bound to apply the published portion of a partly published opinion the same as they would for a wholly published opinion.

In its analysis, the court included quoted excerpts from the trial testimony of the detective concerning the defendant's interview. The excerpts included specific instances of the defendant simply not responding during the interview but did not include him affirmatively stating that he was invoking his right to remain silent or his right to not answer specific questions.

The excerpts included the following:

> Q: And then he wouldn't answer further questions about that?
> A: Correct.
> . . . .
> Q: Was he asked about whether or not any of the sex was forceful with her?
> A: Yes. He didn't answer.
>
> Q: What do you mean "he didn't answer"?
> A: *He just sat quietly.*

Q: How long did he sit there quietly?
A: Difficult to say. Throughout the interview there were times it was a minute or two and probably other times up to four to five minutes. But towards the end of the interview when he became increasingly quiet, then that was ultimately when we terminated the interview or just ended the interview.

Q: *He kind of just stopped being willing to speak?*
A: *Yes.*
. . . .
Q: When there were yes-or-no answers, did you or Detective Jones try and follow up and get more detail?
A: Yes.

Q: Was that successful?
A: Not really.

Q: And you said the interview concluded. Tell us more about that, how it concluded?
A: *Well, just at the end of the interview when we, you know, were kind of just not getting anywhere, we were asking questions and getting non answers -- or I'm sorry—him just being quiet. It just got to the point where it was like I believe I said something to the effect of I'm just trying to get your side of this, but if you're not going to talk, then we might as well just finish things up. Chuprinov Slip Opinion, pp. 4-5 (emphasis supplied)*

The court also quoted and included excerpts from the prosecution's closing argument. The excerpts included the following:

And as soon as law enforcement started asking him whether or not it was forceful, *then he stopped talking*. And you heard that it wasn't like he was willing to share a lot of details even prior to that point. It had not been a super free-flowing conversation that occurred at the police station.

Now, in your instructions, same with what we talked about the credibility of the witnesses, *you are allowed discuss and debate over why someone might get very tight-lipped all of a sudden with the police after he admitted having sex with her*, after he admitted positions, after he admitted how many times it had been going on. Was there a realization that: Maybe I'm not helping myself here by talking to these detectives, right. The detectives are allowed to share that information with you. And you are allowed to use the fact that he is the one in trouble and he is the one charged with crimes *in discussing and debating why he stopped talking to law enforcement* in that interview room.

. . . .

You are allowed to talk about the reasons why the defendant might not have wanted to be so detailed with law enforcement. You are allowed to talk about the reasons why he didn't want to answer questions, why there were questions that they asked him that he wouldn't answer, and you are allowed to think about that in the context, even as Detective Sergeant Don explained, that people who are in trouble tend to minimize and want to minimize what is actually going on because then they think they're going to be in more trouble. Chuprinov Slip Opinion, pp. 5-6 (emphasis supplied)

In addition to quoting the offending parts of the trial record, the court discussed the legal standards that apply to a claim of a violation of the right to remain silent. The right is enshrined in both the U.S. Constitution Fifth Amendment and the Washington Constitution. *Miranda* warnings are a requirement that protects criminal suspects in law enforcement custody concerning these rights. In short, "Miranda warnings also 'constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty.' " *Chuprinov Slip Opinion, p. 7*

In a trial, a prosecutor may not comment on a suspect's exercise of the right to remain silent. The test for whether a prosecutor violates this prohibition is in four parts: "First, it is constitutional error for a police witness to testify that a defendant refused to speak to him or her. Similarly, it is constitutional error for the State to purposefully elicit testimony as to the defendant's silence. It is constitutional error also for the State to inject the defendant's silence into its closing argument. And, more generally, it is constitutional error for the State to rely on the defendant's silence as substantive evidence of guilt." *Chuprinov Slip Opinion, p. 7*

The four part test becomes complicated when the suspect selectively exercises the right to remain silent. This occurs when a suspect answers some questions but refuses to answer others. In this case, the court found that the prosecution violated the right to remain silent according to all four parts of the test. The court held that the defendant invoked his right to remain silent when he simply stopped responding during questioning. That portion of the defendant's statement should not have been admitted into evidence. In court, the prosecution exploited the defendant's silence by referring to it in closing argument and relying upon it as evidence of guilt. All of these aspects of the trial presentation were error. The court stated simply, "The State linked Chuprinov's silence with his guilt and instructed the jury it could do the same." *Chuprinov Slip Opinion, p. 8*

The court next addressed the question of whether the defendant's willingness to answer some questions but not all made a difference. The court reviewed several prior cases where a suspect had done just that. These included a prior case decided by the same court: "This court allowed the testimony, reasoning that '[b]ecause Curtiss did not invoke her right to remain silent during questioning . . . *testimony regarding her lack of a response to certain interview questions was not improper*.' " *Chuprinov Slip Opinion, p. 9 (emphasis supplied)*

The court in *Chuprinov* found that its prior case and several other similar cases were different from this case. It stated, "Regardless of a prior waiver and agreement to speak to law enforcement, after *Miranda* warnings, a person 'may invoke the right to silence in response to any question posed by law enforcement." . . . 'No special set of words is necessary to invoke the right. In fact, an accused's silence in the face of police questioning is quite expressive as to the person's intent to invoke the right.' " *Id*

The court distinguished prior cases where questions not answered by a suspect were deemed fair game. It held that the defendant in *Chuprinov* had sufficiently invoked his right to remain silent and those parts of the police interview should have been kept out of the trial.

The remainder of the published part of the opinion addressed harmless error. It will come as no great surprise that the court did not believe the violation to have been harmless. Accordingly, the court reversed the convictions for child rape first and second degree. It sustained the conviction to the child rape third degree, which the defendant affirmatively admitted and about which he did not remain silent.

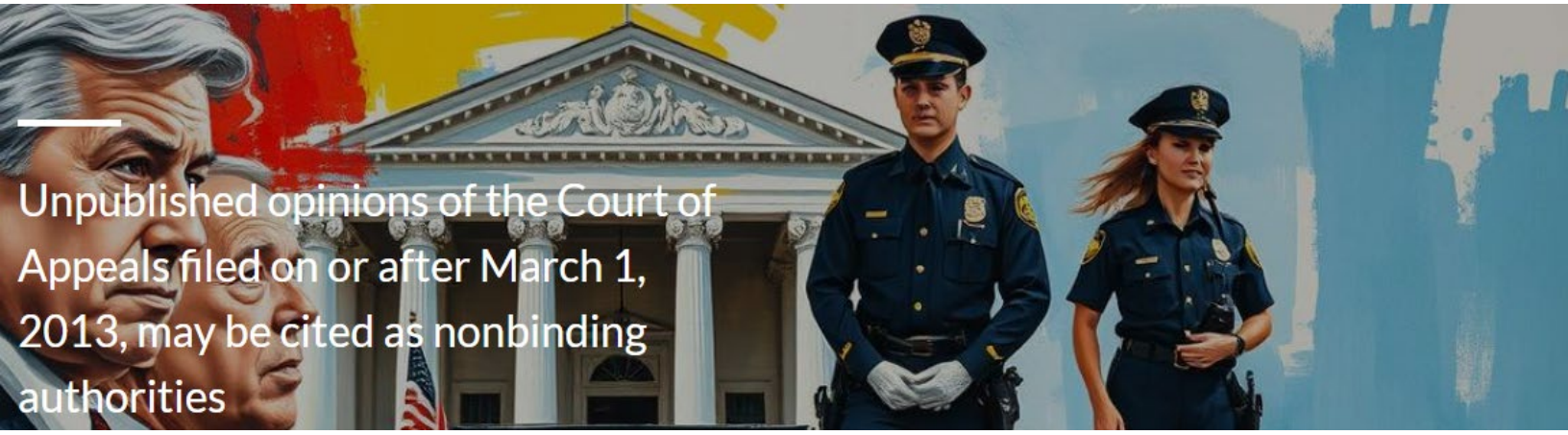
Training Takeaway

The discussion of the partial silence cases is well worth reading in this opinion. There is a wide area of uncertainty here. On the one hand, in some cases there can be testimony and argument about a suspect not answering some questions. On the other, a suspect does have the right to refuse to answer specific questions. In such cases it is a constitutional violation to introduce the testimony or argue that it is evidence of guilt.

These two principles are insolubly in conflict. For a law enforcement officer being called in to testify, a pre-testimony meeting with the trial prosecutor (and perhaps the trial prosecutor's appellate division) is crucial to make sure the testimony stays on the right side of the line.

It must never be forgotten that the right to remain silent is a constitutional right that the defendant can use to support overturning his conviction at all stages of a case. For law enforcement and for trial prosecutors, deliberate choices should be jointly made as to how to gingerly step through the right to silence landmines.

EXTERNAL LINK: View the Court Document



Unpublished Opinion Disclaimer

The cases following this notice are wholly unpublished. This means that they do not constitute case law and are not mandatory authority in court proceedings. A court rule provides the following concerning unpublished cases: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1

The cases are of interest to law enforcement even though they are unpublished. The courts' resolutions of issues in particular cases under particular facts provide insight into the possible way in which issues may be decided in the future. Just as a court may not rely on unpublished cases as mandatory authority, law enforcement should also not consider such cases mandatory but should instead accord such cases such persuasive value as they deem appropriate keeping in mind that it was a panel of appellate judges who issued the unpublished opinion.

State v. Kanta, 58434-4, Washington Court of Appeals, Division Two (Oct 1, 2024)

Factual Background

This case was unpublished and came before the court on an appeal from a Department of Licensing (DOL) suspension of a driver's license in a DUI case. The issue addressed is the admissibility of a blood test from a sample collected using a vial that was close to expiration. The case is of interest to any officer regularly involved in DUI enforcement and the collection of blood samples from intoxicated drivers.

The DUI stop and blood sample collection occurred in July 2021. A sheriff's deputy responded to a one car accident in which the defendant's car had gone off the road and overturned. A preliminary breath test (PBT) showed the defendant's blood alcohol level (BAC) at .173%. The defendant was arrested, transported for medical treatment, and voluntarily agreed to give a blood sample. The sample was drawn by medical personnel using a blood draw kit from the deputy. The deputy's report was admitted into evidence at the DOL hearing. In the report the deputy stated, "that '[p]rior to providing this blood kit to the phlebotomist [he] checked to make sure that the tubes were in good condition, were not expired, and that the white preservative anticoagulant powder was present in the tubes.'" *Kanta Slip Opinion, p. 2*

Although the sample was collected the same night as the accident, the blood was not tested until May 2022. Before the date of testing, the expiration date came and went. Thus, the blood was tested some six months after the expiration date for the tubes. The finding from the analysis of the blood sample was that the defendant's BAC was .18%. Thereafter in October 2022, DOL provided notice that the defendant's license would be suspended.

The defendant contested the license suspension. She obtained a declaration from an employee of the blood tube manufacturer which stated that the company stood behind the collection tubes up to the expiration date but not beyond. The declaration further stated, "The expiration date included on BD

Vacutainer® Tubes is included to ensure the product is working properly from the date of manufacture up to the certain date of expiration as predetermined at the time of manufacture." *Kanta Slip Opinion, p. 4.* The defendant objected to admitting the result of the blood test into evidence and argued that DOL was unable to show that the blood samples complied with the blood analysis WAC because the testing was done after the expiration date for the tubes.

The DOL hearing examiner ruled that the blood test was admissible. The examiner found that the DOL had met its *prima facie* burden of proof and that there was no evidence impeaching the blood test result. Accordingly, the defendant's license was suspended.

The defendant appealed the suspension to the superior court. After a hearing, and after reviewing the record, the superior court upheld the DOL decision. That ruling was then appealed to the Court of Appeals.

Analysis of the Court

The court began with reviewing the RCW and the WAC provisions concerning DUI blood tests. Those are found in WAC 448-14-020 and RCW 46.61.506. The court summarized the requirements of those provisions as follows: "Additionally, '[b]lood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.' WAC 448-14-020(3)(b). WAC 448-14-020 makes no reference to an expiration date for the sample container and preservative." *Kanta Slip Opinion, p.* 7

In addition to the statutory and regulatory requirements the court also made note of standards adopted by case law. In particular the court discussed a prior case in which a DUI defendant argued that the State had to introduce first hand testimony about the chemical composition of the anticoagulant powder in the test tubes. *See* State v. Brown, 145 Wn.App. 62(2008). The *Brown* court had rejected that argument saying, the blood test was properly admitted into evidence in part because a toxicologist was able to testify as to the content of the vials and that the anticoagulant had functioned properly when he did his BAC testing.

The argument in the *Brown* case was technical and targeted much the same as the argument in this case. The court in both cases rejected the argument. In this case the court stated, "Kanta focuses all of her arguments on the

admissibility of her blood test. The WAC does not require that the blood in the test tubes be tested prior to the expiration of the tubes. As we note above, once the department satisfies its initial burden of producing *prima facie* evidence establishing that the test complied with the code, the test results are admissible." *Kanta Slip Opinion, p. 11*

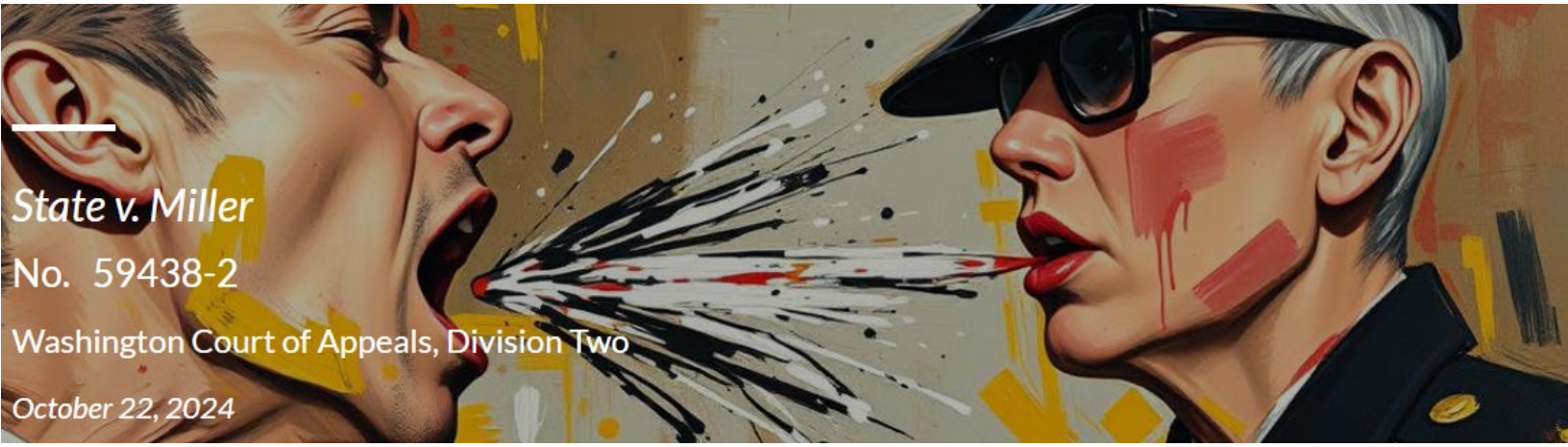
The court also took note of the content of the arresting officer's report. His inclusion of specific observations of the condition of the blood vials and that they were not expired at the time of the blood draw, contributed to the court holding that the BAC result was properly admitted into evidence and the defendant's license was validly suspended.

Training Takeaway

Documenting the details required for admitting BAC results in a DUI case is increasingly quite a challenging task. In any investigation, like DUI that depends heavily on performing a number of separate steps or requirements in a particular order, it is worthwhile to double check that all the required steps are reflected in the report for each case.

An iron clad report plus in court testimony that an officer follows a habit of completing DUI investigations the same way each and every time (and that the procedure is "by the book") can be powerfully persuasive in the face of technical defense attacks on the BAC result. It is noteworthy that the officer here included all of the necessary details in his report. And it likely didn't hurt that the facts included an accident in which the defendant wrecked her car and blew a .173 on the PBT.

EXTERNAL LINK: View the Court Document



State v. Miller, 59438-2, Washington Court of Appeals, Division Two (Oct 22, 2024)

Factual Background

This case came before the court on an appeal from a conviction for third-degree assault on an officer. The issue was sufficiency of the evidence. The incident from which the case arose involved the defendant spitting in the face of the officer.

The court gave a succinct description of the facts from the evidence introduced at trial. The court stated, "While Miller was being handcuffed, he was yelling, causing saliva to spray onto Officer Dragt. Officer Dragt told Miller, *'Hey, don't spit on me.'* ... Miller then 'cocked his head back,' 'cleared his throat,' and spit on Officer Dragt's face... Miller's saliva was all over her face and it covered her glasses so she could no longer see. To prevent Miller from spitting on her again, Officer Dragt covered Miller's face—first with his hat, and then with a breathable mask called a 'spit sock' designed to block spitting." *Miller Slip Opinion, p. 2*

The defendant was charged with third-degree assault. He was convicted by a jury. He appealed and claimed that there was insufficient evidence to support his conviction. This case was from his direct appeal of his conviction.

Analysis of the Court

A charitable description of the defendant's argument on appeal would describe it as imaginative. But it could also be called offensive.

The court framed the argument as follows:

> In his closing argument, Miller argued that the State failed to meet its burden to show that the spitting was offensive. Miller argued that on-duty police officers were "not your average person" and asked the jury to consider whether Officer Dragt was "unduly sensitive" for her job. . . The

> State countered by arguing that the jury was instructed to rely on its "common sense and experience" and that the "harmful or offensive" standard referred to an "ordinary person," not an officer. *Miller Slip Opinion*, p. 3

The court's analysis first addressed the legal standards that apply to third-degree assault. The court quoted the statute defining the crime and stated that a defendant commits the crime when he "[a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." See RCW 9A.36.031(1)(g). The court also stated that the term "assault" is a reference to common law assault, which includes "an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person." *Miller Slip Opinion*, p. 4-5

In light of the foregoing definitions, coupled with the fact of spitting in the face of a female officer, the court made quick work of the defendant's arguments. "In Miller's view, Officer Dragt needed to testify about her subjective reaction to the intentional spitting incident, rather than about spitting generally or about the unintentional previous spitting. But the jury had to consider whether an *ordinary person* in these circumstances would find the touching offensive." *Miller Slip Opinion*, p. 5

The court pointed out that the officer testified about her warning to the defendant and the reasons for not wanting to be spat upon. "Officer Dragt also testified that she took steps to prevent further spitting afterwards. And she explained the reasons why she did not want to be in contact with a stranger's saliva. A rational jury could certainly have found that this spitting would offend an ordinary person who is not unduly sensitive." *Id*

Happily, the defendant's arguments did not prevail. Common sense ruled the day and the defendant's conviction was upheld.

Training Takeaway

This case, even though it was unpublished, has some good lessons in it. The lessons are especially pertinent to in-court testimony.

In the usual case, a trial prosecutor cannot lead his witnesses when they testify in court. What this means in practice is that the prosecution is stuck with how the witness answers the questions and can't suggest how a witness could modify or improve an answer. And this in turn means that witnesses should be as complete and descriptive as possible.

Things that may seem obvious, such as that being the victim of spitting in the face is "offensive," can and should be spelled out explicitly. Common sense tells most of us that individuals who don't mind being spit upon in the face are aberrant rather ordinary. Still one never knows when a juror or judge might be looking for a technical way out because of sympathy or some other reason having nothing to do with the law or evidence.

Spell it out so it appears in print in the record on appeal is a takeaway worth remembering anytime law enforcement give in court testimony.

EXTERNAL LINK: View the Court Document

State v. Ownbey, 39470-1, Washington Court of Appeals, Division Three (Oct 22, 2024)

Factual Background

This case came before the court on an appeal from a conviction for several sex offenses. The appeal addressed several issues of interest to officers and detectives engaged in the investigation of sex offenses. The issues included the rape shield statute, admissibility of expert testimony in support of a sex assault victim's credibility, and sufficiency of the evidence for sentencing enhancements.

The facts arose from a relationship between the victim and the defendant that was partly for business purposes and partly personal and social. The victim met the defendant through an ad on Craigslist which stated that the defendant wanted to impregnate someone. After meeting the defendant in person, the victim decided against romance but continued to be friends with the defendant.

The relationship evolved to include business. The defendant was engaged in outdoors marketing. His business included attending marketing expos, including an expo in Las Vegas. During that expo, the defendant claimed that he and the victim discussed pursuing a sexual relationship with each other. The defendant also claimed that during the same expo, the victim had had a sexual encounter with another couple. In regard to these two claims, at trial the prosecution conceded that the defendant could ask the victim on the stand about the sex discussion but not about the encounter with the other couple.

The sexual assault occurred approximately three years after the business/personal relationship first began. It took place during an overnight stay in Leavenworth. The defendant invited the victim to join him and told her that he had booked two rooms. Upon arrival she discovered that the two rooms were actually just one room with one bed. She nevertheless stayed with the defendant.

The first night went by without a problem. But the next day they met for a breakfast that included alcohol. The victim intended to drive to her home in Idaho but felt it necessary to sleep off the alcohol. She went back to bed clothed but woke up with no clothes on and the defendant naked, "spooning" with her, and attempting to get her to inhale an aphrodisiac, "Rush." The victim panicked and tried to get away. The defendant responded by putting her in a choke hold. She was able to get away and called a rape crisis line and law enforcement after locking herself in the bathroom.

At trial, the victim was permitted to be asked about discussing a sexual relationship with the defendant. She explained the discussion by drawing a distinction between "sexting" and "sexual banter." She acknowledged sexual banter but not sexting. She was also questioned about her memory in regard to certain statements she had made to detectives. She admitted making the statements indicating lack of memory to the detective but explained that her memory "did come back" after being treated in the hospital.

The defense was not permitted to question the victim about the alleged sexual encounter with another couple in Las Vegas. The trial court ruled the testimony inadmissible under the rape shield statute. Also, the defendant did not testify. However, his account of the events in Leavenworth was introduced through two police interviews. In short, he claimed the Leavenworth incident was consensual, that they were "doing Rush together," and that victim abruptly stopped the encounter and that he complied with her wishes.

The defendant was acquitted of an attempted rape count but convicted of three assault counts. One of the assault counts was the charge at issue in the appeal. That charge was based on the use of a noxious substance to commit the assault. That count also included a sentence enhancement for sexual motivation and for abuse of a position of trust.

Analysis of the Court

The issues of interest to law enforcement were included in two subsections of the court's analysis. The first issue was the rape shield statute. As to that issue, the defendant claimed that exclusion of the evidence of the alleged sexual encounter with another couple in Las Vegas was a constitutional violation of his right to present a defense. The court identified several constitutional standards that apply to such claims.

The first standard concerns relevance. In short, a defendant does not have an unlimited right to introduce just any evidence. "Evidence that a defendant

seeks to introduce at trial, however, 'must be of at least minimal relevance.' … A defendant only has a right to present relevant evidence." *Ownbey Slip Opinion p. 10.* The court then quoted the rape shield statute and considered whether any of the evidence from Las Vegas should have been admitted.

The rape shield statute can be found at RCW 9A.44.020. It includes provisions which limit evidence of past sexual behavior both with a defendant and with third parties. The court noted, "The rape shield statute was created to end the archaic common law rule that 'a woman's promiscuity somehow had an effect on her character and ability to relate the truth.' . . .[The] Supreme Court made a distinction between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive a defendant of the ability to testify to their version of events."

The *Ownbey* court then applied two subsections, (2) and (3) of the statute to the evidence admitted and excluded by the trial court and held that the trial court's rulings were correct.

Of the classes of evidence sought to be admitted, the court determined that one was properly admitted. The defendant was permitted to question the victim about alleged sexual discussions between the two of them. This was permitted because it was probative on the issue of consent. But the defendant was not permitted to question her about the alleged encounter with another couple. The court stated, "Further, Mr. Ownbey has not demonstrated that this evidence was relevant for any reason, including to impeach N.F.'s credibility. Whether N.F. had a sexual relationship with another couple while on a trip to Las Vegas is immaterial to her credibility. Because the evidence was not relevant, Mr. Ownbey's constitutional rights were not violated when the court declined to admit it." *Ownbey Slip Opinion p. 14-15*

The second issue arose from the sentence enhancement convictions. These were presented to the jury for special verdicts. The first enhancement was abuse of a position of trust. The **c**ourt discussed sufficiency of the evidence for abuse of a position of trust in light of the statutory standard which is found in subsection 3(n) of RCW 9.94A.535. That provision states that what must be proved is: "The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." *Id*

The court reviewed the relationship between the victim and the defendant in light of this provision. It stated the the length of a relationship mattered and that here the length of the relationship supported the jury's finding on the special verdict. "Here, N.F. testified she had known Mr. Ownbey for years,

since 2017. Additionally, N.F. testified that she and Mr. Ownbey had taken trips together, gone hiking together, worked together, and communicated often. Given N.F.'s testimony about the duration and nature of her relationship with Mr. Ownbey, a rational trier of fact could have found that Mr. Ownbey occupied a position of trust with N.F." *Ownbey Slip Opinion p. 21*

The second enhancement was sexual motivation. Sexual motivation is defined in the Sentencing Reform Act as follows: "RCW 9.94A.030(48) defines 'sexual motivation' as 'one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.' " *Ownbey Slip Opinion p. 23.* The court had little difficulty upholding the jury's sexual motivation verdict based on the victim's testimony about the defendant using an aphrodisiac and a crime lab scientist's testimony on what the substance was capable of doing.

The court reviewed several other less relevant issues from the trial. It rejected all of the defendant's appellate issues and upheld his conviction but reversed on several minor sentencing issues.

Training Takeaway

The most important takeaway from *Ownbey* is the rape shield discussion. The rape shield statute is concerned with evidence permitted to be introduced at trial.

For law enforcement, it is important to be aware of what the statute renders admissible and not admissible. Past sexual entanglements or encounters with the defendant are particularly important in sexual assault investigations, and the details and circumstances showing relevance or irrelevance are important for both investigators and prosecutors to be aware of.

Other types of past sexual conduct can be considered protected and cases such as *Ownbey* show that courts closely examine any attempt to delve into such matters in pursuit of a consent defense. Sensitivity and caution should be the rule where sexual history other than that involving the defendant is concerned.

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State v. Peterson, 86614-1, Washington Court of Appeals, Division Two (Oct 28, 2024)

Factual Background

This case came before the court on an appeal from a conviction for vehicular homicide. The issues presented on appeal included two of interest to law enforcement. The first was a *Miranda* issue involving statements made both before and after arrest and the advisement of *Miranda* rights. The second was sufficiency of the evidence for two alternative vehicular homicide convictions, namely one conviction charged under the recklessness alternative, and another charged under the disregard for the safety of others alternative.

The case originated with a fatal, head-on collision between the defendant's car and an on-coming motorcycle. The motorcycle was traveling southbound in his lane of travel. The defendant was traveling northbound and was seen passing other vehicles on a two-lane each way roadway. The accident location was on a curve going downhill. Another driver who was also traveling northbound saw the defendant coming up behind him, passing cars, and traveling at approximately 100 mph.

Washington State Patrol (WSP) troopers investigated the collision. One of the troopers arrived after the defendant was loaded into an ambulance. He did not advise the defendant of his *Miranda* rights before asking preliminary questions. The questions included whether the defendant had consumed alcohol. The defendant said that he had drank whiskey during the initial questioning. The trooper also noted several signs and symptoms of intoxication.

The same trooper followed the defendant to the hospital. While the defendant was being treated, he made further observations of symptoms of intoxication. He subsequently placed the defendant under arrest and advised him of his *Miranda* rights. "York testified that Petersen indicated he understood those rights, he did not express any confusion regarding his rights, and agreed to speak to law enforcement." *Petersen Slip Opinion, p. 3*

A second trooper asked additional questions at the hospital after the arrest and advisement. The second trooper confirmed that the defendant had been advised of his rights and had waived fifteen minutes before he resumed questioning but did not re-advise the defendant of his rights. During this second stage of questioning the defendant stated that he had swerved to avoid rear-ending a car in front of him that had abruptly applied its brakes. He also admitted having had four shots of whiskey some six to eight hours before the collision. The defendant also consented to Horizontal Gaze Nystagmus (HGN) testing. He showed signs of impairment during that testing.

The prosecution charged the defendant with all three alternatives for vehicular homicide. At trial the jury convicted him of two of the alternatives, namely alternatives based on recklessness and on disregard for the safety of others. The jury was not unanimous as to the first alternative, intoxication.

Analysis of the Court

The court began with the *Miranda* issue. It addressed first the legal standards that apply to each of the two *Miranda* issues. The first issue was whether the defendant was in custody, and therefore entitled to *Miranda* advisement when the first trooper spoke to him at the scene while he was in the ambulance, and later at the hospital before he formally placed the defendant under arrest.

The court stated that "custody" for purposes of custodial interrogation and *Miranda* requires that the defendant's freedom be curtailed "to a degree associated with formal arrest." *Petersen Slip Opinion, p. 9.* This is a reasonable person standard, and a "court considers the totality of the circumstances, including the 'nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on the suspect, and the duration and character of the questioning.' " *Id*

The prosecution relied upon two cases (*State v. Kelter* and *State v. Butler*) in the appeal which focused on the degree to which the defendant was under the control of the police at the time of the questioning. These are well worth reading in conjunction with this case. According to the *Petersen* court, both cases stand for the proposition that a defendant confined in the hospital for medical reasons by medical personnel is generally not considered to be in custody.

The *Petersen* court held that the defendant was likewise not in custody for purposes of *Miranda.* "Similar to the defendants in *Kelter* and *Butler*, Petersen was restricted at the time of questioning not by police, but because of his own

medical needs. Even though there were numerous other people present at the accident scene, including WSP investigators, they were there to address other aspects of the accident." *Petersen Slip Opinion, p. 11*

The court next addressed whether the questioning by the second trooper at the hospital violated *Miranda.* The second trooper knew that the defendant had been advised of his rights within 15 minutes before being contacted. On appeal the defendant claimed that his medical condition precluded him being mentally competent to validly waive *Miranda.* The defendant relied on a 1978 U.S. Supreme Court case which similarly involved a defendant in the hospital. However, the *Petersen* court pointed out that the defendant there was "depressed almost to the point of coma" and "repeatedly asked not to be interrogated." *Petersen Slip Opinion, p. 13.* These facts among others distinguished the defendant's case from the 1978 case.

The court held that the defendant's rights were not violated. "Even if, unlike the officers in *Peerson*, York and Gannon both posed questions to Petersen, Petersen was not repeatedly questioned while 'barely conscious,' as was Mincey. The only indication of the severity of Petersen's injuries was the amount of time he spent in the hospital, which was around two hours. Given the brevity of the visit, Petersen's verbal acknowledgment of receiving and understanding the *Miranda* warnings and his agreement to speak to Gannon, the unchallenged facts support the trial court's conclusion that Petersen voluntarily, knowingly, and intelligently waived his rights before speaking to Gannon." *Petersen Slip Opinion, p. 15*

The last issue of interest in the Petersen case was sufficiency of the evidence for convictions vehicular homicide based on recklessness, and disregard for the safety of others. Considering that the defendant had collided head-on in the opposite lane of travel after having been admittedly drinking, the court had no difficulty determining that there was sufficient evidence. But it also addressed the defendant's claim that the evidence was consistent with his statement and testimony that he swerved to avoid a rear end collision. The court responded to this argument by saying, "Further, counter to Petersen's own testimony, other evidence suggested Petersen drove intentionally in the oncoming lane of traffic in an attempt to pass other vehicles and that the conditions were dry. Taken in the light most favorable to the prosecution and admitting the State's evidence as true—with all reasonable inferences interpreted in favor of the State and most strongly against the defendant—we conclude there was sufficient evidence to support the vehicular homicide conviction." *Petersen Slip Opinion, p. 21*

The defendant's conviction was upheld on both the *Miranda* and sufficiency issues. Because the circumstances of the investigation are commonplace, the court's analysis is well worth reviewing even though the opinion is unpublished and does not carry the weight of mandatory authority.

Training Takeaway

The *Petersen* court's resolution of the Miranda issue was reasonable common sense. That having been said, there would likely not have been any harm in re-advising this defendant of his *Miranda* rights even if re-advisement was not required. By all accounts, the defendant wanted to talk, and he had a story to tell that was exculpatory. We can never know, but he likely would have told his story to the second trooper even if he had been re-advised of his rights. Under such circumstances it will always be worth considering whether there would be any harm in a re-advisement.

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Cases & Reference

State v. Chuprinov, 85145-4, Washington Court of Appeals, Division One (October 7, 2024)

- *Chuprinov Slip Opinion*

State v. Kanta, 58434-4, Washington Court of Appeals, Division Two (October 1, 2024)

- *Kanta Slip Opinion*
- WAC 448-14-020
- RCW 46.61.506
- *State v. Brown*, 145 Wn.App. 62(2008)

State v. Miller, 59438-2, Washington Court of Appeals, Division Two (October 22, 2024)

- *Miller Slip Opinion*
- RCW 9A.36.031(1)(g)

State v. Ownbey, 39470-1, Washington Court of Appeals, Division Three (October 22, 2024)

- *Ownbey Slip Opinion*
- RCW 9A.44.020
- RCW 9.94A.535
- RCW9.94A.030(48)

State v. Peterson, 86614-1, Washington Court of Appeals, Division Two (October 28, 2024)

- *Petersen Slip Opinion*
- *State v. Kelter*
- *State v. Butler*

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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]