LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: ***Thank you for your service, protection and sacrifice***

DECEMBER 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

IN CRIMINAL CASE, THREE-JUDGE PANEL RULES THAT NO FOURTH AMENDMENT VIOLATION OCCURRED WHEN UNDERCOVER ATF OFFICERS SECRETLY RECORDED A TRANSACTION WITH DEFENDANT IN HIS MOTEL ROOM AFTER OBTAINING CONSENT TO ENTER HIS MOTEL ROOM WITHOUT TELLING HIM ABOUT THEIR ACTIVATED RECORDING EQUIPMENT

In U.S. v. Esqueda, ___ F.4th ___ , 2023 WL ___ (December 12, 2023), a three-judge Ninth Circuit panel rejects defendant's argument that undercover ATF agents violated his Fourth Amendment rights when they obtained his consent to entry of his motel room without telling him that they had activated audio-visual equipment concealed on their persons.

A synopsis by the Ninth Circuit staff (which is not part of the Ninth Circuit Opinion) summarizes the three-judge panel's Opinion as follows:

The panel affirmed the district court's denial of Christopher Esqueda's motion to suppress evidence in a case in which Esqueda entered a conditional plea to possessing a firearm as a felon, 18 U.S.C. § 922(g)(1).

An informant and undercover officers conducted a controlled purchase of a firearm from Esqueda in his motel room. The undercover agents—without a search warrant—entered the motel room with the consent of Esqueda and his co-defendant.

The agents surreptitiously recorded the encounter using audio-video equipment concealed on their persons. The video recordings depicted the interior of Esqueda's motel room during the encounter and showed Esqueda handing a .22 caliber revolver to an undercover officer.

Esqueda argued that the officers' secret recording of the encounter exceeded the scope of the "implied license" he granted when he consented to the officers' physical entry. He therefore claimed that the officers conducted a search violative of his Fourth Amendment rights under the Supreme Court's trespassory, unlicensed physical intrusion test outlined in Florida v. Jardines, 569 U.S. 1 (2013), and United States v. Jones, 565 U.S. 400 (2012).

The panel rejected this argument because longstanding Supreme Court precedent that preceded Katz v. United States, 389 U.S. 347 (1967), dictates that an undercover officer who physically enters a premises with express consent and secretly records only what he can see and hear by virtue of his consented entry does not trespass, physically intrude, or otherwise engage in a search violative of the Fourth Amendment.

The panel wrote that the Supreme Court's decisions in Jardines and Jones do not disturb that well-settled principle. The panel therefore held that no search violative of the Fourth Amendment occurred.

Result: Affirmance of conviction of Christopher Esqueda by U.S. District Court (Central District of California) for possessing a firearm as a felon, 18 U.S.C. § 922(g)(1).

LEGAL UPDATE EDITORIAL NOTES: 1. ***Consenting entry for undercover investigation by Washington law enforcement officers***

I am confident that there is not any on-point reported Washington court decision on consent searches that would require a different result on the consent-to-enter issue than was arrived at by the Ninth Circuit panel under the facts of the Esqueda case. Consenting entries in the course of undercover operations are permitted under Washington case law, although officers should be aware of the decisions in State v. Leach, 113 Wn.2d 735 (1989) & State v. Morse, 156 Wn.2d 1 (2005) (holding that under the heightened privacy protection article I, section 7 of Washington constitution that where two persons are present, and both have dominion and control over premises, officers are required to ask both for consent to search) and State v. Hoggatt, 108 Wn. App. 257 (Div. II, 2001) (the Leach/Morse rule for multiple consents to search does not apply where officers merely request consent to enter a residence, as opposed to requesting consent to search).

Also, as noted in the Ninth Circuit's Opinion excerpted above, defendant Esqueda unsuccessfully contended that a consent entry is a warrantless search if law

enforcement does not disclose the undercover operation as part of the consent request. Defendant based that argument on the U.S. Supreme Court decisions in Jones and Jardines in which the U.S. Supreme Court established a police-trespass theory for defining Fourth Amendment "search" as an alternative to the reasonable-expectation-of-privacy concept for defining "search." I am not aware of any reported Washington appellate decision where a defendant has made the Jones-Jardines argument that defendant Esqueda made without success to the Ninth Circuit.

2. *Electronic surveillance by law enforcement under Washington statutes*

Washington statutes, of course, are different in many ways from federal statutes on electronic surveillance. For a thorough discussion of applicable Washington statutes and case law current through 2017, see "Electronic Surveillance and Digital Evidence in Washington State, 2017" from the King County Prosecutor's Office (https://waprosecutors.org/wp-content/uploads/2019/04/2017-SURVEILLANCE-MANUAL-FINAL.pdf). That publication is also accessible as a "manual" on the website of the Washington Association of Prosecuting Attorneys. I am not aware of anything in the Washington statutes or case law regarding electronic surveillance and recording that would require officers to inform a suspect that the officers are intercepting or recording conversations where the officers are otherwise authorized (by court order or otherwise) to secretly intercept and record under the particular requirements of the Washington statutes.

As always, I note that what I state in the Legal Update is not legal advice but is merely an aid to readers in their own legal research and as a possible aid to officers and law enforcement agencies in their consultation with agency counsel or local prosecutors.

IN FEDERAL PROSECUTION OF DEFENDANT FOR HIS INVOLVEMENT IN A CONSPIRACY TO ILLEGALLY DISTRIBUTE OXYCODONE AND HYDROCODONE, DEFENDANT IS HELD TO HAVE NO RIGHT OF PRIVACY IN HIS OPIOID RECORDS MAINTAINED IN NEVADA'S PRESCRIPTION MONITORING PROGRAM DATABASE; THE SAME RULE MIGHT APPLY IN A WASHINGTON STATE CRIMINAL CASE INVOLVING PRESCRIPTION OPIOIDS

In U.S. v. Motley, ___ F.4th ___ , 2023 WL ___ (9th Cir., December 29, 2023), a criminal defendant loses his Fourth Amendment challenge to law enforcement's warrantless access to Nevada's Prescription Monitoring Program database, which ultimately led to his convictions under federal statutes for his involvement in a conspiracy to illegally distribute oxycodone and hydrocodone.

The Motley Lead Opinion signed by two judges describes as follows the facts relating to the early stages of the investigation during which the database records were obtained:

> In July 2018, law enforcement began investigating Motley because of information from a confidential informant ("CI") who had proven reliable in a past, unrelated controlled purchase. The CI disclosed that Motley, who lives in California, regularly traveled to Reno, Nevada, to illegally obtain and sell prescription drugs.
>
> > [Court's footnote 4: *Specifically, an officer explained: "The CI told me that [Motley] comes from California and meets with a physician . . . approximately*

> *every 30 days. [Motley] then meets this physician and the physician writes Motley a prescription for Oxycodone. In addition, the physician gives [Motley] a stack of prescriptions in other people's names for [Motley] to sell to those people."*
>
> As part of their investigation, [without obtaining a warrant and unbeknownst to Motely] law enforcement obtained a report from Nevada's PMP database that showed a certain physician had prescribed Motley opioids — oxycodone and tramadol — averaging 279 morphine milligram equivalent ("MME") per day over a several-year period. The amount prescribed suggested opioid abuse or diversion, as CDC guidance at the time recommended avoiding or carefully justifying an increase in dosage to greater than or equal to 90 MME per day.

Using this information and other investigative information, the law enforcement agency obtained tracking warrants for Motley. He challenged the tracking warrants, claiming that evidence obtained under the warrants must be suppressed on grounds that his Fourth Amendment rights were violated when law enforcement obtained the databased information without a warrant.

The Majority Opinion signed by two judges concludes that Motley had no reasonable expectation of privacy in his opioid records maintained in Nevada's Prescription Monitoring Program database because of the long-standing and pervasive regulation of opioids by the government.

The third judge concurs in the judgment of conviction of Motley, but she asserts that the Court should not reach the substantial legal question of whether Motley had an objectively reasonable expectation of privacy in the identity and dosage of his prescription medications.

Result: Affirmance of U.S. District Court (Nevada) conviction of Myron Motley arising from his involvement in a conspiracy to distribute controlled substances — oxycodone and hydrocodone.

LEGAL UPDATE EDITOR'S NOTE: There is a Washington appellate precedent that appears to line up somewhat with the Ninth Circuit's Motley decision. In Murphy v. State, 115 Wn. App. 297 (2003), the Washington Court of Appeals addressed a civil lawsuit in which Plaintiff Patrick Murphy sued the Washington State Pharmacy Board (1) for gaining access to his opioid prescription records without a search warrant, and (2) for disclosing information from those records to the Snohomish County Prosecutor's Office.

The Murphy Court explained that patients who purchase prescription narcotics from pharmacists have a limited expectation of privacy in the information compiled by pharmacists regarding their prescriptions. The Court held that, because patients know or should know that their purchase of such drugs will be subject to government regulation and scrutiny, and because dispensers of prescription drugs have kept similar records open to government scrutiny throughout Washington state history, prescription records maintained by pharmacies may be accessed by the Pharmacy Board without a warrant.

The Murphy Court also held that nothing in the law precluded or restricted the Pharmacy Board from disclosing the opioid prescription information to the prosecutor.

Note, however, that as I stated above in an Editor's Note regarding a previous entry, what I state in the Legal Update is not legal advice but is provided merely as an aid to readers in their own legal research and as a possible aid to officers and law enforcement agencies in their consultation with agency legal counsel or local prosecutors. A further

caution in relation to this note regarding Motley is that, while I am familiar with relevant Washington appellate case law, I have never researched Washington statutes that may be relevant to the issue regarding warrantless access to opioid prescription information.

FOURTH AMENDMENT STANDING: CRIMINAL DEFENDANTS WHO WERE IN THE BUSINESS OF SPICE MANUFACTURING AND DISTRIBUTION – A BUSINESS IN WHICH THEY HAD LARGE OPERATIONS IN BOTH THEIR HOME STATE OF FLORIDA AND NEVADA – ARE HELD TO BE WITHOUT SUFFICIENT PERSONAL CONNECTIONS TO AN OPERATIONAL WAREHOUSE IN NEVADA TO ALLOW THE DEFENDANTS TO CHALLENGE THE WARRANT THAT AUTHORIZED A SEARCH OF THAT WAREHOUSE

In U.S. v. Galecki, ___, F.4th ___ , 2023 WL ___ (9th Cir., December 27, 2023), a three-judge panel votes 3-0 to (1) affirm the U.S. District Court convictions of defendants for violating federal statutes prohibiting drug trafficking and money-laundering; and (B) reverses their convictions for mail fraud and wire fraud (the reversed convictions are not addressed in this Legal Update entry).

Defendants were in the business of manufacturing and distributing "spice" as drugs, although they claimed to investigators that they were merely manufacturing and distributing potpourri, and that they had no control over what use was made of their products. They had begun their business in Florida and had expanded the very lucrative operations of their business known as Zencense to Nevada.

Among the panel's rulings is a determination that the defendants did not have a sufficient personal connection to a Las Vegas warehouse to give them standing to raise a Fourth Amendment challenge to a search of the warehouse under a warrant (pages 16-22 of the Opinion). In key part, the analysis by the Court of Appeals on this issue is as follows:

> In arguing that they have standing to challenge the search of Zencense's Nevada warehouse, Defendants assert that they each had a "reasonable expectation of privacy" in those premises. . . .
>
> To establish standing under this test, Defendants had to show that they "manifested a subjective expectation of privacy" in the Nevada warehouse that "society is willing to recognize . . . as reasonable." California v. Ciraolo, 476 U.S. 207, 211 (1986). We conclude that Defendants failed to make that showing.
>
> As we have recognized, determining who may assert a reasonable expectation of privacy with respect to specific commercial spaces "requires analysis of reasonable expectations 'on a case-by-case basis.'" SDI Future Health, 568 F.3d 684, 695 (2009) (quoting O'Connor v. Ortega, 480 U.S. 709, 718 (1987) (plurality)). The need for such a case-by-case inquiry arises from two considerations.
>
> First, because "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home," Donovan v. Dewey, 452 U.S. 594, 598–99 (1981), the "expectation of privacy in commercial premises" is "less than[] a similar expectation in an individual's home." New York v. Burger, 482 U.S. 691, 700 (1987); see also Minnesota v. Carter, 525 U.S. 83, 90 (1998) ("Property used for commercial purposes" is thus "treated differently for Fourth Amendment purposes from residential property.").

Second, in light of the "great variety of work environments," any given company officer, manager, or owner may not have the same personal reasonable expectation of privacy in all of the commercial spaces of the organization. SDI Future Health, 568 F.3d at 695. In SDI Future Health, we identified a number of considerations that inform the determination as to whether a particular individual has a reasonable expectation of privacy in a specific company space.

First, we noted that, under our decision in United States v. Gonzalez, Inc., 412 F.3d 1102 (9th Cir. 2005), the joint owners and managers of a "small business," particularly one that is "family-run," may exercise such complete "day-to-day" personal control over, and "full access" to, the company's facilities that those owner/managers would have a reasonable expectation of privacy over the relevant spaces. . . . [noting in Gonzalez], by contrast, that "the hands-off executives of a major corporate conglomerate might lack standing to challenge all intercepted conversations at a commercial property that they owned, but rarely visited").

Second, we stated in SDI Future Health that a further "crucial" threshold factor is whether the particular place searched in the commercial facility was "given over to the defendant's exclusive use," 568 F.3d at 695–96 (emphasis added) (simplified), because a showing of such exclusivity would indicate that, absent countervailing considerations, the person's expectation of privacy was reasonable.

Third, SDI Future Health held that, outside "the case of a small business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized."

We further stated [in SDI Future Health] that whether the requisite personal connection has been shown should be assessed "with reference to the following factors," which we said are not exclusive:

> (1) whether the item seized is personal property or otherwise kept in a private place separate from other work-related material; (2) whether the defendant had custody or immediate control of the item when officers seized it; and (3) whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization.

"Absent such a personal connection or exclusive use, a defendant cannot establish standing for Fourth Amendment purposes to challenge the search of a workplace beyond his internal office." Under this framework, Galecki and Ritchie did not establish Fourth Amendment standing with respect to the Nevada warehouse.

First, this case does not fall within the distinctive scenario, typified by [the prior decision in Gonzalez], in which the defendants personally exercise day-to-day physical access to and control over the facilities as part of their daily management of a closely held small business. Indeed, the record does not affirmatively indicate that Galecki and Ritchie had ever actually visited the Nevada warehouse, much less exercised personal day-to-day control over the physical plant.

Second, the Nevada warehouse is not the personal office of either Defendant.

Because this case thus does not fall into either of these two scenarios, we consider whether Defendants established that, in light of the factors identified in SDI Future Health, they had the requisite "personal connection to the places searched and the materials seized."

As to the first SDI Future Health factor, the items seized from Zencense's Nevada warehouse were not the "personal property" of Galecki or Ritchie, nor were they "kept in a private place separate from other work-related material." Rather, they were materials used in the manufacture of Zencense's products, such as XLR-11, plant material, acetone, and flavorings; physical equipment, such as drying racks; or documents, such as packing slips, handwritten notes concerning flavorings, and a document relating to rental of a facility. Because "the first factor really addresses whether the item seized was personal property without any relationship to work," it provides no support for finding the requisite personal connection to the warehouse.

The second SDI Future Health factor likewise provides no basis for finding standing, because neither Galecki nor Ritchie had personal "custody or immediate control" of the items at the time that they were seized. As noted earlier, there does not appear to be any record evidence that either Defendant ever even visited the warehouse, which was thousands of miles from Zencense's Florida headquarters. Moreover, Defendants concede that neither of them was present at the warehouse at the time it was searched.

The third SDI Future Health factor addresses whether the defendant "took precautions on his own behalf to secure the place searched or things seized from any interference without his authorization." Id. (emphasis added). This "third factor involves actions the employee takes on his own behalf, not as an agent of the [company]." Defendants have pointed to no such evidence in the record. Instead, they point to the fact that Eaton took steps to keep the warehouse locked and secure and that Defendants had the legal right, as managers of Zencense, to prohibit others from entering the property.

At best, those actions show only that Defendants took steps as agents of Zencense to ensure the security of the company's property, and not that they took any steps to secure the warehouse or its contents on their own behalf. As we made clear in SDI Future Health, it is not enough that Defendants set "general policy" over company premises, "put in place significant security measures" there, or took "steps to protect the privacy" of the building.

Under this factor, there must be some showing that actions were taken for the benefit of Galecki or Ritchie personally, as opposed to the benefit of the company as a whole. There is no such evidence.

Nor does the record disclose any other factor, beyond the three we identified in SDI Future Health, that would support finding the required "personal connection" to the Nevada warehouse.

> [Court's Footnote 4: *Defendants point to the general factors that we used to analyze Fourth Amendment standing in [*United States v. Lopez-Cruz, 730 F.3d 803, 807 (9th Cir. 2013)*], such as whether the defendant has a property interest in the placed searched, whether the defendant has the right to exclude others from it, and whether he took "normal precautions to maintain privacy." 730 F.3d*

at 808 (citation omitted). In light of these factors, Zencense [i..e, the business] would clearly have standing to challenge the search of the warehouse had [the business entity been criminally] prosecuted. See SDI Future Health, 568 F.3d at 694 n.3. But in the specific context of an owner, manager, or employee of a company, these factors must be viewed within the context of the SDI Future Health framework.]

Accordingly, we hold that Galecki and Ritchie failed to establish that they have Fourth Amendment standing to challenge the search of the Nevada warehouse, and that the district court therefore properly denied their motions to suppress.

[Some citations omitted, others revised for style; some paragraphing revised for readability]

Result: Affirmance of U.S. District Court (Nevada) convictions of defendants for violating federal statutes prohibiting drug trafficking and money-laundering; reversal of their convictions for mail fraud and wire fraud.

LEGAL UPDATE EDITORIAL COMMENT: I am not aware of any Washington appellate court decision that has addressed the constitutional "standing" issue of the Galecki case in looking at a similar fact pattern in analysis under either the Fourth Amendment or article I, section 7. Although I think that similar reasoning would be applied by the Washington courts under article I, section 7 of the Washington constitution, it is generally, of course, not advisable for law enforcement to rely on "standing" theories to justify warrantless searches.

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: NINTH CIRCUIT PANEL VOTES 2-1 TO UPHOLD THE U.S. DISTRICT COURT'S DISMISSAL OF A RESTAURANT OPERATOR'S LAWSUIT THAT RELATED TO ARREST AND CITATION FOR VIOLATING ARIZONA GOVERNOR'S COVID-19 EMERGENCY EXECUTIVE ORDER OFFERING ON-SITE DINING; TWO OF THE JUDGES CONCLUDE THAT PROBABLE CAUSE JUSTIFIED THE ARREST AND CITATION

In Miller v. City of Scottsdale, ___ F.4th ___ , 2023 WL ___ (December 8, 2023), a three-judge Ninth Circuit panel votes 2-1 to uphold a U.S. District Court dismissal of a Civil Rights Act section 1983 lawsuit by a restaurant operator who challenged the lawfulness of his arrest and citation for violating an Arizona statute that makes it a misdemeanor to violate an emergency executive order, in this case a COVID-19 Executive Order by the Arizona Governor. The officers determined that the man had violated the statute by operating a restaurant in April of 2020 after having been warned about a prior alleged violation of the Executive Order.

Separate Opinions are issued by each of the three Ninth Circuit judges. The analysis is somewhat complicated and conflicting in the three Opinions. The Legal Update will not try to summarize or excerpt from the analysis.

The most important general principle of the case is that officers are protected from liability for false arrest or retaliatory arrest or citation if officers have probable cause to make the arrest or issue the citation, even if a different interpretation (1) of the underlying facts or (2) of the black letter law ultimately prevails. Two of the three judges in the Miller case conclude that the officers had probable cause to make the arrest and citation, and therefore they agreed that the Civil Rights Act lawsuit must be dismissed.

Result: Affirmance of U.S. District Court order dismissing the lawsuit.

LEGAL UPDATE EDITOR'S NOTE: I assume that law enforcement agencies will consult legal counsel or will have previously received direction from legal counsel before arresting or citing persons for violating Executive Orders from the Governor's Office.

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WASHINGTON STATE COURT OF APPEALS

ELECTRONIC SURVEILLANCE PROHIBITIONS OF THE PRIVACY ACT, CHAPTER 9.73 RCW, DO NOT BAR ADMISSION OF A PORTTION OF A SEXUAL ASSAULT VICTIM'S TAPE RECORDING THAT SHE MADE WITHOUT CONSENT OF THE PERPETRATOR; THE RULING IS THAT THE KEY PART OF THE RECORDING CAPTURED SOUNDS OF A SEXUAL ASSAULT, NOT SOUNDS OF A "PRIVATE CONVERSATION"

In State v. Kamara, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, December 4, 2023), Division One of the Court of Appeals affirms the second degree rape conviction of defendant, rejecting his argument that the trial court incorrectly interpreted the Washington Privacy Act, chapter 9.73 RCW, by admitting into evidence at trial an electronic recording made by his victim during the rape. The Kamara Court summarizes its ruling as follows in the first paragraph of the Court's Opinion:

> Under Washington's privacy act, RCW 9.73.030, it is generally unlawful to record a private conversation without first obtaining consent of all persons engaged in the conversation. And evidence obtained in violation of the privacy act is inadmissible at trial.
>
> Morris Kamara appeals his conviction for rape in the second degree. Kamara argues that the trial court erred in admitting the victim's cell phone audio recording of the rape because it was a private conversation made without his consent and violated the privacy act.
>
> Because the portion of the recording at issue was not a private conversation but a recording of a sexual assault, the trial court did not err in admitting the audio recording at trial. We affirm [the conviction].

[Some paragraphing revised for readability]

Facts (Excerpted from Court of Appeals Opinion):

> Kamara and B.T. met at a mutual friend's birthday party in July 2019. B.T. had seen Kamara before at various events with members of the Liberian community. B.T. knew Kamara as JR. After the party, Kamara sent B.T. a friend request on Facebook. They began messaging each other on Facebook. Kamara asked B.T. out but she declined because she was in a relationship. Kamara was persistent and asked several more times.

Because Kamara kept pushing, on August 30, 2019, B.T. agreed to meet with him. B.T. texted Kamara her address and later that night he arrived outside of her apartment. B.T. testified at trial to the events that occurred that evening.

Once B.T. got in Kamara's car, he immediately drove off. B.T. asked where they were going and Kamara responded that they were going to his place to smoke hookah and watch movies. B.T. repeatedly told Kamara that she had to be home soon in order to sleep before her 8:30 a.m. shift the next day.

Once at Kamara's apartment, Kamara offered B.T. a drink. B.T. declined, but Kamara poured her some wine. They watched a program on TV. After some time, Kamara sat next to B.T. on the couch and then he began putting his hands on her, stroking down her arm, and leaning against her. B.T. got up to use his bathroom and give herself some time to think.

While in the bathroom, B.T. activated a recording app on her phone. At first, she just played with it, recording sounds and then listening. The next time she activated it, she got a notification and switched to a different app on her phone without stopping the recording. [Court's footnote 1: *When first interviewed by [a police officer], B.T. [the victim] told him she started the recording when she first got to Kamara's house.*

When she returned to the living room, B.T. sat farther away from Kamara on the couch and continued scrolling through her social media to distract herself. Kamara moved closer and began making sexual remarks and advances toward B.T.

B.T. told him she had to go, since she had work the next morning, but Kamara insisted she stay until 2:00 a.m. B.T. told Kamara "no" multiple times and told Kamara not to touch her. B.T. told Kamara she would just nap on the couch until he took her home at 2:00 a.m., but he wanted her to go to his room.

Kamara forced B.T. into his bedroom by pulling her off the couch and pushing her back until she was pushed onto his bed. He pinned her arms to the bed and then used his full body weight on her so she couldn't move. He pulled her pants down and raped her while she cried and repeatedly told him "no, don't, and I don't want to do this." B.T. tried to fight him off, but did not succeed. After B.T. continued to cry and beg Kamara to stop, he finally got off of her and walked out of the room.

B.T. testified that she felt defeated. When Kamara returned and started touching her again, B.T. didn't fight, she "just let him do what he had to do."

Kamara then offered to take her home. Once home, B.T. plugged her phone, which had died at some point while at Kamara's home, into its charger. When the phone turned on, she texted her best friend about what had happened.

The next morning, she showered and went to work. She also texted another friend what had happened at Kamara's home.

That evening, B.T.'s friend took her to Auburn Regional Medical Center where B.T. underwent a sexual assault examination. She was interviewed by [a law enforcement officer], briefly, while in the emergency room.

> The next day, B.T. discovered the audio recording on her cell phone. She emailed the recording to [the officer]. Kamara was arrested and charged with rape in the second degree.

[Some paragraphing revised for readability]

Proceedings below: (Excerpted from the Court of Appeals Opinion)

> Before trial, Kamara moved under CrR 3.6 to suppress the audio recording as inadmissible under Washington's privacy act, RCW 9.73.030. The State sought only to admit the portion of the recording that captured the rape.
>
> After analyzing the audio recording in open court, the trial court issued detailed findings of the contents, breaking down the 28 minutes, 50 seconds long recording into discrete segments from beginning to end. At various points, two voices can be heard, one male and one female. The voices were identified at trial to be Kamara and B.T.
>
> The trial court's findings included that from the start of the recording to minute 20:45, the recording captures music, noises, TV, laughter, and some unintelligible discussion. At the 14-minute mark, B.T. says, "don't touch me." "At 17:20 – the female voice states, 'I don't want to drink anymore' and at 18:50 – she states 'don't, I can walk.'"
>
> The [trial] court's findings continue:
>
> > At 20:45 – there is conversation that goes "let me sleep" and the female voice says "no – don't." The recording captures the sound of a female crying.
> >
> > The male voice responds "no you're good[.]
> >
> > From that point forward, the remainder of the recording is primarily statements that are interspersed with crying, requests to stop, male laughter, statements from the female to stop, statements from the female of "leave me alone, I'm scared, I don't want to do this, JR stop it, it hurts," and additional laughter from the male voice.
> >
> > This continues to the end of the tape.
> >
> > The recording also includes the female voice saying "what are you doing, I'm begging you please stop. Get off me please."
>
> The trial court concluded:
>
> > From 20:45 to the end of the recording – the court finds that the contents of the recording do not capture a conversation. What is recorded is not an exchange of information. Instead, what it captures is an act of sexual assault.
> >
> > Pursuant to State v. (David) Smith, 85 Wn.2d 840, 540 P.2d 424 (1975), the contents of the recording from 20:45 through the end of the recording is not a conversation and RCW 9.73.030 does not apply."

[Court's footnote 2: *Alternatively, the trial court held that if the last nine minutes of the recording were construed as a conversation, they fell within the privacy act exception for communications by a hostage holder. RCW 9.73.030(2)(d). Because we affirm the trial court's determination that the last nine minutes of the recording were not a conversation, we do not address the trial court's alternate holding that an exception to the privacy act applied.*]

At trial, Kamara maintained his objection to the admissibility of the recording but argued that, if the court admitted the excerpt proposed by the State, the entire recording should come in under the rule of completeness. As a result, following B.T.'s testimony, the entire recording was played for the jury.

The jury found Kamara guilty of rape in the second degree.

[One footnote omitted; some paragraphing revised for readability]

ISSUE AND RULING: Washington's Privacy Act, chapter 9.73 RCW, broadly prohibits and excludes from evidence recordings of private conversations without the consent of all participants in the conversations. Did the trial court correctly rule that a portion of the recording in this case captured sexual assault events, not a private conversation, and therefore the Privacy Act does not preclude admission of that portion of the recording at issue? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of King County Superior Court conviction of Morris Kamara of rape in the second degree.

ANALYSIS BY THE COURT OF APPEALS (Excerpted from the Court of Appeals Opinion)

"Washington's privacy act is considered one of the most restrictive in the nation." [State v. Kipp, 179 Wn.2d 718, 724 (2014)]. Under the privacy act, it is generally unlawful to record a private conversation without first obtaining consent of all persons engaged in the conversation. RCW 9.73.030(1)(b). Information obtained in violation of the act is inadmissible in any civil or criminal case. RCW 9.73.050.

. . . . .

In determining whether a communication between individuals constitutes a "conversation" under the privacy act, courts use the ordinary meaning of the term: "oral exchange, discourse, or discussion." State v. David Smith, 85 Wn.2d 840, 846 (1975). Recordings of sounds that do not constitute a "conversation" do not implicate the privacy act. David Smith, 85 Wn.2d 846. In particular, sounds of an assaultive act are not a conversation protected by the privacy act; a recording of such noise is admissible. [State v. John Smith, 189 Wn.2d 655, 663-64 (2017)].

In David Smith, a shooting victim, Nicholas Kyreacos, carried a tape recorder to a meeting where he suspected potential foul play. The recording starts with remarks from Kyreacos and a companion about their destination and arrangements, and, when they arrive, Kyreacos narrates the scene as he walks.

"Then, suddenly are heard the sounds of running footsteps and shouting, the words 'Hey!' and 'Hold it!', Kyreacos saying 'Dave Smith,' and a sound resembling a gunshot."

Several more words are exchanged between Smith and Kyreacos, another shot is heard, then Kyreacos screaming and begging for his life, followed by more shots, and silence.

Then voices are heard saying, "We've already called the police" and "Hey, I think this guy's dead man."

The Supreme Court held [in its David Smith decision], "We are convinced that the events here do not comprise 'private conversation' within the meaning of the statute. Gunfire, running, shouting, and Kyreacos's screams do not constitute 'conversation' within that term's ordinary connotation of oral exchange, discourse, or discussion."

Thus, the recording did not fall within the prohibition of RCW 9.73.030 and its admission was not prohibited under RCW 9.73.050. In doing so, the [Washington] Supreme Court [in its David Smith decision] confined its holding to the "bizarre facts" of the case and declined to adopt a definitive definition of "private conversation" applicable to all cases.

In [the John Smith case], during a violent assault of his wife, Smith used the home's landline to dial his cell phone to help locate it. The cell phone's voice mail system recorded the incident.

The recording contained "sounds of a woman screaming, a male claiming the woman brought the assault on herself, more screams from the female, name calling by the male," and a verbal exchange between the two. The recording was admitted at trial and [John] Smith was found guilty of attempted second degree murder. The Court of Appeals reversed, holding the trial court erred in denying the motion to suppress because the recording was of a "private conversation" and Smith had unlawfully recorded it.

The Supreme Court, in an opinion signed by four justices, reviewed the recording and found it like the recording in David Smith, "[t]he recording contains shouting, screaming, and other sounds, but it also contains brief oral exchanges between Mr. and Mrs. Smith in which Mr. Smith tells his wife that he is going to kill her, and she responds, 'I know.'" The Supreme Court held "[b]ecause the voice mail recording primarily contains the sounds of a violent assault being committed, we hold that based on [the 1975 Washington Supreme Court decision in David Smith], the content of the voice mail recording here is not of a 'conversation' as contemplated by the privacy act." John Smith, 189 Wn.2d at 664. Thus, the recording did not fall within the prohibitions of the privacy act and its admission was not prohibited.

Four justices concurred, but would have held that because the recording contained not just sounds but also "conversation" the privacy act applied.

> [Court's footnote 5: *In a separate concurrence, Justice Gonzáles would have held that John Smith had no right to challenge the admissibility of the recording because he made the recording*. . . .]

Smith, 189 Wn.2d at 674 (Gordon McCloud, J., concurring). But the conversation fell within the threat exception to the privacy act and thus was admissible. John Smith, 189 Wn.2d at 674 (Gordon McCloud, J., concurring).

> [Court's footnote 6*: In response, Justice Madsen, lead opinion author, noted: Justice Gordon McCloud's concurrence contends that the presence of verbal exchanges in the recording at issue here distinguishes this case from David Smith and that we improperly "stretch[ ]" the analysis in the David Smith case by applying it here. Concurrence (Gordon McCloud, J.) at 1005. But, as noted, verbal exchanges were also present in David Smith in the recording between the victim and the assailant . . . The recording in David Smith and the voice mail recording here contain the sounds of a violent assault being committed. Application of David Smith is appropriate here. John Smith, 189 Wn.2d at 664 n.4*]

Kamara argues that we should not rely on David Smith because the Supreme Court declined to definitively define a "private conversation" under the privacy act because of the bizarre circumstances of the case. While true, David Smith remains binding precedent.

And nothing in John Smith overruled or abrogated David Smith. Indeed, in John Smith, eight justices agreed that under David Smith certain sounds do not constitute conversation. . . .

And even if not fully binding, the lead opinion of John Smith is "highly persuasive." . . . .

> [Court's footnote 7*: While not binding, we note that we have relied on the lead opinion in John Smith in at least one unpublished opinion. In State v. Tayler, No. 81001-4-I slip op. at 13 (Wash. Ct. App. Jan. 3, 2022), this court cited John Smith and held "the recording is peppered with non-conversational sounds of physical assaults, screaming, and general violence, all falling outside the scope of the Privacy Act."*]

. . . .

Based on our de novo review of the recording, we agree with the trial court's conclusion that the last nine minutes of the recording do not constitute a conversation, and instead record an assault.

The audio recording is 28 minutes and 50 seconds long. At various points, two voices can be heard, one male and one female. From the start of the recording to 20 min., 45 sec., the recording captures music, noises, TV, laughter, and some unintelligible discussion. At the 14-minute mark, B.T. says, "stop touching me . . . can you do me a favor and not touch me."

At 14 min., 10 sec., Kamara responds, "I can't, I'm sorry, I can't." At 14 min., 33 sec., B.T. asks, "what happened to you're safe with me?"

At 16 min., 47 sec., Kamara tells B.T. to "put that damn phone down, focus on me." At 18 min., 37 sec., there are muffled noises and B.T. says, "don't, I can walk . . . I can sleep on the couch."

At 20 min., 45 sec., the recording captures B.T. saying, "no, no, no let me sleep," "no, don't," "JR stop" and then captures the sounds of B.T. crying. At 21 min., 20 sec. and 21 min. 56 sec., Kamara tells B.T., "no you're good." At 22 min.,14 sec., B.T. is then heard crying, repeatedly saying "no," "please stop," "I'm not doing this."

At 22 min. 30 sec., Kamara says where B.T.'s phone is. B.T. says, "I'm scared," "JR, JR stop it hurts," and "wait, why are you doing this, I'm begging you please stop, no, get off me, get off me please." 23 min., 38 sec.; 24 min., 10 sec.; 26 min., 02 sec. While B.T. sobs and begs Kamara to stop, Kamara laughs. From 26 min., 56 sec., to the end of the recording, B.T. is heard crying with music in the background.

At oral argument, Kamara's counsel repeatedly asserted that to be a conversation there must be "an exchange of ideas and words." We don't disagree with this characterization of a conversation. But there is no "exchange of ideas and words" in the last nine minutes of the recording.

And unlike in both Smith cases, the recording did not capture brief oral exchanges between B.T. and Kamara. We agree with the trial court that the last nine minutes of the recording contains the sounds of a sexual assault being committed. This portion of the recording is not a private conversation as contemplated by the privacy act.

The trial court did not err in admitting the recording.

[Some citations omitted, others revised for style; some footnotes omitted; some paragraphing revised for readability]

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BRIEF NOTES REGARDING DECEMBER 2023 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "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."

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The six entries below address the December 2023 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and brief descriptions of the holdings/legal issues are bolded.

1. State v. Andrew Scott Griffin: On December 4, 2023, Division One of the COA rules in favor of defendant's appeal from Skagit County Superior Court convictions for (A) *one count of*

child molestation in the third degree and (B) *one count of assault in the fourth degree*. **The Court of Appeals agrees with defendant that the trial court erred by admitting evidence that he had previously sexually abused the alleged child victim of the charged offenses.**

In State v. Crossguns, 199 Wn.2d 282 (2022), the Washington Supreme Court disapproved of the "archaic" term and "outdated" rationale behind the common law "lustful disposition" doctrine as a rationale for admitting evidence of a defendant's previous uncharged sexual assault crimes. However, the seven Justices who signed the Majority Opinion in Crossguns agreed on an alternative theory to admit the evidence in that case. The alternative rationale was that under the totality of the facts of this case, Evidence Rule 404(b) – which allows evidence of other crimes, wrongs, or acts to be admitted as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident – supported the trial court's admission of defendant's uncharged acts of sexual assault.

In Griffin, the defendant was tried after the Washington Supreme Court's decision in Crossguns. The Court of Appeals appears to state that the prosecutor in Griffin nonetheless appeared to rely in part on the now-discarded "lustful disposition" theory, and the prosecutor convinced the trial court to admit evidence of defendant's prior sexual advances on the victim. The Court of Appeals rules in Griffin that the evidence should not have been admitted at Griffin's trial. Also, unlike in Crossguns, there was not an alternative basis in the facts of this case to apply Evidence Rule 404(b) under the rationale that the evidence was as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The Griffin case is therefore remanded to the Superior Court for retrial.

Here is a link to the Opinion in State v. Griffin:
https://www.courts.wa.gov/opinions/pdf/843541.pdf

2. State v. William Earl Talbott II: On December 4, 2023, Division One of the COA affirms the Snohomish County Superior Court convictions of defendant for *two counts of aggravated murder in the first degree*. One of defendant's arguments was that a deputy sheriff gave improper opinion testimony when the deputy testified at trial that the deputy had told his sergeant that the case "had been solved." To determine whether statements constitute impermissible opinion testimony, the court should consider all relevant circumstances of the case, including the following: (1) the type of witness involved (particularly troubling is opinion testimony from a law enforcement witness because of a tendency for jurors to accept such testimony), (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and' (5) the other evidence before the trier of fact. State v. Demery, 133 Wn.2d 753 (2001). **The Court of Appeals rules that the testimony from the deputy that he had previously told his sergeant that the case "had been solved" was improper opinion testimony, but that the admission of the testimony was "harmless error" under the totality of the evidence that was lawfully admitted in the case.**

Here is a link to the Opinion in State v. Talbott:
https://www.courts.wa.gov/opinions/pdf/803344.pdf

3. State v. Brittney L. Shumate [note that the Court spells the name "Schumate" in some docket information, but the briefing of the parties and the Opinion spell the name "Shumate"]: On December 5, 2023, Division Two of the COA gives defendant Shumate a temporary reprieve from her Cowlitz County Superior Court convictions for 10 counts of *animal cruelty in the first degree*. The Court of Appeals rules that the Superior Court's failure to enter findings of fact and

conclusions of law to support the convictions requires (as conceded by the prosecutor's office) the remand of the case to the Superior Court for that court to enter findings of fact and conclusions of law. **However, the Court of Appeals rules that defendant's argument for suppression of evidence discovered by animal control officers fails based on defendant's abandonment of a right to privacy in the premises searched.**

The key analysis by the Shumate Court on the privacy issue is as follows:

> Shumate primarily relies on State v. Birdsong, 66 Wn. App. 534, 832 P.2d 533 (1992), for the proposition that she did not abandon the property, so she maintained the sole undisputed possession of the leased premises and therefore animal control's entry into the apartment was unlawful. Specifically, Shumate argues there was no evidence showing she planned to terminate the lease, as she still had the keys and did not notify anyone that she planned to move out.
>
> Contrary to Shumate's assertions, Birdsong is distinguishable. Birdsong moved out of his rental home weeks before the end of the lease but left furniture in the garage. [Birdsong at 534]. More significantly, after the police were called by the landlord, but before the police had entered, Birdsong arrived to clean the home and remove his possessions.
>
> The court held that the evidence was insufficient to show Birdsong had abandoned the property and the search and seizure without his consent was unreasonable violation of his private affairs. [Birdsong at 538]. It explained that Birdsong himself retained the key, kept his possessions there, and was present at the time of search because he was going to clean the house and remove his possessions. [Birdsong at 539].
>
> Turning to the case before us, assuming Shumate retained her key and kept her property at the apartment, the similarities to Birdsong end there. Unlike Birdsong, here, the facts show that Shumate abandoned her apartment before [the animal control officers] entered the premises. Despite [the apartment manager] seeing Shumate in December 2019, [the apartment manager] received constant complaints from tenants regarding animal noises in the apartment, and [the apartment manager] reached out to Shumate but never received a response.
>
> [The apartment manager] also provided Shumate notice to pay or vacate twice via posting and first-class mail, but again Shumate never responded or paid as she never received the notice. Then, after animal noises stopped suddenly, [the apartment manager] tried to reach Shumate but was unable to.
>
> Finally, when performing a welfare check, [animal control officers] observed obvious evidence of abandonment in the form of deceased animals, trash, feces, and scattered debris.
>
> **This evidence is a far cry from [defendant] Birdsong's active involvement in the subject home. The trial court did not err in concluding Shumate abandoned the apartment. Shumate did not maintain a reasonable expectation of privacy in the apartment. Accordingly, entry was lawful and her argument fails.**

Here is a link to the Opinion in State v. Shumate:
https://www.courts.wa.gov/opinions/pdf/D2%2057025-4-II%20Unpublished%20Opinion.pdf

4. State v. James L. Moore: On December 14, 2023, Division Three of the COA affirms the Spokane County Superior Court conviction of defendant for *felony violation of a protection order.* Defendant argued on appeal that the corpus delicti rule precluded his conviction because what he claimed to be one of the elements of his crime (his prior knowledge of the order) could was established only through the testimony of a police officer regarding the defendant's self-incriminating statements to the officer.

The prosecutor argued to the Court of Appeals that knowledge of a protection order is not an element of that crime. **The Court of Appeals rules that the Court need not resolve this dispute, because, by taking the witness stand and admitting prior knowledge of the protection order, the defendant waived his argument under the corpus delicti rule. He could not thus object to the sufficiency of the State's proof where he took the stand at his trial and admitted to prior knowledge of the no-contact order.**

Here is a link to the Opinion in State v. Moore:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=388654MAJ

5. State v. Benjamin Adam Stott: On December 19, 2023, Division One of the COA affirms the Pierce County Superior Court convictions of defendant for *(A) attempted second degree rape of a child, (B) attempted commercial sexual abuse of a minor, and (C) communication with a minor for immoral purposes.* The convictions stem from Stott's communications with an undercover Washington State Patrol (WSP) officer who was posing as a fictional 13-year-old girl ("Kaci") as part of an online sting operation that aimed to find and arrest adults interested in engaging in sex with children.

Stott was arrested and charged upon leaving his home to meet up with "Kaci." **Stott moved to dismiss the charges against him, claiming that he was denied due process as a result of outrageous government conduct in the sting operation. The Court of Appeals rules in extended legal analysis of the totality of the circumstances that the trial court, after applying the five factors outlined in State v. Lively, 130 Wn.2d 1 (1996) correctly denied the motion.** The Court of Appeals also addresses the published appellate court decision in State v. Solomon, 3 Wn. App. 2d 895 (2018), another prosecution that stemmed from a similar undercover operation. See also State v. Glant, 13 Wn. App. 2d 356 (2020)

Here is a link to the Opinion in State v. Stott:
https://www.courts.wa.gov/opinions/pdf/D2%2057114-5-II%20Unpublished%20Opinion.pdf

6. State v. Kevin Laurence Lewis: On December 26, 2023, Division One of the COA affirms defendant's Snohomish County Superior Court conviction for *aggravated first degree murder*. The State's theory was that Lewis hired his cousin Jerradon Phelps to kill his wife Amanda Canales, and that Phelps, together with his girlfriend Alexis Hale, mistakenly killed Canales's sister Alisha Canales-McGuire. On appeal, two of the defendant's legal arguments were: (1) that a detective gave improper opinion testimony about defendant's guilt by implying that a theory of the investigation was that the defendant's anger over a domestic dispute was a motive for the killing; and (2) that the defendant was in custody for Miranda purposes when police first contacted him and asked him questions without giving him Miranda warnings, thus making the defendant's statements to the officers inadmissible.

The Opinion of the Court of Appeals concludes (in analysis at pages 33-39 of the unpublished Court Opinion) that, while the question is a close one considering the facts

of this case and the inferences that can be drawn from the detective's wording of his testimony, the detective did give improper opinion testimony when he testified about how anger over a domestic dispute may have triggered the defendant's actions. However, the Court of Appeals rules further that – in light of the closeness of the question on this issue, and in light of the other evidence of defendant's guilt – the error in the trial court's allowing of this testimony was harmless error.

In regard to the Miranda custody issue, the Court of Appeals rules under the following analysis at pages 10-15 of the unpublished Court Opinion that there was not a custody situation that required Miranda warnings:

> When [Detective A] and [Detective B] contacted Lewis at his residence the morning of the shooting, [Detective B] informed Lewis there had been a shooting at Canales's house. They had a conversation in which Lewis stated that he was home all night.
>
> When asked if he knew where Canales was, Lewis answered, "She should be at home" and expressed surprise when informed she was not. [Detective A] testified Lewis did not inquire about his children. The State offered these statements at trial. Lewis argues the trial court erred by concluding he was not in custody when he made these statements.
>
> The trial court held a pretrial CrR 3.5 hearing. The morning of the shooting, [Detectives A and B] went to Lewis's residence along with [two other officers]. The detectives asked the [other two officers] to approach Lewis's residence with them as detailed security. [Detective A] testified that because he and [Detective B] were in unmarked clothing, it was necessary to have patrol deputies on scene so individuals would know the detectives were law enforcement.
>
> [One of the uniformed officers] went to a neighbor's porch while the two detectives approached the front door. [The other uniformed officer] stood in the front yard area, about 20 feet behind the detectives. All four officers were carrying their duty-issued handguns in their holsters.
>
> [One of the uniformed officers] also carried a patrol rifle. [That officer] testified the rifle
>
> > "[stayed in a] low ready position. So, it would be pointed, swung on your person, and pointed at the ground. It is ready to be used, but it is not pointing at anything but the ground."
>
> [Detective B] knocked on the front door multiple times. After a minute or two, Lewis opened the door. When Lewis answered the door, [a person] appeared behind him. [Detective B] advised Lewis he wanted to talk to him privately, and Lewis offered to step outside.
>
> When Lewis was on the front patio, [Detective B] advised Lewis that he was not under arrest. [Detective B] asked Lewis if he would be willing to walk to his work truck to talk privately, and Lewis agreed.
>
> As the detectives and Lewis walked to [Detective B's] truck, [one of the uniformed officers] followed behind to continue security detail. While walking, Lewis made statements expressing surprise that Canales had not been home that night.

When the two detectives and Lewis arrived at the truck, Lewis sat in the front passenger seat, [Detective A] sat in the seat behind him, and [Detective B] sat in the driver's seat. [The two uniformed officers] returned to their patrol vehicles.

Inside the [truck, Detective B] advised Lewis he was not under arrest and was free to leave. [Detective B] told Lewis that he was potentially identified as a witness in the case because of previous history between him and Canales.

Lewis asked [Detective B] if he needed a lawyer, to which [Detective B] stated he could not give legal advice. [Detective B] asked Lewis whether or not he was home the previous night, and Lewis confirmed he was home.

When asked whether he would be willing to provide a statement to answer additional questions, Lewis replied, "'That is something I might need a lawyer for.'" [Detective B] told Lewis he was free to leave. Lewis opened the truck door, exited the vehicle, and walked away. [Detective A] testified that Lewis sat in the truck for "roughly five minutes."

The trial court ruled Lewis was not in custody for purposes of Miranda, nor was he subjected to a custodial interrogation. We agree.

. . . . A custody determination is an objective test that asks whether a reasonable person in the suspect's position would feel restrained to the degree associated with formal arrest. State v. Escalante, 195 Wn.2d 526 (2020).

Courts must examine the question based upon the totality of the circumstances. "Relevant circumstances may include 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." Escalante at 534 . . . .

Detectives first interacted with Lewis on the front porch of his home. After being asked to speak privately with detectives, Lewis offered to step outside. [Detective B] advised Lewis he was not under arrest and asked if the three could speak inside [Detective B's] truck.

Neither detective told Lewis he was required to go to the vehicle; instead, [Detective B] assured Lewis he was not under arrest and he did not have to speak with them. Inside the truck, [Detective B] told Lewis he was not under arrest and was free to leave.

After approximately five minutes in the vehicle, Lewis terminated the conversation. Lewis was never physically restrained. Given the totality of the circumstances, a reasonable person in Lewis's position would not feel restrained to the degree associated with formal arrest.

Lewis additionally asks this court to "interpret article I, section 9 of the Washington Constitution separate from the Fifth Amendment and hold that article I, section 9 requires courts to consider the race and ethnicity of the suspect amongst the totality of the circumstances in determining whether that person was subject to a custodial interrogation." Lewis argues the trial court erred in not incorporating Lewis's experiences as a Black man into the context of a custodial interrogation evaluation.

All four officers responding to Lewis's residence were white. Article I, section 9 of the Washington constitution states in relevant part, "No person shall be compelled in any criminal case to give evidence against himself." Lewis asks the court to engage in an analysis under State v. Gunwall, 106 Wn.2d 54 (1986) to support this argument.

Lewis points to State v. Sum, where the [Washington Supreme Court] held that in determining "whether a person has been seized by law enforcement for purposes of article I, section 7 of the Washington Constitution[,] 'all the circumstances' of the encounter includes the race and ethnicity of the allegedly seized person." 199 Wn.2d 627, 630 (2022).

Explaining the seizure inquiry under article I, section 7, the court said, "[W]hile it is true that there is no uniform life experience or perspective shared by all people of color, heightened police scrutiny of the BIPOC [Black, Indigenous, and other People of Color] community is certainly common enough to establish that race and ethnicity have at least some relevance to the question of whether a person was seized." [Sum] at 647.

Taking guidance from GR 37, the court [in the Sum Opinion] explained that the objective inquiry for whether a seizure has occurred turns on whether an "objective observer could conclude" the person was not free to leave, having awareness that "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against BIPOC in Washington." .

The [Washington] Supreme Court held in [three cited decisions] that article I, section 9 is coextensive with the Fifth Amendment. This is binding on this court.

Additionally, if we were to apply the framework of Sum and GR 37, Lewis does not indicate how this record shows an aware objective observer could conclude under the Sum framework that Lewis was in custody to the degree associated with formal arrest. In Sum, a police officer, based on his knowledge of months-earlier events in the "area," indicated he was alerted to Sum's vehicle "because it was parked there." The officer approached the vehicle because the driver was "slumped over," which called for "a social contact. "

In this case, police were investigating a homicide to which Lewis's name was connected through past domestic response calls. Recognizing the four officers were white and Lewis was Black, the nature of the police inquiry was much more specific than in Sum. It was also less coercive.

In Sum, the officer made contact with the driver and immediately began questioning Sum. Here, officers knocked and advised Lewis he was not under arrest and could decline to speak with them. After speaking with the detectives inside the truck for five minutes, Lewis terminated the conversation.

Lewis showed he subjectively appreciated his option to terminate the conversation by doing so, and his doing so was respected. The trial court did not err in denying Lewis's motion to suppress the statements he made on September 20, 2017.

[Some citations omitted, others revised for style; some paragraphing revised for readability]

Here is a link to the Opinion in State v. Lewis:
https://www.courts.wa.gov/opinions/pdf/835947.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

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