LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

OCTOBER 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT GROUNDED IN CLAIM OF EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT: OFFICERS AVOID LIABILITY IN 2-1 VOTE BASED ON QUALIFIED IMMUNITY AND ON CAUSATION ANALYSIS, BUT ALL THREE NINTH CIRCUIT JUDGES RAISE CONCERNS ABOUT THE USE OF AN ARMORED VEHICLE TO DO A PIT MANEUVER

In Sabbe v. Washington Board of County Commissioners, ___ F.4th ___ , 2023 WL ___ (9th Cir., October 17, 2023), a three-judge Ninth Circuit panel votes 2-1 to affirm a U.S. District Court

granting summary judgment to law enforcement officers in an excessive force Civil Rights Act case.

Several Fourth Amendment sub-issues are presented in this case that centers around the law enforcement agency's (1) use of an armored vehicle to execute a PIT maneuver on the pickup truck of a drunk and belligerent man driving erratically in his own filed, (2) followed by law enforcement firing of a barrage of bullets in response to the man's apparent firing at the officers.

A Ninth Circuit staff summary, which is not part of the Majority Opinion or Dissenting Opinion in the case, provides the following synopsis of the Opinions:

> The panel affirmed the district court's summary judgment for law enforcement officers in an action alleging, in part, that defendants violated Remi Sabbe's Fourth Amendment rights by entering his private property without a warrant, using an armored vehicle to intentionally collide with Sabbe's pickup truck while he was inside, and shooting and killing him.
>
> [Summary of Majority Opinion]
>
> Defendants [law enforcement officers] responded to calls from Sabbe's neighbor that Sabbe was driving a pickup truck erratically on a rural field on his own property, that he was drunk and belligerent and may have fired a gun.
>
> An hour after thirty officers arrived at the property in marked police cars with their overhead lights on, defendants used an unmarked armored vehicle to twice execute a pursuit intervention technique ("PIT") maneuver by intentionally colliding with Sabbe's truck in the field. Officers reportedly shot Sabbe after they thought they heard a gunshot and saw a rifle pointed at them.
>
> The [Majority Opinion] first rejected plaintiff's argument that [the officers] violated Sabbe's Fourth Amendment rights by entering the property without a warrant . Sabbe's response to the warrantless entry was a superseding cause of his death and unforeseeable given the circumstances. Accordingly, [the Majority Opinion concludes that] the officers' decision not to obtain a warrant before entering the property—regardless of whether that decision constituted a Fourth Amendment violation—was not the proximate cause of Sabbe's death.
>
> The [Majority Opinion next concluded] that a jury could find that defendants' second PIT maneuver constituted deadly and excessive force because (1) it created a substantial risk of serious bodily injury, (2) Sabbe did not pose an imminent threat to the officers or others at that point, and (3) less intrusive alternatives were available. Nevertheless, no clearly established law would have provided adequate notice to reasonable officers that their use of the armored vehicle to execute a low-speed PIT maneuver under these circumstances was unconstitutional.
>
> The [Majority Opinion concluded] that the district court correctly ruled that the officers were entitled to qualified immunity for shooting and killing Sabbe because the officers' split-second decision to open fire did not constitute excessive force.
>
> Finally, the [the Majority Opinion] rejected plaintiff's failure-to-train claim against the County, finding that the record did not give rise to a genuine dispute that the County's

failure to establish guidelines for using the armored vehicle to execute PIT maneuvers rose to the level of deliberate indifference.

[Summary of Dissenting Opinion]

Concurring in part and dissenting in part, [the Dissenting Opinion by] Judge Berzon stated that, viewing the evidence in the light most favorable to Sabbe, he did not point a rifle or shoot at the officers, nor did the officers reasonably believe that he did. [The officers] therefore were not entitled to summary judgment as to whether the fatal shooting of Sabbe was excessive force.

Additionally, [the officers'] mode of entry onto Sabbe's property in an unmarked military vehicle was a proximate cause of his death. Although Judge Berzon concurred in the conclusion that a reasonable jury could find that the second PIT maneuver constituted excessive force, she would deny qualified immunity because a reasonable officer would have understood that the action was likely to cause death or serious injury.

Finally, Judge Berzon agreed that the district court properly dismissed plaintiff's failure-to-train claim against the County.

[Some paragraphing revised for readability; some revisions made to clarify that where the staff summary uses a phrase such as "the panel held," the references generally reference conclusions of law in the Majority Opinion.]

On the legal causation issue, the Majority Opinion concludes as follows that the Plaintiff and the Dissenting Opinion are relying on a former Ninth Circuit "provocation rule" that the U.S. Supreme Court rejected in County of Los Angeles v. Mendez, 137 S.Ct. 1359, 581 U.S. 420 (2017):

> Boiled down, the dissent argues that Defendants' "disproportionate," "aggressive mode of entry" proximately caused Sabbe's death. But in making this argument, the dissent harkens back to the "provocation rule," where an officer's intentional or reckless provocation of a violent confrontation created an excessive force claim for what would otherwise be a reasonable use of force. Mendez v. County of Los Angeles, 815 F.3d 1178, 1198 (9th Cir. 2016), rev'd, 581 U.S. 420 (2017). The Supreme Court eliminated the provocation rule, and we are not free to rely on it. Mendez, 581 U.S. at 428, 432.

The Majority Opinion includes lengthy analysis under the Fourth Amendment excessive force framework established in Graham v. Connor, 490 U.S. 386 (1989). Viewing the allegations by Plaintiff in the case in the most favorable light for Plaintiff, as is required in summary judgment analysis, the Majority Opinion concludes that (1) balancing the type and amount of force used against (2) the government's interest in the use of force, a jury could find that excessive force was used. The analysis includes conclusions that a jury could find that (A) less intrusive alternatives were available to the officers; and (B) there was time to give a warning regarding the force that was used, and no such waring was given.

However, the Majority Opinion goes on to conclude that there was no established case law on point at the time that the officers acted. Accordingly, the Majority Opinion concludes under the second prong of "qualified immunity" analysis that the officers cannot be held liable in this section 1983 Civil Rights Act excessive force.

LEGAL UPDATE EDITOR'S NOTE/COMMENT: The Majority Opinion and Dissenting Opinion in this case each cover over 30 pages.

Result: Affirmance of summary judgment order of U.S. District Court (Oregon) for the law enforcement defendants.

FREE SPEECH PUBLIC FORUM ISSUES ARE RESOLVED IN FAVOR OF OFFICERS WHO ESCORTED A MAN OUT OF AN ENCLOSED AREA THAT HAD A PAID-ENTRY REQUIREMENT WHERE THE MAN WAS DISTRIBUTING RELIGIOUS TOKENS WITHOUT PERMISSION OF THE ENTITY THAT WAS USING THE AREA FOR A FESTIVAL

In Camenzind v. California Expo. & State Fair, ___ F.4th ___ , 2023 WL ___ (October 31, 2023), a Ninth Circuit panel votes 2-1 in favor of law enforcement officers who were sued by a man who the officers escorted out of a festival where the man was distributing religious tokens to festival attendees inside the ticketed perimeter of the festival.

A Ninth Circuit staff summary, which is not part of the Majority Opinion or Dissenting Opinion in the case, provides the following synopsis of the Opinions:

> The panel affirmed the district court's summary judgment for defendants in an action alleging that state police officers violated the First Amendment and the Speech Clause of the California Constitution when they removed plaintiff Burt Camenzind from a privately organized Hmong New Year Festival at the state-owned California Exposition and State Fair ("CalExpo") for distributing religious tokens to attendees.
>
> [Staff summary regarding Majority Opinion]
>
> Officers told Camenzind that he could distribute his tokens in designated zones, referred to as Free Speech Zones, outside the entry gates but not inside the festival itself. Camenzind nevertheless purchased a ticket, entered the festival, began handing out tokens, and was subsequently ejected. He brought suit alleging that the Cal Expo fairgrounds, in their entirety, constitute a traditional "public forum," analogous to a public park, thereby entitling his speech to the most robust constitutional protections.
>
> The [Majority Opinion concluded] that the enclosed, ticketed portion of the fairgrounds constituted a nonpublic forum under the United States Constitution and the California Speech Clause. The space did not permit free access, its boundaries were clearly delineated by a fence, and no evidence suggested that access had previously been granted as a matter of course.
>
> The [Majority Opinion] further noted that California courts have drawn distinctions between ticketed and un-ticketed portions of venues, and Camenzind pointed to no case holding that an enclosed area with a paid-entry requirement constitutes a public forum.
>
> The [Majority Opinion also] determined that [the Court] need not decide whether the area outside the fence was a public forum under the First Amendment because the California Speech Clause provided independent support for Camenzind's argument that it was indeed such a forum, albeit subject to reasonable restrictions on speech.

> The [Majority Opinion] concluded that the Free Speech Zones in the exterior fairgrounds were a valid regulation of the time, place, and manner of Camenzind's speech [and that] the guidelines on distributing literature in the enclosed area were likewise permissible.
>
> [Staff summary regarding Dissenting Opinion]
>
> Dissenting in part, Judge VanDyke agreed with much of the majority's analysis, but did not think the majority properly applied California law to determine whether the area inside the fence was a public forum under the California Speech Clause, nor was the record sufficiently developed to make that determination. Accordingly, [in his Opinion that dissents in part] Judge VanDyke would remand for the district court to develop the record and properly answer that question.

[Some paragraphing revised for readability; some revisions made to clarify that where the staff summary uses a phrase such as "the panel held," the references generally reference conclusions of law in the Majority Opinion.]

LEGAL UPDATE EDITOR'S NOTE/COMMENT: This case addresses thorny legal issues as to which each law enforcement agency should seek guidance (in advance of the issue arising) from the agency's own legal advisor as to the requirements of state law and of the First Amendment. The Legal Update will not try to analyze the legal issues in the case or excerpt from the Opinions. The Majority Opinion in this case covers over 20 pages, and the Dissenting Opinion covers about eight pages.

Result: Affirmance of order of U.S. District Court (Sacramento) granting summary judgment for government defendants in an action alleging that state police officers violated the First Amendment and the Speech Clause of the California Constitution when they removed plaintiff Burt Camenzind from a privately organized Hmong New Year Festival at the state-owned California Exposition and State Fair.

RCW 9.73.060: THERE IS NO CIVIL LIABILITY WHERE A PRIVATE PERSON OR PUBLIC ENTITY VIOLATES THE WASHINGTON PRIVACY ACT BY MAKING AN UNCONSENTED RECORDING UNLESS THE VIOLATION RESULTS IN AN INJURY TO A PLAINTIFF'S PERSON, A PLAINTIFF'S BUSINESS, OR A PLAINTIFF'S REPUTATION; MERELY UNLAWFULLY RECORDING COMMUNICATIONS DOES NOT BY ITSELF SUPPORT A CLAIM FOR DAMAGES

In Jones v. Ford Motor Company, ___ F.4th ___ , 2023 WL ___ (9th Cir., October 27, 2023), a three-judge Ninth Circuit panel is unanimous in rejecting a lawsuit against the Ford Motor Company that was brought based on the fact that there is a recording system in the "hands free" technology of some Ford cars.

A key issue in the case was whether the Plaintiffs could establish that they were entitled to damages based upon (1) the provisions of the Washington Privacy Act (chapter 9.73 RCW), and (2) the mere fact of unconsented recordings having taken place. The key statutory language was that in RCW 9.73.060, which provides:

> Any person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter **shall be subject to legal action for damages, to be brought by any other person claiming that a violation of this statute has injured**

his or her business, his or her person, or his or her reputation. A person so injured shall be entitled to actual damages, including mental pain and suffering endured by him or her on account of violation of the provisions of this chapter, or liquidated damages computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation.

[Bolding and underlining supplied by Legal Update editor]

In key part, the Ninth Circuit Opinion's description of the fact and the Opinion's legal analysis under RCW 9.73.060 are as follows:

> [Factual description in the Ninth Circuit Opinion]
>
> Ford manufactures and sells automobiles with integrated infotainment systems that allow drivers and passengers to use their cellphones hands-free while operating Ford vehicles. According to the complaint, as part of this design, the infotainment system automatically downloads, copies, and indefinitely stores the call logs and text messages of any cellphone connected to it. If text messages or call logs are deleted from a cellphone, the vehicle nevertheless retains the communications on the vehicle's on-board memory, even after the cellphone is disconnected. Vehicle owners cannot access or delete their personal information once it has been stored.
>
> Plaintiff Jones owns a Ford vehicle equipped with such a system. He exchanged private text messages with Plaintiff McKee before subsequently connecting his cellphone to the vehicle's on-board infotainment system. Both Plaintiffs allege that their private communications were unlawfully recorded from Plaintiff Jones's cellphone and permanently stored on his Ford vehicle in violation of the WPA.
>
> Plaintiffs do not allege, however, that Ford actually accessed the personal communications on the vehicle. Instead, Plaintiffs allege that the information may be accessed by a third-party company, for example, the Berla Corporation ("Berla"). According to the Plaintiffs, Berla produces hardware and software capable of extracting stored text messages and call logs stored on a vehicle's on-board memory. Berla products are not generally available to the public, and sales access is restricted to law enforcement, the military, civil and regulatory agencies, and select private investigation service providers.
>
> [Legal Analysis in the Ninth Circuit Opinion]
>
> To bring a claim under the WPA, a plaintiff must show that "a violation of [the WPA] has injured his or her business, his or her person, or his or her reputation. A person so injured shall be entitled to actual damages . . . or liquidated damages." WASH. REV. CODE § 9.73.060. On appeal, Plaintiffs claim that a violation of the WPA itself is an invasion of privacy that constitutes remediable injury. But the statutory text does not support their interpretation.
>
> It is well established that "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." . . . . If Plaintiffs' understanding of the statute were sufficient to establish a claim, WPA Section 9.73.060 would be surplusage because a violation of the statute alone, without

more, would automatically satisfy an injury to the person. Yet, the statute expressly requires an injury to one's business, person, or reputation. We find it difficult to believe Washington intended such a redundant outcome.

This issue has been percolating through district courts in our circuit, and they have reached the same conclusion. See, e.g., Brinkley v. Monterey Fin. Servs., LLC, 340 F. Supp. 3d 1036, 1044–45 & n.3 (S.D. Cal. 2018) (finding that the invasion of privacy inherent in the unauthorized recording of an individual's conversation, without more, is insufficient to meet the Section 9.73.060 injury requirement); Russo v. Microsoft Corp., No. 4:20-cv-04818-YGR, 2021 WL 2688850, at *3 n.3 (N.D. Cal. June 30, 2021) (finding that the WPA's cause of action applies only to those claiming that a violation has injured business, person, or reputation).

We embrace this analysis and hold that an invasion of privacy, without more, is insufficient to meet the statutory injury requirements of Section 9.73.060. To succeed at the pleading stage of a WPA claim, Plaintiffs must allege an injury to "his or her business, his or her person, or his or her reputation." WASH. REV. CODE § 9.73.060. Plaintiffs failed to do so here. We note that Plaintiffs were given an opportunity to amend their complaint but declined to do so.

[Footnote and some case citations omitted; some paragraphing revised for readability]

Result: The Ninth Circuit panel affirmed the judgment of the U.S. District Court (Western District, Tacoma) dismissing for failure to state a claim a class action alleging that the Ford Motor Company made unlawful recordings of Plaintiffs' private communications in violation of the Washington Privacy Act ("WPA").

LEGAL UPDATE EDITOR'S COMMENT: I do not know if this ruling has significance for law enforcement, but I included the decision in the Legal Update just in case. Note that the Ninth Circuit Opinion in Jones v. Ford Motor Company does not discuss (1) RCW 9.73.080, which makes it a misdemeanor to violate the Privacy Act in certain circumstances; or (2) RCW 9.73.050, which makes unlawful recordings generally inadmissible in court.

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WASHINGTON STATE SUPREME COURT

A RESPONDENT TO A SEXUAL ASSAULT PROTECTION ORDER THAT IS BASED ON NONCONSENSUAL PENETRATION IS CATEGORICALLY NOT ALLOWED TO RAISE A CRIMINAL AFFIRMATIVE DEFENSE THAT THE RESPONDENT REASONABLY BELIEVED THAT THE PETITIONER HAD THE CAPACITY TO CONSENT

In DeSean v. Sanger, ___ Wn.2d ___ , 2023 WL ___ (October 5, 2023), all nine Justices of the Washington Supreme Court agree that the Sexual Assault Protection Act does not permit respondents where nonconsensual sexual penetration is alleged to raise the affirmative criminal defense that the respondent reasonably believed that the victim had the capacity to consent. One of the Justices, Justice Sheryl Gordon McLoud agrees with the Majority Opinion on the above point (thus making the Court unanimous on that issue), but she writes a concurring Opinion that addresses another issue that the Majority Opinion does not address.

The Majority Opinion in DeSean v. Sanger, in the opening three paragraphs, summarizes the Opinion's ruling as follows:

> The Sexual Assault Protection Order Act (SAPOA), former ch. 7.90 RCW (2020), allows a victim of unwanted sexual contact to seek a civil protection order against the perpetrator. Under the act, a court enters a protection order if it finds that the petitioner has been a victim of nonconsensual sexual conduct or penetration by the respondent. At issue is whether a respondent to sexual assault protection order (SAPO) based on nonconsensual penetration may raise a criminal affirmative defense that they reasonably believed the petitioner had capacity to consent.
>
> Carmella DeSean sought a SAPO against Isaiah Sanger after an evening of drinking ended in unwanted sex. At the evidentiary hearing, Sanger argued DeSean consented and had capacity to do so. The trial court found DeSean lacked capacity due to intoxication, declined to consider Sanger's defense, and granted the SAPO. Sanger appealed, and the Court of Appeals reversed, holding that under the SAPOA and Nelson v. Duvall, 197 Wn. App. 441, 387 P.3d 1158 (2017), the trial court should have considered Sanger's affirmative defense.
>
> We reverse the Court of Appeals and hold that the SAPOA does not permit respondents in nonconsensual sexual penetration cases to raise the affirmative defense that they reasonably believed the victim had capacity to consent. The plain language of the statute is unambiguous and omits affirmative defenses. The SAPOA functions independently from the criminal code, and we decline to graft a criminal defense into a statute intended to provide sexual assault victims with civil remedies.

Result: Reversal of Division Two Court of Appeals decision and remand to the Clark County Superior Court to take any further action consistent with the Supreme Court decision and with the law and facts.

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WASHINGTON STATE COURT OF APPEALS

EVIDENCE LAW RULING: BASED ON THE CROSSGUNS PRECEDENT REJECTING "LUSTFUL DISPOSITION" THEORY FOR ADMITTING EVIDENCE, THE ALLEGED PRIOR SEXUAL ADVANCES BY THE DEFENDANT TOWARD THE VICTIM ARE RULED INADMISSIBLE; TWO OTHER EVIDENCE LAW RULINGS ARE ALSO MADE

In State v. Bartch, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, October 30, 2023), a three-judge panel of Division One of the Court of Appeals rules on three issues under the Law of Evidence. On one of the issues (the Crossguns issue), the panel is unanimous. On the other two issues, one of the judges articulates some disagreement that will not be addressed in the Legal Update.

The opening paragraph of Majority Opinion in Bartch summarizes in conclusory form the rulings as follows:

> Brogan Bartch appeals a conviction for indecent liberties, based on a charge that he had sexual contact with S.P. while she was incapable of consent. We agree with Bartch that the trial court erred by (1) admitting evidence that Bartch had made prior sexual

advances toward S.P. [this is the Crossguns issue], (2) excluding under the rape shield statute evidence offered to show dishonesty by S.P. [a witness], and (3) excluding prior inconsistent statements by a government witness.

1. Crossguns Issue

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 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 Bartch, the defendant was tried for a sexual assault prior to the Washington Supreme Court's decision in Crossguns. The trial court in Bartch relied on the now-discarded "lustful disposition" theory to admit evidence of defendant Bartch's prior sexual advances on the victim. The Court of Appeals rules in Bartch that the evidence should not have been admitted at his trial. Unlike in Crossguns, there was not an alternative basis in the facts 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.

2. Rape shield law issue

The "rape shield" provisions of RCW 9A.44.020 generally bar evidence of a sex crime victim's prior sexual history on the issue of consent in a rape prosecution. However, as the Bartch Court notes, if the alleged victim makes a statement that is inconsistent with his or her past sexual history, such a statement can open the door to admission of evidence about past sexual history for impeachment purposes. In Bartch, the alleged victim testified that she would not have consented to the sexual assault in question because she had a boyfriend at the time. However, there was ample evidence that she had had multiple consensual partners while she was with that boyfriend. The Bartch Court rules that this evidence can be admitted to impeach the alleged victim.

3. Impeachment based on prior inconsistent statements of a witness

The third Evidence Law ruling in Bartch is summarized as follows in the "Weekly Roundup for November 2, 2023" of the WAPA online Case Law Digest (https://waprosecutors.org/case-law-2022/):

> Prior inconsistent statements of a witness may not be excluded as overly prejudicial when that exclusion allows a key witness to testify to their version of events virtually unchallenged. When ap plying ER 403's balancing test of probative value vs. unfair prejudice, the proper focus is on the truth-seeking process, and the more essential the witness' testimony, the more the value of impeachment outweighs the potential prejudice. Here, a key state witness testified at a sexual assault trial that the victim was unconscious or incoherent during a time that she had previously told the police that she and the victim had had a conversation about the victim's history of being sexually assaulted and disbelieved. The trial court abused its discretion by excluding cross-

examination into the content of the conversation to impeach the witness' assertion that the victim was unconscious or incoherent. . . .

(WAPA *Editor's note: The Court reached this decision based on evidence law, not the 6th Amendment.*)

Result: Reversal of King County Superior Court conviction of Brogan R. Bartch for indecent liberties; case remanded for retrial.

SUFFICIENCY OF EVIDENCE OF INDECENT EXPOSURE UNDER RCW 9A.88.110, DIVISION ONE RULES EVIDENCE IS SUFFICIENT TO CONVICT WHERE DEFENDANT ALLEGEDLY AND APPARENTLY WAS TOUCHING HIS ERECT PENIS OVER HIS CLOTHING WHILE WATCHING THREE 12-YEAR-OLD GIRLS PLAYING AT A PLAYGROUND

In State v. Thompson, ___ Wn. App. 2d ___ , 2023 WL ___ (August 28, 2023, unpublished Opinion ordered published on October 9, 2023), Division One of the Court of Appeals reverses a Skagit County Superior Court order that dismissed the criminal charge for felony indecent exposure against defendant Thompson under RCW 9A.88.110. The Superior Court had concluded that the indecent exposure statute is unconstitutionally vague under the facts of the case, where defendant was allegedly touching his erect penis over his clothing while watching three 12-year-old girls who were playing on a playground. Division One of the Court of Appeals disagrees.

RCW 9A.88.010 provides:

(1) A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. The act of breastfeeding or expressing breast milk is not indecent exposure.

(2)(a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor.

(b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.

(c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.

The Thompson Court declares that the statute (A) does not make nudity an element of the crime, (B) is not void for vagueness, and (C) prohibits the conduct that is alleged in this case. The case is remanded for trial. The Thompson Court's Opinion is lengthy and complicated. This Legal Update entry will not attempt to break down the Court's analysis and will not excerpt at great length from the Opinion.

The Legal Update will provide only the following excerpts from the Thompson Court's discussion of State v. Vars, 15 Wn. App. 482 (2010) and State v. Stewart, 12 Wn. App. 2d 236 (2020).

> In Vars, the defendant was seen walking around residential neighborhoods naked, but no particular witness could testify they saw his genitals. . . . [Defendant] Thompson makes much of the fact that, . . . this court [in Vars] mentioned the defendant's actual nudity. However, in Vars, this court was addressing the narrow issue of whether a witness must observe naked genitalia as an element of the crime of indecent exposure. This court found the witness did not need to observe the actual genitalia when circumstantial evidence was sufficient to infer the defendant's genitalia was likely "exposed."
>
> The question here is different: whether a defendant's genitals must be nude. Vars did not need to reach or define the phrase "any open and obscene exposure of his or her person." Vars simply returned to the understanding of obscenity first announced in [State v. Galbreath, 69 Wn.2d 664 (1966)], when finding that "the gravamen of the crime is an intentional and 'obscene exposure' in the presence of another that offends society's sense of 'instinctive modesty, human decency, and common propriety.'" Vars at 491 (quoting Galbreath, 69 Wn.2d at 668). Vars does not disturb our more holistic understanding of the phrase "obscene exposure" above.
>
> The second case [defendant] Thompson relies on is [State v. Stewart, 12 Wn. App. 2d 236 (2020)], where this court examined again whether there was substantial evidence of indecent exposure. In Stewart, the defendant was seen crouching in an alleyway (from behind) with his hand moving "rapidly" in front of his pants. Witness testimony was unclear for whether his pants were on. The witness did not see his genitalia. The court concluded, despite that fact, there was substantial evidence he was indecently exposing himself in public "outside his pants," through the totality of the evidence. As in Vars, however, this court was not preoccupied with the question whether, and did not find as a matter of law, masturbation must occur on the outside of the pants to find a defendant guilty of indecent exposure.

[Some citations omitted and others revised for style; footnote omitted]

Result: Reversal of Skagit County Superior Court order that dismissed the charge against Corey Justin Thompson. The case is remanded for trial.

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BRIEF NOTES REGARDING OCTOBER 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 four entries below address the October 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 descriptions of the holdings/legal issues are bolded.

1. State v. Travis Michael Carney: On October 5, 2023, Division Three of the COA affirms the Spokane County Superior Court conviction of defendant for (A) *three counts of first degree rape of a child,* (B) *one count of attempted first degree rape of a child, and* (C) *three counts of first degree child molestation*. **The Carney Court's Opinion includes extended analysis of the facts and the law on both of the following fact-intensive issues: (1) under well-established, case-law-based, multi-factor tests for competency of witnesses to testify, the Opinion rules that a nine-year-old child witness was lawfully ruled competent to testify at defendant's trial despite the child's vulnerabilities in testifying as a witness to crimes committed when the child was seven (see State v. Allen, 70 Wn.2d 690 (1967)); and (2) under equally well-established rules for admissibility of child hearsay, the Opinion rules that the child's hearsay statements to a forensic interviewer were lawfully admitted at defendant's trial under the well-established case-law-based, multi-factor tests in Washington for admissibility of child hearsay (see State v. Ryan, 103 Wn.2d 165 (1984)).**

The Court's Opinion in State v.Carney can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/388093_unp.pdf

2. State v. Lucas Kyle Cartwright: On October 16, 2023, Division One of the COA affirms the Snohomish County Superior Court *no-contact order prohibiting Cartright from contacting Christopher Logan by any means, including via third parties for 10 years*. The order followed a trial in which Cartwright was prosecuted for assault with a firearm in the first degree (he was acquitted on that charge) and unlawful possession of a firearm in the first degree (he was convicted on that charge). On appeal, Cartwright argued that the ten-year prohibition on contacting Logan, particularly through third parties, violates his constitutional right to access to the courts. He hinged this argument on (1) the fact that the alleged victim of the assault is suing Cartwright's parents civilly, the alleged victim may testify in the ongoing litigation; (2) the possibility that the alleged himself may sue Cartwright civilly. The Cartwright Opinion declares: **"Because we find the no-contact order reasonably necessary and crime related, we affirm."**

The Court's Opinion in State v. Cartwright can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/843311.pdf

3. State v. Randy Louis Donaldson: On October 24, 2023, Division Two of the COA affirms the Pierce County Superior Court convictions of the defendant *for first degree assault of one witness and second degree assault of another witness, all with firearm sentencing enhancements.* Ms. Brown is a witness who described Donaldson to police several times immediately after a shooting, each time describing a light-skinned Black man who had shoulder-length dreadlocks pulled back into a ponytail, had a gold grille in his mouth, and wore a black hoodie. Shortly after that, friends showed Brown a Facebook video taken the night of the

shooting that included Donaldson. A few days later, Ms. Brown identified Donaldson to police as the person in the Facebook video who later shot her husband. That same day, police showed Ms. Brown photo montages, including one where Donaldson was the only person with dreadlocks. Ms. Brown initially could not identify any shooter in the montages, but she called police the next day and identified Donaldson as the shooter.

The Donaldson Court rules under the following analysis that the photo montage procedure was impermissibly suggestive:

> Donaldson first argues that the photo montage procedure was impermissibly suggestive. He contends that his photo was the only one in the montage that matched Brown's earlier descriptions to police of a Black man with dreadlocks. And he asserts that, because the detectives administering the montage knew Donaldson was a suspect, the lack of a double-blind procedure further impacted the montage's suggestibility. We agree that having only one person in the montage with a distinctive hairstyle that matched the witness's earlier descriptions rendered the montage impermissibly suggestive.
>
> A photo montage is impermissibly suggestive if it "directs undue attention to a particular photo." . . . Generally, a photo montage will be impermissibly suggestive "when the defendant is the only possible choice given the witness's earlier description." . . . For example, courts have found montages impermissibly suggestive when witnesses described distinctive characteristics and the defendants were the only people in the montages with those characteristics. . . .
>
> Here, Donaldson was the "only possible choice" in the photo montage after Brown's preliminary descriptions to police of a light-skinned Black man with shoulder-length dreadlocks. . . . Other witnesses described a shooter with braids, but Brown only ever described dreadlocks to police. And the lack of a double-blind procedure was another factor weighing in favor of suggestiveness. [Court's footnote: *The lack of a double-blind montage without more will not necessarily render a procedure suggestive*.] We hold that the montage was impermissibly suggestive. We must then examine the reliability of Brown's identification under the totality of the circumstances. . . .

However, the Donaldson Court goes on to rule that the montage identification was reliable under the totality of the circumstances.

LEGAL UPDATE EDITOR'S RESEARCH NOTE: See the article "Eyewitness Identification Procedures: Legal and Practical Aspects" on the CJTC Internet LED page: <https://www.cjtc.wa.gov/resources/law-enforcement-digest>

The Court's Opinion in State v. Donaldson can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2055942-1-II%20Unpublished%20Opinion.pdf

4. State v. Dennis Ray Giancoli: On October 31, 2023, Division Two of the COA affirms the Pierce County Superior Court convictions of defendant for (A) two counts of first degree assault, (B) one count of attempting to elude a pursuing police vehicle, and (C) witness tampering (the State conceded that the Court of Appeals should set aside additional convictions for burglary and kidnapping). One of the issues in the case was whether a pre-trial photo identification procedure by law enforcement was unduly suggestive.

The Giancoli Court's legal analysis under the Washington Supreme Court's 2022 decision in State v. Derri, 199 Wn.2d 658 (2022) in key part is as follows:

> Giancoli asserts that the photo montage procedure was impermissibly suggestive because it was not administered in a double-blind fashion and because Stebbins viewed the photos simultaneously. We disagree.
>
> The Derri opinion originally said that police should "present photomontages sequentially, rather than simultaneously." State v. Derri, No. 100038-3, slip op. at 21 (June 23, 2022), https://www.courts.wa.gov/opinions/pdf/1000383.pdf. That sentence has since been removed from the opinion. Ord. Amending Op., State v. Derri, No. 100038-3, at 1 (Wash. Sept. 9, 2022), https://www.courts.wa.gov/opinions/pdf/1000383.pdf. Thus, a witness simultaneously viewing the images of a montage does not currently weigh in favor of suggestibility.
>
> Giancoli also argues that the photomontages were impermissibly suggestive because they were not performed in a double-blind fashion. The Derri court found multiple factors contributed to suggestiveness and it did not say that one factor is or should be dispositive. See 199 Wn.2d at 679. Here, the detective who administered the photomontages knew which people had been arrested.
>
> But this is the only remaining Derri factor that Giancoli identifies as weighing in favor of impermissible suggestiveness in this case. He points to no other factor, nor does he point to any evidence that the lack of double-blind presentation made any difference here.
>
> We conclude that the photomontages were not impermissibly suggestive here. We thus need not reach reliability. . . . We affirm the trial court's order admitting Stebbins's pretrial and in court identifications of Giancoli.

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[Some paragraphing revised for readability]

The Court's Opinion in State v. Giancoli can be accessed on the Internet at
https://www.courts.wa.gov/opinions/pdf/D2%2056287-1-II%20Unpublished%20Opinion.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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