Law Enforcement Digest

OCTOBER 2010

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

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OCTOBER 2010 LED TABLE OF CONTENTS

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WASHINGTON STATE HOSPITAL ASSOCIATION ISSUES 2010 EDITION OF GUIDE TO DISCLOSURE OF PROTECTED HEALTH INFORMATION UNDER FEDERAL, STATE LAW

The Washington State Hospital Association (WSHA) has updated its pamphlet, Hospital and Law Enforcement Guide to Disclosure of Protected Health Information (4th Edition, August 2010). This Guide helps hospitals navigate the challenges of the intersection of the federal Health Insurance Portability and Accountability Act (HIPAA) and Washington state statutes when determining whether the law permits disclosure of protected health information to law enforcement. A variety of law enforcement scenarios are discussed. A model patient authorization form is included.

The Guide may be downloaded at [http://www.wsha.org/files/62/HIPAA_Guide_2010.pdf]

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U.S. STATE DEPARTMENT HAS UPDATED ITS "CONSULAR NOTIFICATION AND ACCESS MANUAL"

The United States State Department has updated, effective July 2010, its manual, "Consular Notification and Access Manual." The existing U.S. State Department link on the Criminal Justice Training Commission **LED** page may be used to access the updated manual.

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BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) SEARCH WARRANT HELD OVERBROAD, AND LINE OFFICERS HELD NOT IMMUNE FROM CIVIL RIGHTS LIABILITY EVEN THOUGH SUPERIORS AND DEPUTY PROSECUTOR APPROVED WARRANT BEFORE JUDGE SIGNED IT – 8-3 MAJORITY HOLDS OFFICERS NOT REASONABLE IN BELIEVING WARRANT WAS SUPPORTED BY PROBABLE CAUSE TO SEARCH FOR GANG INDICIA AND FIREARMS EVIDENCE – In Millender v. County of Los Angeles, ___ F.3d ___, 2010 WL 3307491 (9th Cir. 2010) (decision filed August 24, 2010), an 8-3 majority of an en banc Ninth Circuit panel rejects the reasoning of a prior 3-judge panel's decision (**see Aug 09 LED:15**) and holds that Los Angeles County deputy sheriffs are not entitled to qualified immunity for their conduct in obtaining and executing a search warrant that was overbroad (not supported by probable cause) in two respects.

Deputies investigated a report that a man had shot at his girlfriend's car with a sawed-off shotgun with pistol grip. They obtained a picture of the shotgun. There was no evidence that any other firearms or ammunition were involved, or that the crime had any relation to the perpetrator's gang membership. Nonetheless, the deputies obtained a search warrant for the perpetrator's residence (which he shared with his 74-year-old foster mother) to search for, among other things, 1) all firearms and all firearms-related items, and 2) all evidence of gang membership. The search warrant and affidavit were reviewed and approved by a sergeant,

lieutenant, and a deputy district attorney before being reviewed and signed by a state court judge. The search under the warrant yielded a different shotgun (belonging to the foster mother) and some .45-caliber ammo, plus some personal papers of the perpetrator.

The foster mother later sued regarding the breadth of the search warrant. The U.S. District Court (California) ruled for the foster mother and denied qualified immunity to the deputies. They appealed to the Ninth Circuit. Two judges on the initial, 3-judge, Ninth Circuit panel assumed for argument's sake that the warrant was overbroad both as to "all firearms" and "gang membership" evidence. But those two judges concluded that the deputies are entitled to qualified immunity because 1) the warrant was approved by a district attorney and a judge, and 2) the deputies' assessment of probable cause was not "entirely unreasonable."

The Ninth Circuit later set aside the 3-judge panel's decision and reconsidered the appeal. The majority opinion in the new 8-3 decision issued August 24, 2010 holds that there was no probable cause for the authorizations to search for 1) all firearms and all firearms-related items or for 2) all evidence of gang membership. And the new majority opinion concludes that qualified immunity must be denied the officers on the rationale that a reasonably well-trained officer familiar with established Fourth Amendment case law would have known that the warrant's affidavit does not establish probable cause to search for these categories of items.

Judge Callahan writes a dissent, joined by Judge Tallman, arguing that (1) the "all firearms" clause was supported by the affidavit under probable cause analysis, and that, in any event, (2) the officers were reasonable and therefore are entitled to qualified immunity in light of the information in the affidavit and the fact that a sergeant, lieutenant and deputy district attorney had reviewed and approved the warrant application before it was submitted to a magistrate. Judge Silverman writes a separate dissent that concedes that the warrant application did not establish PC for the two authorizations at issue, but that agrees with the other dissenters that the officers should be given qualified immunity.

Result: Affirmance of U.S. District Court (California) decision denying qualified immunity to the deputy sheriffs.

LED EDITORIAL COMMENT: We agree with the dissenters' views in Millender, but we urge care by those draft warrant applications to link the categories of items sought to probable cause in the affidavit/declaration.

(2) MIRANDIZED SUSPECT'S REFUSALS TO DEMONSTRATE HOW HIS PURPORTEDLY "ACCIDENTAL" SHOOTING OF HIS ESTRANGED WIFE OCCURRED WERE INADMISSIBLE "SELECTIVE" ASSERTIONS OF HIS RIGHT TO SILENCE – In Hurd v. Terhune, ___ F.3d ___, 2010 WL 3293355 (9th Cir. 2010) (decision filed August 23, 2010), a three-judge panel reviewing a request for habeas corpus relief disagrees with California state courts and a federal district court judge. The panel rules that a murder defendant was "selectively" asserting his right to silence during a Mirandized custodial interrogation when the defendant refused to demonstrate to interrogating law enforcement officers how he had "accidentally" shot his wife while purportedly demonstrating to her how to use the gun.

The Hurd panel describes as follows the factual and procedural circumstance of the California state court murder prosecution:

> On March 3, 1995, Hurd was convicted of the first degree murder of his wife, Beatrice ("Bea"), following a second trial by jury. Hurd's first trial resulted in a hung jury and a mistrial. The jury in Hurd's second trial found that Hurd carried

out the murder of his wife for financial gain, a special circumstance making Hurd eligible for a sentence of death or life without the possibility of parole . . . .

Hurd appealed his conviction to the California Court of Appeal, which affirmed the trial court. Hurd petitioned the Supreme Court of California and the Supreme Court of the United States for review. Both courts denied his petitions. On October 28, 1999, Hurd petitioned for a writ of habeas corpus in the United States District Court for the Central District of California. On November 20, 2007, the district court denied that petition.

Hurd and Bea had been married for eight years at the time of her death in April 1993. In March 1993, Bea separated from Hurd and sought the counsel of an attorney. Bea's attorney estimated that Hurd would owe her between $2,800 and $3,300 per month in alimony upon their divorce. At that time, Hurd earned $8,593 per month. On April 1, 1993, Bea served Hurd with divorce papers.

On April 16, 1993, Bea took their two children, aged four and eight, to Hurd's house, where the children spent the night. The next morning, Bea arrived to pick up the children and brought with her a stack of typed papers. Bea was upstairs with Hurd when their son, downstairs, heard a shot. Bea, crying, walked down the stairs before collapsing. Hurd descended the stairs behind her and took their son outside. Hurd reentered the house and called 911. An ambulance arrived and took Bea to the hospital, where she died from a single bullet wound to the chest.

Investigation showed that the shot was fired from a distance of one to six inches. The bullet entered Bea's chest from left to right, front to back, at a 35- to 40-degree downward angle. Bea's face and scalp had abrasions and bruises apparently suffered before her death.

Hurd testified that when Bea arrived at his house on the day of the incident, Bea expressed concern over possible rioting following the pending verdict in the second Rodney King trial. Hurd told Bea that he would let her borrow his firearm and show her how to operate it. Standing in front of Bea, Hurd attempted, with difficulty, to load a round into the firearm. Hurd testified that as he lowered the firearm to inspect it, it accidentally discharged.

Police arrived at Hurd's house and found him sitting motionless near the front entrance, next to Bea. Police took Hurd into custody and informed him of his Miranda rights. Hurd expressed his willingness to talk without an attorney present, and Detective Carr began questioning him.

After Hurd recounted his version of the facts, Carr asked Hurd to submit to a polygraph examination. Carr assured Hurd that, if the polygraph showed that Hurd was being truthful, the police department would end its investigation of him. Hurd declined to undergo the polygraph exam and explained that he believed them to be unreliable. Carr replied, “I think you don't want to take one because you murdered your wife.” Carr then repeatedly suggested that Hurd take a polygraph. Hurd maintained that he would not.

Carr next asked Hurd to demonstrate how the shooting occurred. Hurd refused to reenact the shooting. Carr continued to question Hurd about the chain of events

> and again asked Hurd to demonstrate. When Hurd declined, Carr suggested that Hurd either take a polygraph or demonstrate what happened. Hurd refused, and Carr suggested that Hurd would go to jail for being uncooperative. Carr's supervisor, Detective Straky, entered the room and explained that the District Attorney would not think much of Hurd's refusals to cooperate.
>
> Carr and Straky continued to ask Hurd to demonstrate how the shooting took place, and Hurd continued to refuse. The detectives suggested that a judge and jury would find his lack of cooperation unreasonable. Through the remainder of the questioning, Straky and Carr asked for a reenactment several more times, with Hurd refusing each time.
>
> Before trial, Hurd moved to suppress statements made at his interrogation as involuntary based on the investigating detectives' multiple false promises of leniency for cooperation, false assurances, and coercive statements. Hurd argued that the voluntariness of the interrogation ended when Carr threatened to jail Hurd if he refused to submit to a polygraph examination. Hurd further argued that his repeated refusals to submit to a polygraph or reenact the shooting were invocations of his constitutional right to remain silent and that his responses to that line of questioning were therefore inadmissible. The trial court denied Hurd's motion, concluding that Hurd did not effectively invoke the protections of the Fifth Amendment because he offered responses and explanations instead of flat refusals. Throughout Hurd's trial, the prosecution referred to Hurd's refusal to reenact the shooting as affirmative evidence of his guilt. In his opening statement, the prosecutor played the tape of Hurd's interrogation and counted the number of times he refused to demonstrate the shooting. The prosecutor referred to Hurd's refusals again while presenting his case-in-chief and during his closing argument.

Case law under Miranda makes inadmissible the words and acts and omissions of a suspect during custodial interrogation if such evidence constitutes or relates to assertions of the right to silence, including "selective" assertions of that right. While other statements or acts or omissions of the suspect during the interrogation may be admissible, the evidence relating to the "selective" assertions is not admissible. The Hurd panel concludes that the refusals of defendant Hurd to demonstrate the purportedly "accidental" shooting come under this rule of selective silence-right assertions. Therefore, the evidence relating to the selective assertions should not have been admitted at trial, and the prosecutor should not have been permitted to argue to the jury from such evidence.

The Hurd panel also suggests, without ruling on the issue, that the interrogators may have been improperly coercive in their use of the interrogation technique described above.

Result: Reversal of U.S. District Court (Central District of California) denial of writ of habeas corpus relief; case remanded to District Court for determination of whether the matter may be retried in the California state courts.

(3) FITNESS FOR DUTY RE-EXAMINATION OF OFFICER BY SAME PSYCHOLOGIST AND OFFICER'S DISMISSAL FOR REFUSAL OF THE RE-EXAM HELD LAWFUL – In Brownfield v. City of Yakima, ___ F.3d ___, 2010 WL 2902503 (9th Cir. 2010) (decision filed July 27, 2010), a 3-judge panel rejects the civil lawsuit by a law enforcement officer seeking damages for the Yakima Police Department's order for him to attend a fitness-for-duty psychological examination, and his dismissal for, among other things, not attending the examination.

The Ninth Circuit panel holds as a matter of law that, in light of the evidence of the officer's extended recent pattern of volatile behavior on and off the job, and in light of the equivocal medical information possessed by the agency at the time it ordered a re-examination with the same examiner, the agency did not violate the officer's rights under the federal Americans With Disabilities Act (ADA) or the federal Family Medical Leave Act (FMLA) (1) in scheduling him for a repeat fitness-for-duty psychological examination with the same examiner, and (2) in dismissing the officer when he refused to attend the examination.

Result: Affirmance of U.S. District Court (Eastern District of Washington) order granting summary judgment to the City of Yakima on the officer's contentions that the agency violated the ADA, the FMLA, and/or the free speech clause of the federal constitution's First Amendment (the officer's free speech retaliation claim was rejected on the rationale that his complaints regarding actions of a co-worker did not address "matters of public concern" within the meaning of the free speech case law under the federal Civil Rights Act).

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WASHINGTON STATE SUPREME COURT

DURESS DEFENSE UNDER RCW 9A.16.060: THREAT MAY BE IMPLIED

State v. Harvill, ___ Wn.2d ___, 234 P.3d 1166 (2010)

Facts and Proceedings below: (Excerpted from Supreme Court opinion)

> Joshua Frank Lee Harvill sold cocaine to Michael Nolte in a controlled buy organized by the Cowlitz County Sheriff's Office. Harvill was arrested after the transaction and charged with unlawful delivery of cocaine. At trial, Harvill admitted his participation in the transaction and relied solely on the defenses of duress and entrapment. Specifically, Harvill claimed that he sold cocaine to Nolte because he feared that, if he did not, Nolte would hurt him or his family.
>
> Harvill testified that he received 9 or 10 calls from Nolte in the days leading up to the controlled buy in which Nolte insisted that Harvill get Nolte some cocaine. Nolte would say, "You gotta get me something," or "You better get me some cocaine," and his tone was aggressive. But, Harvill could not recall Nolte ever saying "or else" or words to similar effect. Harvill received four more calls on the day of the transaction, the last two while he was at Chuck E. Cheese's restaurant with his family. Harvill claimed that he was afraid that Nolte would immediately come to Chuck E. Cheese's and drag him or one of his family members outside and hurt one of them if Harvill refused to get Nolte some cocaine. He denied that he sold cocaine otherwise.
>
> Harvill and Nolte had known each other for several years. Nolte was 5 feet 10 inches and weighed 200 pounds. Harvill was 5 feet 5 inches and weighed about 140 pounds. Harvill was afraid of Nolte, he testified, because he saw Nolte daily at work, where Nolte would brag about how he had once smashed another man's head with a beer bottle, causing brain damage. Harvill also knew that Nolte had previously grabbed a gun from another man and then stabbed him. Nolte and Harvill's brother had wrestled once and Nolte nearly broke Harvill's brother's arm.

> Harvill asserted that Nolte used steroids and that he feared what Nolte was capable of.
>
> Harvill requested a jury instruction on duress, so that he could argue the defense during closing argument. The trial court denied the instruction on the ground that Nolte never voiced any actual threat to Harvill. Rather, Harvill's fear of Nolte stemmed from his knowledge about Nolte's behavior, which the trial court held was insufficient to establish duress as a matter of law. Harvill objected, arguing that he had perceived Nolte's requests for drugs as a threat: if he refused to get Nolte drugs, Nolte would come to Chuck E. Cheese's and hurt him or his family.
>
> This was enough, Harvill claimed, to present the issue of duress to the jury. The trial court adhered to its initial holding rejecting the duress instruction. However, the court allowed Harvill to present closing argument connecting the evidence of Harvill's fear of Nolte to his entrapment defense. Harvill did so.
>
> The jury convicted Harvill, and he appealed. The Court of Appeals assumed, without deciding, that the trial court erred by denyng the duress instruction but concluded that any error was harmless. The Court of Appeals reasoned that, in rejecting Harvill's argument that Nolte induced him to participate in the crime (entrapment), the jury necessarily rejected the argument that Nolte compelled Harvill to participate by threat or use of force (duress).

[Footnotes omitted]

ISSUE AND RULING: Where a person makes an actual threat, but the threat is only implied, does the threat provide support for a “duress” defense under RCW 9A.16.060? (ANSWER: Yes, rules a unanimous Supreme Court)

Result: Reversal of Court of Appeals decision that affirmed Cowlitz County Superior Court conviction of Joshua Frank Lee Harvill for unlawful delivery of cocaine; remand for retrial.

ANALYSIS: (Excerpted from Supreme Court opinion)

> Duress is an affirmative defense that must be established by a preponderance of the evidence. The defendant must prove that
>
> > (a) he participated in the crime under compulsion by another who by threat or use of force created an apprehension in his mind that in case of refusal he or another would be liable to immediate death or immediate grievous bodily injury; and (b) such apprehension was reasonable upon his part; and (c) he would not have participated in the crime except for the duress involved.
>
> See RCW 9A.16.060(1). The trial court denied Harvill's request for a duress instruction on the ground that there was no actual "threat." See RCW 9A.16.060(1)(a) (allowing a duress defense only if the defendant "participated in the crime under compulsion by another who by threat or use of force, created an apprehension . . . ." (emphasis added)). In this context, "threat" means "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(27)(a). According to the trial court, Nolte never communicated any intent to do Harvill

harm, and Harvill's fear, based on general knowledge about Nolte's past behavior, did not constitute a "threat" under the duress statute. Harvill counters that he perceived Nolte's requests for drugs as threats – that is, as indirect communications of Nolte's intent to harm Harvill if he did not supply Nolte with drugs – and that his perception of a threat, if reasonable, was enough to allow him to argue the duress defense.

The question comes down to whether the duress statute requires an explicit threat or whether an implicit threat that arises from the circumstances will suffice. At trial and again on appeal, the State emphasized that Nolte never told Harvill to get him drugs "or else," arguing that the absence of this phrase or similar words confirms that no express or implied threat occurred. But, the lack of an "or else" proves only that there was no direct threat. The statutory definition of threat sweeps more broadly. See RCW 9A.04.110(27) (defining "threat" as "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury" (emphasis added)). Determining what counts as an indirect communication of intent to cause physical harm depends on the totality of the circumstances.

State v. Williams, 132 Wn.2d 248 (1997) **Nov 97 LED:07** illustrates this point. Williams was charged with welfare fraud when she failed to report her abusive, live-in boyfriend's income to the Department of Social and Health Services (DSHS). She argued that her boyfriend had ordered her not to disclose his income to DSHS, and she feared he would severely hurt her or her children if she disobeyed him. The trial court rejected her request for a duress instruction because, as her boyfriend frequently left town for his work, the threat of harm to Williams was not "immediate" under the statute. We reversed, holding that "the duress statute does not require that it actually be possible for the harm to be immediate. Rather, it directs the inquiry at the defendant's belief and whether such belief is reasonable." Because Williams testified that she believed the threat was of immediate harm and had expert testimony suggesting that such a belief was reasonable, the immediacy of the harm was a jury question.

There was no discussion in Williams of whether Williams's boyfriend ever explicitly threatened to hurt her or the children if she reported his income, but the opinion suggests that an explicit threat was not required. We held that Williams should be able to present testimony that, based on her interactions with and knowledge about her boyfriend, she reasonably perceived his words and actions as an implicit threat. Moreover, were an explicit threat necessary to support a duress defense, Williams's expert testimony about her perception of harm if she disobeyed her boyfriend would have been irrelevant: the evidence would have revealed on its face whether Williams's boyfriend had physically or verbally threatened her. The reasoning in Williams therefore suggests that proof of duress can be based on a perception of harm in light of a history between the actors.

. . . .

The State also cites In re Disciplinary Proceeding Against Dornay, 160 Wn.2d 671 (2007), for the proposition that, absent evidence of an explicit threat or use of force, a duress defense fails. Dornay rejected a duress defense because there was no evidence that the attorney had an "'apprehension'" that "'she or another would be liable to immediate death or immediate grievous bodily injury.'"

> The court noted the lack of testimony about a threat or use of force only to illustrate the absence of evidence of "apprehension." Dornay is unhelpful here because Harvill testified at length about his apprehension, and the question was whether he reasonably perceived an implicit threat. The jury should have been allowed to consider this question.
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> . . . .
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> Assuming error, the Court of Appeals nevertheless affirmed Harvill's conviction because it held that the trial court's error was harmless. It reasoned that, in rejecting Harvill's entrapment defense, the jury necessarily would have rejected Harvill's duress defense. This conclusion is unsupported. . . .

[Some citations omitted]

LED EDITORIAL COMMENT AND CROSS REFERENCE NOTE: See the entry below at pages 17-20 addressing State v. Budik, 156 Wn. App. 123 (Div. III, 2010), in which the Court of Appeals held that there must be an actual threat, whether express or implied, for the duress defense to apply. We believe, despite some loose language in Harvill, that Harvill is consistent with Budik. In order for there to be duress, the alleged threat-maker must have said or done something overt that is subject to interpretation as a threat, express or implied.

UNDER SIXTH AMENDMENT AND UNDER RCW 9A.44.020(2)'S "RAPE SHIELD" PROVISIONS, ORGY-CONSENT DEFENSE SHOULD HAVE BEEN ALLOWED

State v. Jones, 168 Wn.2d 713 (2010)

Facts and Proceedings below: (Excerpted from Supreme Court opinion)

> [In] an offer of proof [at the start of a trial for second degree, forcible rape], Jones's attorney argued that Jones wished to testify that on the night of the incident K.D. [the 17-year-old alleged victim who was Jones's niece]] used alcohol and cocaine and engaged in consensual sex not only with Jones but also with two other men. More specifically, Jones was prepared to testify that Jones and K.D. went to the King City Truck Stop where they met two men and one woman and that during a nine-hour alcohol and cocaine-fueled sex party the two women danced for money and engaged in consensual sexual intercourse with all three males. The court found that evidence of the sex party was offered for the purpose of attacking the victim's credibility and was barred by the rape shield statute. The court therefore ruled that Jones could not testify to these claims or cross-examine K.D. about them, despite Jones's protests that the ruling prevented him from exercising his right to confrontation and his right to present a defense.
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> . . . .
>
> The jury found Jones guilty of second degree rape with the aggravating circumstance of use of a position of trust to facilitate the commission of the crime.

ISSUES AND RULINGS: 1) Did the trial court violate defendant's Sixth Amendment right to present a defense in precluding him from presenting evidence of the allegedly mutually-consenting, orgiastic events on the evening in question? (ANSWER: Yes)

2) Does Washington's rape shield statute (assuming that it could constitutionally do so) apply to bar defendant from presenting such evidence? (ANSWER: No, the statute is directed at evidence of "past conduct" (conduct prior to the occurrence of the events criminally charged) of an alleged victim, not conduct at the time of the alleged crime)

Result: Reversal of Benton County Superior Court conviction of Christopher Lawrence Jones for second degree rape; case remanded for retrial.

ANALYSIS: (Excerpted from Supreme Court opinion)

1) SIxth Amendment right to confrontation was violated

> Jones argues that that the trial court improperly refused to let him testify or cross-examine witnesses about the events on the night of the alleged sexual encounter. As noted above, the trial court ruled that the evidence was offered for the purpose of attacking the victim's credibility and was barred by the rape shield statute. Jones argues that this ruling violated his Sixth Amendment right to present a defense. We agree.
> . . . .
>
> In [State v. Hudlow, 99 Wn.2d 1 (1983)], we made a clear distinction between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive defendants of the ability to testify to their versions of the incident. In that case, evidence of past general promiscuity could be excluded, but the clear implication was that evidence of high probative value could not be restricted regardless of how compelling the State's interest may be if doing so would deprive the defendants of the ability to testify to their versions of the incident.
>
> Jones was prepared to testify that K.D. consented to sex during an all-night drug-induced sex party. The trial court refused to let Jones present this testimony or cross-examine K.D. about the testimony. This is not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense. Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence.

2) The "rape shield" statute does not apply

> The trial court ruled that the sex party evidence was offered for the purpose of attacking the victim's credibility and was barred by the rape shield statute. the trial court erred, as the rape shield statute did not apply to the case at hand, and even if it did apply, the rape shield statute cannot be used to bar evidence of high probative value. The rape shield statute provides:
>
> > Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary

> to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

RCW 9A.44.020(2).

The rape shield statute does not apply in this case. The Court of Appeals correctly stated that "[n]o Washington case has defined the phrase 'past sexual behavior' for purposes of the rape-shield statute." It also correctly noted that Division Three had previously questioned whether flirtatious behavior on the evening of a rape counted as past sexual conduct and held that such behavior was not barred by the rape shield statute. A quick reading of the rape shield statute, however, shows that it applies only to past sexual behavior. . . . Any reading of the statute that conflates "past" with "present" sexual conduct is tortured. The statute was not designed to prevent defendants from testifying as to their version of events but was instead created to erase the misogynistic and antiquated notion that a woman's past sexual behavior somehow affected her credibility. Hudlow.

Jones's evidence refers not to past sexual conduct but to conduct on the night of the alleged rape. He wanted to testify that K.D. was not raped, but that she consumed alcohol and cocaine and consented to sex with three men during an all-night sex party. If we bar this evidence because of the rape shield statute, we are effectively reading the word "past" out of the statute. There is no indication that this is what the legislature intended.

Even if the rape shield statute did apply, it cannot be used to bar evidence of value per the Sixth Amendment. The rape shield statute was created for the purpose of ending an antiquated common law rule that "a woman's promiscuity somehow had an effect on her character and ability to relate the truth." The statute was aimed at ending the misuse of prior sexual conduct evidence, so that a woman's general reputation for truthfulness could not be impeached because of her prior sexual behavior. More specifically, the statute "is based on the observation that such evidence is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question." This does not mean that evidence of past sexual behavior is never relevant, however. Evidence of past sexual conduct, such as meeting men in bars before consenting to sex or other distinctive sexual patterns, could be relevant if it demonstrates "enough similarity between the past consensual sexual activity and defendant's claim of consent." We ruled in Hudlow that if such evidence is of minimal relevance, "the evidence may be excluded if the State's interest in applying the rape shield law is compelling in nature." If the evidence is of high probative value, however, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." As previously analyzed, the sex party evidence is Jones's entire defense. It could not be of higher probative value, so the rape shield statute could not be used to bar such evidence even if it did apply.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) STALKING STATUTE'S PHRASE "INTENTIONALLY AND REPEATEDLY HARASSING OR FOLLOWING ANOTHER PERSON" RECEIVES PRO-STATE INTERPRETATION – In State v. Kintz, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3341260 (2010), by a 7-2 vote, the Washington Supreme Court affirms the decision of the Court of Appeals (see **Aug 08 LED:24**), and rejects a "stalking" defendant's argument that he did not commit stalking where, on several occasions while driving his car, he followed individual women who were strangers to him, contacted them, and then, after a break in the contact, followed them for an additional extended period of time.

The stalking statute reads, in pertinent part, that "A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and repeatedly harasses or repeatedly follows another person. . . ." RCW 9A.46.110(1)(a). The statute defines repeatedly as "on two or more separate occasions." RCW 9A.46.110(6)(e).

Defendant argued that he did not "repeatedly" do anything. He theorized that for each continuous period during which he engaged in his following of a woman, the following of the particular woman was merely one continuous "occasion," not a series of repeated occasions. In its 2008 decision, the Court of Appeals explained in part its reason for rejecting Kintz's argument:

> Here, Kintz repeated his visual and verbal contact with each victim on separate occasions. For each of the charges, Kintz had several discrete encounters with his victims. Gudaz testified that she saw Kintz at least five times. Each time he either drove by her or stopped to talk to her and then drove out of eyesight. These breaks in contact, with time and distance between Kintz and Gudaz, separated the encounters into individual events. Similarly, Westfall saw Kintz in the parking lot and then lost sight of him when she walked down the trail. When she lost sight of Kintz, this particular incident ended. As soon as she emerged onto the road, the white van came up behind her, marking another encounter. These are two, individual encounters. Each contact between Kintz and his victims constitutes a separate occasion.
>
> Therefore, we conclude the trial court did not err in interpreting the repeated contact provision of the statute, or in finding that sufficient evidence supported a conclusion that Kintz had contact with the victims on separate occasions as contemplated by the statute.

In part, the majority opinion's explanation for concluding that Kintz's actions with respect to the two women constituted stalking is as follows:

> Westfall Incident
>
> The Westfall incident consisted of four distinct episodes, each separated by a significant interruption of Kintz's contact with Westfall. The first episode consists

of Kintz's initial attempt to make contact with Westfall in the parking lot. It ended when Westfall walked down the trail. The second episode consists of Kintz's first pass and ended when Kintz drove out of Westfall's view. At this point, Westfall testified that she became frightened. The third episode encompasses Kintz's second pass, three-point turn, and third pass, at which point Kintz again drove away, leaving Westfall "very scared and angry." The fourth episode includes Kintz's fourth pass (second three-point turn), and fifth pass (the encounter at the stop sign), and finally a sixth pass. During each episode, Kintz "deliberately maintain[ed] visual and physical proximity" to Westfall. Thus, each episode constitutes a separate occasion of following under RCW 9A.46.110(6)(b). Viewed in the light most favorable to the State, a rational trier of fact could easily have found Kintz guilty of stalking Westfall by following her on two or more separate occasions.

Episodes two, three, and four also constitute separate occasions of unlawful harassment as defined by RCW 10.14.020. Each represents a "course of conduct" directed at Westfall, which seriously alarmed her, served no lawful purpose, was such as would cause a reasonable person to suffer substantial emotional distress, and actually caused substantial emotional distress, as evidenced by Westfall's very real fear. Each would also cause a reasonable parent to fear for the well-being of her children; especially episode four, when Westfall crossed in front of Kintz's idling van with her three children. Based on the breaks in contact between these episodes, the jury could have found that they constituted two or more separate occasions of harassment. Thus, the Court of Appeals properly concluded that sufficient evidence supported Kintz's conviction on the charge of stalking Westfall.

Gudaz Incident

The Gudaz incident was similarly divided into four discrete episodes (leaving aside the first time Gudaz saw the white van, when Kintz drove past her as she was jogging on the shoulder). These four episodes are again separated by a break in Kintz's contact with his target; this time, Gudaz. The first episode consists of Kintz's first stop next to Gudaz and his request for directions. It ended at the point Kintz drove away.

The second episode includes Kintz's appearance in a driveway near Gudaz; his subsequent pass; his second stop and second request for directions; and his insistence that Gudaz draw him a map on the clipboard that he thrust out the window. It ended when Kintz again drove away, out of Gudaz's sight, leaving her "pretty frustrated" and "pretty scared." The third episode encompasses Kintz's presence on the side of the road along which Gudaz was jogging; his third stop, when he pulled up next to Gudaz in the oncoming lane and parked within one foot her; his offer of a ride and money; and his continued travel in Gudaz's direction after she started running again. This episode ended when Kintz finally drove away. At this point, Gudaz, who was "really scared" and a "mess," hid between a shed and a fence until she saw two bicyclists picking berries.

The fourth episode consists of Kintz's past [**sic - - here the LED Editors believe the Court meant to say "driving past" or "again driving past**], which left Gudaz "freaked out."

Result: Affirmance of Division One Court of Appeals decision (**Aug 08 LED:24**) that affirmed the Whatcom County Superior Court convictions of Clarence Andrew Kintz (aka Chuck Kintz) for two counts of stalking.

LED EDITORIAL NOTE: The Supreme Court majority opinion is lengthy, as is the dissent that is authored by Justice Richard Sanders and concurred in by Justice Tom Chambers. The majority opinion responds to the dissent point for point. LED space limits preclude presenting a detailed summary of the competing arguments or an extended excerpting from the majority and dissenting opinions, which include extensive discussion of: (1) dictionary definitions of terms in the stalking statute, (2) the statutory construction rule requiring strict construction of ambiguous criminal statutes against the State, and (3) hypothetical scenarios. LED readers may wish to read the majority and dissenting opinions to assess for themselves whether this LED entry oversimplifies the analysis.

(2) SUPREME COURT CONFIRMS THAT EXCLUSIONARY RULE OF WASHINGTON CONSTITUTION DOES NOT CONTAIN A CASE-LAW-BASED GOOD FAITH EXCEPTION – In State v. Adams, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3259874 (2010), in a short unanimous opinion, the Washington Supreme Court confirms its Exclusionary Rule holding in State v. Afana, 169 Wn.2d 169 (2010) **Aug 10 LED:10**. Based on Afana, the Adams Court explains that there is no case-law-based good faith exception to exclusion of evidence under article I, section 7 of the Washington constitution.

In 2006, law enforcement officers searched car of defendant Adams incident to arresting him for driving with a revoked license. The trial court upheld the search of the car. So did the Court of Appeals in a 2008 decision. **See Nov 08 LED:11**. But then the U.S. Supreme Court and the Washington Supreme Court issued decisions in 2009 and 2010 that generally bar (at the very least) a vehicle search incident to arrest where there is no reason to believe the vehicle contains evidence of the crime of arrest. See the cases (Gant, Patton and Valdez) cited and discussed in the Afana LED entry in the August 2010 **LED**.

In Adams, the Washington Supreme Court explains that the search was unlawful under the new search-incident standard, and that, per the Exclusionary Rule holding in Afana, it does not matter that the officers acted in good faith and were reasonably relying on existing court precedents when they searched the car in 2006.

Result: Reversal of Court of Appeals decision that affirmed the King County Superior Court conviction of Coryell Levoi Adams for possession of cocaine.

(3) FORMER RCW 26.50.110 MADE CRIMINAL ALL NO-CONTACT ORDER VIOLATIONS, AS DOES THE CURRENT VERSION OF THE STATUTE – In State v. Bunker, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 3341262_ (2010), in a consolidation of three cases, the Supreme Court rules 8-1 (Justice Richard Sanders in lone dissent), that former RCW 26.50.110 made criminal all no-contact order violations.

The consolidated case addressed former RCW 26.50.110, which was in effect through the effective date of 2007 amending legislation. The 2007 legislation revised the language that was at issue in this case to erase any doubt that all violations of no-contact orders are criminal violations. See **July 07 LED:03** addressing chapter 173, Laws of 2007.

Result: Affirmance of Division One Court of Appeals decision that affirmed the King County Superior Court convictions of Leo B. Bunker and Donald Carl Williams for felony violations of no-contact orders under former RCW 26.50.100; reversal of Pierce County Superior Court

decision that reversed the Pierce County District Court conviction of Rachel Marie Vincent for gross misdemeanor violation of a no-contact order under RCW 26.50.110.

(4) "HONOR-BASED" INTERNET BETTING SERVICE IS ENGAGED IN "BOOKMAKING" AND "PROFESSIONAL GAMBLING" EVEN THOUGH THE SERVICE REQUIRES ALL USERS TO AGREE THAT ALL BETS ARE NON-BINDING AND THE SERVICE DOES NOT TAKE A POSITION ON THE BETS – In Internet Community & Entertainment Corp. v. State of Washington, ___ Wn.2d ___, ___ P.3d ___, 2010 WL ___ (2010), the Washington Supreme Court reverses a Division Two Court of Appeals decision reported at **May 09 LED:23**. The Supreme Court unanimously rules in a Declaratory Judgment lawsuit that a corporation that operated an internet betting service was engaged in "bookmaking" and "professional gambling" within the meaning of chapter 10.46 RCW.

The internet betting service began business in 2007. The service was essentially acting as an "honor-based betting" matchmaker whose customers paid fixed fees for its services, which matched people who wished to make money bets against each other. The Washington Gambling Commission soon informed the betting service that the Commission believed that the service was violating the laws regarding bookmaking and professional gambling. The betting service filed a declaratory judgment action and argued that operation of the service was not engaged in either bookmaking or professional gambling, because (1) the service required all users to agree that all bets were non-binding, and (2) the service did not take a position on the bets. The superior court granted summary judgment to the Gambling Commission, but the Court of Appeals reversed. The Supreme Court has now reinstated the superior court decision.

"Bookmaking" is defined by RCW 9.46.0213 as "accepting bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or 'vigorish' for the opportunity to place a bet." The Supreme Court disagrees with the Court of Appeals and concludes that under the plain language of this definition it constituted "bookmaking" for the internet betting service to charge a fee for putting bettors together, even though the betting service did not take a position on the bets. This interpretation of "bookmaking" controls the analysis by the Supreme Court on the remaining issues.

Next, the Supreme Court addresses the question of whether the internet service was engaged in "professional gambling" as defined in RCW 9.46.0269(1). Engaging in "gambling" under certain circumstances listed in subsections (a) through (c) of RCW 9.46.0260(1) can constitute "professional gambling."

"Gambling" in turn is defined by RCW 9.46.0237 in as "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon *an agreement or understanding that the person or someone else will receive something of value* in the event of a certain outcome." The "honor-based" internet service required all users of the corporation's service to agree that all bets were non-binding. Because of that element of the operation, the Court of Appeals had concluded that the corporation's actions of bringing bettors together – for small fixed service fees from the bettors for use of the internet forum – put the actions of the corporation outside the definition of "gambling."

The Supreme Court, however, notes that one of the alternative definitions of "professional gambling" does not require that there be any "gambling" as that specific term is defined in RCW 9.46.0237. If a person engages in "bookmaking," the person is by definition engaging in "professional gambling" under subsection (d) of RCW 9.46.0269(1). Thus, under subsection (d),

there can be “professional gambling” even if there is no “gambling” activity as defined in RCW 9.46.0237.

The Supreme Court also concludes, based on the same analysis and parallel definitions of “gambling information” and “gambling records” that the service was in violation of laws relating to possessing and transmitting such records and information.

Result: Reversal of Court of Appeals opinion that reversed a Thurston County Superior Court order granting summary judgment to the State; remand for entry of order granting summary judgment to the State.

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WASHINGTON STATE COURT OF APPEALS

WHERE VICTIM KNEW WHO SHOT HIM AND HIS COMPANION BUT CLAIMED TO POLICE HE DID NOT KNOW, THE VICTIM COMMITTED “RENDERING CRIMINAL ASSISTANCE;” ALSO, DURESS DEFENSE NOT APPLICABLE TO MERE GENERALIZED FEAR OF RETALIATION WITH NO ACTUAL THREAT, EXPRESS OR IMPLIED, FROM ANOTHER

State v. Budik, 156 Wn. App. 123 (Div. III, 2010)

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

> Titus Davis shot into the passenger side of a truck and killed the driver, Adama Walton, and injured the passenger, Kenneth Budik. Detectives arrived to investigate.
>
> Eyewitnesses saw three men standing outside Mr. Budik's side of the truck window at the time of the shooting: Freddie Miller ("Soldier"), Titus Davis ("Titus"), and Juwuan Nave ("Rascal"). All three men and Mr. Walton were known gang members. The witnesses said that Mr. Davis did the shooting and Mr. Miller provided the transportation.
>
> Police talked to Mr. Budik. He said he did not know who shot him. In fact, he gave little information and appeared hostile. Mr. Budik did tell the officers that Mr. Walton was driving. Police found a spent casing in the cab of the truck; this suggested that the shooter shot inside the truck in full view of Mr. Budik. The detective concluded from this that Mr. Budik knew more than he was saying. The detective attributed his difficulty with his investigation to the general fear in the community of gang members and suspicion of law enforcement.
>
> Police also interviewed Mr. Budik again at the hospital. There Mr. Budik told the detectives that he and Mr. Walton had spent the last few hours before the incident at a nightclub and a house party. And as they were leaving the party in Mr. Walton's truck, he bent over to get his drink. Someone shot several rounds into the truck through the open passenger window. Mr. Walton then hit the accelerator and drove straight into several parked cars and the truck overturned. Mr. Budik again told a detective that he did not see who did the shooting.
>
> Mr. Budik spoke with Rae Walton, Mr. Walton's mother, two days after the shooting and told her that "Rascal [Juwuan Nave] did it." Ms. Walton reported

this to police. And the State then charged Mr. Budik with one count of first degree rendering criminal assistance. The State also charged both Mr. Davis and Mr. Miller with murder. There was no direct evidence against Mr. Nave so he has not been charged.

At trial, a detective testified that the investigation would "have been able to take a different turn" had Mr. Budik told law enforcement what he told Ms. Walton. Mr. Budik acknowledged that he talked to Ms. Walton on the phone, but denied giving her names. Mr. Budik testified he never attempted to mislead authorities or send them in the wrong direction.

The jury convicted Mr. Budik as charged.

ISSUES: 1) Where the victim of an assault knew who shot him and his companion but claimed to the police that he did not know the identity of the assailant, did the victim commit the crime of "rendering criminal assistance"? (ANSWER: Yes);

2) Budik argued on appeal that his trial attorney was ineffective to an unconstitutional degree in not asking the trial court for a jury instruction on "duress." Does a mere generalized fear of retaliation for reporting a crime support a defense of "duress" or instead must there have been an actual threat to support such a defense? (ANSWER: There must have been an actual threat)

Result: Affirmance of Spokane County Superior Court conviction of Kenneth Richard Budik for first degree rendering criminal assistance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Rendering criminal assistance applies

"A person is guilty of rendering criminal assistance in the first degree if he . . . renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." RCW 9A.76.070(1). "Rendering criminal assistance" is defined in relevant part as,

> with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he knows has committed a crime . . . or is being sought by law enforcement officials for the commission of a crime . . . he: . . . (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person.

RCW 9A.76.050.

Here, Mr. Budik told police that he did not know who the assailants were. That was not true. And, while Mr. Budik may not have had any obligation to speak, we conclude that, if he chose to speak, he was not privileged to mislead police. The State showed that Mr. Budik told Ms. Walton a few days after these crimes that both "Rascal" and "Soldier" were involved. An eyewitness told a detective that "Rascal" and "Soldier" were at the party. Police did not suspect Mr. Budik of these crimes. He was not the focus of their investigation. And so the questions were not calculated to incriminate him. And he does not argue otherwise. He

argues simply that he has a constitutional right not to speak. Again, while that may be true, his right not to speak is not at issue here.

Mr. Budik also argues that the evidence only showed that he "feared retaliation if he disclosed [the assailants'] identity and his intent was to prevent such retaliation." And while that may be his motive, the jury could infer that his intent was then to prevent, hinder, or delay the apprehension and prosecution of the murderers here. Mr. Budik argues that "the mere making of a false statement is insufficient to establish deception for the purpose of hindering a public servant; it must be one upon which the public servant is likely to rely." He contends that here there is no evidence that police relied on his statements or were prevented from any action based on Mr. Budik's assertion that he did not know the identity of the shooter. Nothing in the statute requires an officer to rely on the deception. Indeed, here there is nothing to rely on because he lied to police when he said he did not know the assailants and, by doing so, hindered their ability to solve this crime. And the jury so found.

A detective testified that the investigation would "have been able to take a different turn" had Mr. Budik provided police with the same information he gave Ms. Walton. And he also testified that it would have been helpful to have an eyewitness who could say that Mr. Nave was or was not involved in the shooting. Further, it would have been helpful to police to learn immediately who may have been involved in the shooting, rather than have to spend several days interviewing other eyewitnesses. This is enough to support the elements of first degree rendering criminal assistance.

Mr. Budik contends that he did not have to answer police questions. He argues that his refusal to provide information to a police officer was not a crime and that he had constitutional rights to refrain from speaking at all . . .

The line of cases cited by Mr. Budik is not helpful here. Police could not compel Mr. Budik to be a witness against himself. But they were not asking questions that would tend to incriminate him. . . . He was not the focus of the investigation and he does not claim otherwise. Police were investigating a murder and assault committed by others. Mr. Budik was not a suspect or under arrest when asked questions by the police. He was a victim of the crime. The information sought by police would not have incriminated Mr. Budik. The State is not prosecuting Mr. Budik for exercising his right to remain silent. It is prosecuting him for lying to police about these crimes.

He had no constitutional right to lie and thereby mislead police about what he knew of these crimes.

2) Duress defense not available

Duress is a defense to a crime. The defendant must show that he was motivated to participate in the crime because of apprehension of immediate death or immediate grievous bodily harm. RCW 9A.16.060(1).

Our first inquiry [in addressing Mr. Budik's ineffective assistance of counsel theory] is whether Mr. Budik would have been entitled to a jury instruction had his attorney asked for one. There is some evidence that Mr. Budik may have feared

> for his safety or the safety of his family after this incident. But there is no evidence that Mr. Budik was threatened by anyone. And so there is certainly nothing in this record to support a reasonable apprehension of immediate death or grievous bodily injury had he cooperated. And without that he is not entitled to a duress defense.

[Some citations omitted; subheadings added]

LED EDITORIAL CROSS REFERENCE NOTE: See the entry above at pages 7-10 in this LED regarding the Washington Supreme Court decision in State v. Harvill, ___ Wn.2d ___, 234 P.2d 1166 (2010), holding that for purposes of the duress defense, a threat – while it must be actual – need not be express but instead need only be implied. As noted above, we believe, despite some loose language in Harvill, that Budik is consistent with Harvill. For there to be duress, the alleged threat-maker must have said or done something overt that is subject to interpretation as a threat, express or implied.

EVIDENCE HELD TO BE SUFFICIENT TO SUPPORT CONVICTION FOR POSSESSING METHAMPHETAMINE WITH "INTENT TO DELIVER"

State v. Slighte, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3309699 (Div. II, 2010)

Facts and Proceedings below:

In a search of his vehicle and person incident to the arrest of Jason Slighte out of his truck, law enforcement officers discovered over a dozen baggies in various places on his person and in his truck. Some of the baggies displayed a marijuana leaf logo. Other baggies displayed a kissed lipstick logo, and some contained no logo. Several of the baggies contained residue that was similar in appearance. In his truck, officers found a digital scale and a straw. The residue in one baggie with a marijuana leaf logo was tested and determined to be methamphetamine.

At trial, Slighte did not challenge the lawfulness of the search. He was convicted of possession of methamphetamine with intent to deliver.

ISSUE: Was the following evidence sufficient to support the "intent to deliver"element of possession of methamphetamine with intent to deliver: a baggie containing methamphetamine, other baggies contained a similar-appearing residue, the presence of a total of over a dozen baggies, a digital scale, and a straw? (ANSWER: Yes)

NOTE: The Court of Appeals also rules that, because Slighte did not challenge the search, he waived any such challenge on appeal. This waiver issue is currently before the Washington Supreme Court in another case. We would expect that Slighte will seek Supreme Court review on that issue. See the "waiver" discussion in the State v. Johnson Court of Appeals entry that begins at page 23 of the **July 2010 LED**.

Result: Affirmance of Lewis County Superior Court conviction of Jason Ronald Slighte for possession of methamphetamine with intent to deliver?

ANALYSIS: (Excerpted from Court of Appeals opinion)

> To convict Slighte of unlawful possession of a controlled substance with intent to deliver, the State has to prove beyond a reasonable doubt that (1) Slighte unlawfully possessed (2) with intent to deliver (3) a controlled substance, namely

methamphetamine. RCW 69.50.401(a). Possession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it. State v. Zunker, 112 Wn. App. 130 (Div. III, 2002) **Aug 02 LED:23** (citing State v. Campos, 100 Wn. App. 100 Wn. App. 218 (Div. III, 2000) **July 00 LED:12**).

[Court's footnote: *Examples of additional factors that have been held sufficient to support an inference of intent to deliver include large amounts of cash, scales, cell phones, address lists, and the like, which have been acknowledged as delivery paraphernalia. See Campos (citing State v. Brown, 68 Wn. App. 480 (Div. I, 1993)* ***May 93 LED:11****)*].

Because the State's forensic scientist could not weigh the small amount of methamphetamine residue in one baggie tested, Slighte contends that the quantity of methamphetamine in his possession was too small to prove intent to deliver. Brief of Appellant (citing State v. Robbins, 68 Wn. App. 873 (Div. III, 1993) **Nov 93 LED:12**). The facts here, however, differ significantly from those in Robbins. Although police officers found paraphernalia tending to show that Robbins was a cocaine dealer, they found only trace amounts of cocaine. Slighte notes that the baggie taken from his from his pocket and tested by the State forensic scientist contained only methamphetamine residue, an amount too small to be sold. But Slighte ignores that the baggie tested was not the only baggie containing illegal drugs that the police discovered and seized and that he allegedly possessed.

On the contrary, the record shows that Slighte was in possession of methamphetamine in varying amounts in several locations. Seized from Slighte's person and his truck were multiple baggies, some of which displayed the same marijuana leaf logo as the baggie the State tested, others displayed a "kissed lipstick print," and some baggies had no logo on them. There were also other baggies containing residue, baggies containing a crystal substance, and a bag of clean, new baggies.

The trial court previously rejected Slighte's argument about the small quantity of tested contraband when it considered Slighte's motion to arrest judgment following the jury's guilty verdict. The trial court reasoned that (1) there were more than a dozen baggies, many of which were marked with the same logo; (2) some baggies contained amounts of a crystalline powder; (3) the State tested the contents of one baggy and determined it to be methamphetamine; and (4) the State did not need to test the contents of every baggy.

The officers also found and seized from Slighte's person items supporting a reasonable inference of delivery – baggies containing a crystalline substance and clean baggies for packaging for sale. In his truck, the officers found a digital scale, a straw, and more baggies, some clean and some containing marijuana or a crystalline substance in varying amounts. We hold, therefore, that, viewed in the light most favorable to the State, as we must, the evidence supports the jury's verdict that Slighte possessed methamphetamine with intent to deliver.

[Some citations omitted; some citations revised]

LED EDITORIAL NOTE: Other Washington appellate court decisions (not addressed in the Slighte opinion) addressing sufficiency of evidence of "intent to deliver" include State v. O'Connor, 155 Wn. App. 282 (Div. III, 2010) June 10 LED:23; State v. Goodman, 150 Wn.2d 774 (2004) Aug 04 LED:21; State v. Todd, 101 Wn. App 954 (Div. III, 2000) Jan 01 LED:11; State v. Hagler, 74 Wn. App. 232 (Div. I, 1994) Oct 94 LED:13; and State v. Lopez, 79 Wn. App. 755 (Div. III, 1995) April 96 LED:16.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WHERE OFFICER SHOUTED TO PASSENGER TO STOP AS HE RAN FROM CAR THAT OFFICER WAS STOPPING FOR TRAFFIC VIOLATION, OFFICER MAY HAVE UNLAWFULLY SEIZED PASSENGER UNDER YOUNG AND MENDEZ; BUT USE OF GUN BY DEFENDANT TO RESIST SEIZURE WAS NOT JUSTIFIED UNDER VALENTINE – In State v. Mann, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3168442 (2010), the Court of Appeals rules that an officer may have acted unlawfully in trying to stop a car passenger from running away during a traffic stop, but that the unlawful action of the officer did not justify the use of deadly force by the defendant to resist arrest.

Officer A made a traffic stop of a car that he observed changing lanes without signaling. As the driver of the car was pulling over, a passenger (defendant Mann) jumped out of the car and began running away. Officer A shouted at Mann to stop, but Mann did not stop. Soon after, Officer B tracked Mann through the snow to a backyard of a home and shouted "Police! Come out!" to which Mann responded by shooting a gun at the officer.

For shooting at Officer B, Mann was tried and convicted of first degree assault, among other crimes. On appeal, Mann argued that his trial attorney was ineffective and should have brought a suppression motion arguing that (1) Officer A unlawfully seized him by telling him to stop when he ran from the car, and (2) Mann therefore was justified in resisting an unlawful seizure and arrest. The Court of Appeals agrees that Mann was probably unlawfully seized, but the Court rules that any unlawfulness of the seizure does not matter.

Under State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**, a person is seized by law enforcement under the independent grounds of article I, section 7 of the Washington constitution (unlike under the Fourth Amendment) when a law enforcement officer gives an order to stop, even if the person so ordered does not actually stop. And under State v. Mendez, 137 Wn.208 (1999) **March 99 LED:04**, another independent grounds ruling under article I, section 7 of the Washington constitution, a law enforcement officer at a traffic stop does not generally have authority to order a vehicle passenger out of or back into the stopped vehicle without the justification of a "heightened awareness of danger." The Mann Court indicates that, because Officer A did not have any reasonable articulable suspicions relating to dangerousness of Mann or the driver, the officer probably unlawfully seized Mann by ordering him to stop as Mann ran from the car.

But, as noted above, the Mann Court holds that the lawfulness of the seizure does not matter under the circumstances of this case. A person who is being unlawfully seized or arrested by an officer has a right to use reasonable and proportional force to resist injury from application of excessive force, but the person may not lawfully use any force to resist his seizure or arrest when faced only with a loss of freedom. State v. Valentine, 132 Wn.2d 1 (1997) **Aug 97 LED:16**. Here, Mann faced only a loss of freedom, and therefore his use of a gun to resist

being captured was not justified. Mann was not entitled to suppression of evidence of his shooting at Officer B.

Result: Affirmance of Spokane County Superior Court conviction of Jason L. Mann for aggravated first degree assault, second degree unlawful possession of a firearm, possession of methamphetamine, and a dangerous weapon violations.

(2) EVIDENCE IN CHILD SEXUAL MOLESTATION CASE HELD SUFFICIENT TO PROVE THE ELEMENTS OF THE DEFINITION OF "SEXUAL CONTACT"– In State v. Harstad, 153 Wn. App. 10 (Div. I, 2009), the Court of Appeals rejects a defendant's argument that evidence of his touching of the upper leg areas of his child victims was not sufficient to establish either (1) that there was "sexual contact," or (2) that the touching was done for purposes of sexual gratification.

Child molestation under RCW 9A.44.083 involves "sexual contact," which "means the touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). Under Washington case law, contact is "intimate" if a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. Body parts, such as the hips and buttocks, in close proximity to the primary erogenous zones have been held to be "intimate parts."

Where an adult with no caretaking function has touched a child's intimate parts, this supports the inference that the touching was done for the purpose of sexual gratification, although additional proof of sexual purpose is required when clothes covered the intimate area that was touched. The defendant was the father of a man who was in a boyfriend-girlfriend relationship with the mother of three children. At times, all six persons were living in the father's residence.

The Harstad Court holds that the evidence was sufficient to show that the defendant touched the victims for the purpose of sexual gratification, as required to support conviction of defendant for first-degree child molestation where: (1) one victim testified that defendant touched her inner thigh while she was wearing only underwear and that defendant was "rubbing" himself when he touched her; and (2) evidence showed that defendant touched the second victim under a blanket while she was trying to sleep and moved his hand back and forth on her leg while breathing heavily.

The Court of Appeals discuss the "sexual contact" sufficiency of the evidence issue as follows:

> Here, B testified that Harstad touched her at night when everyone else was asleep, that she slept wearing only a "T-shirt and underwear, because [she] used to be hot a lot," that Harstad touched her "private place," which she defined as the part that is covered by her underpants, and "[l]ike right by [her] private place," that it happened "[a]bout six times or something," and that Harstad's hand would "always be like rubbing it" when he touched her. She also drew a hand on body sketch's upper inner thigh to demonstrate where she had been touched.
>
> In In re Welfare of Adams, 24 Wn. App. 517 (1979), this court held that "[a]s with the buttocks, we believe that the hips are a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited, particularly if that touching is incidental to other activities which are intended to promote sexual gratification of the actor." Here, we conclude that a person of common intelligence could be

expected to know that B's upper inner thigh, which puts the defendant's hand in closer proximity to a primary erogenous zone than touching the hip does, was an intimate part. Additionally, from the evidence that Harstad was always "rubbing" when he touched B's upper inner thigh, a reasonable jury could infer that Harstad's touching was incidental to another activity intended to promote sexual gratification.

Testimony that B slept in her underwear supports a finding that Harstad did not touch her upper inner thigh over her clothing, which in turn supports an inference of sexual purpose. Testimony that he touched the part of B that her underwear covers is also evidence that he touched an intimate part over her clothing. And the evidence that Harstad's hand was "always [ ] like rubbing it" is sufficient additional proof to establish a sexual purpose, as is the evidence that Harstad whispered, "let me see your pussy" to B on other occasions.

Substantial evidence also supports the jury's conclusion that Harstad touched Sh's intimate parts when he put his hand under the blanket and moved it from side to side "[b]y [her] private area." She marked the upper inner thigh of the body sketch to show where Harstad touched her. While the evidence does not show that Harstad touched Sh under her clothing, Harstad's moving his hand back and forth and his heavy breathing, "[l]ike a whole bunch," support an inference of sexual purpose sufficient to satisfy the sexual contact element of first degree child molestation.

Harstad's suggestion he performed the sort of de facto caretaking role that would explain his touching of B and Sh is not supported by the evidence. Covering a child with a blanket could be seen as caretaking, but it is not the kind of caretaking that requires close contact with an unrelated child's intimate parts. Covering a child with a blanket in order to hide inappropriate touching is, put simply, not caretaking.

Result: Affirmance of King County Superior Court convictions of Ronald Dean Harstad for multiple counts of child molestation, indecent exposure, and felony communication with a child for immoral purposes.

LED EDITORIAL NOTES: The Harstad decision cites, among other precedents on the "sexual contact" sufficiency-of-the-evidence question, the appellate court decisions in State v. Powell, 62 Wn. App. 914 (Div. III, 1991) Feb 92 LED:19; and State v. Jackson, 145 Wn. App. 814 (Div. I, 2008) Sept 08 LED:22. Other cases on the same question, not discussed in Harstad, are State v. Veliz, 76 Wn. App. 775 (Div. III, 1995) Aug 95 LED:20; and State v. Whisenhunt, 96 Wn. App. 18 (Div. III, 1999) Nov 99 LED:19.

(3) WHERE FELONY DUI CHARGE IS BASED ON PRIOR DUIS, PRIOR DUIS MUST HAVE BEEN REDUCED TO CONVICTIONS AT THE TIME OF THE NEW DRIVING EVENT – In State v. Castle, ___ Wn. App. ___, 156 P.3d 539 (Div. I, 2010), the Court of Appeals rules that to support a felony DUI prosecution under RCW 46.61.502 based on prior DUIs, the prior DUIs must have been reduced to convictions at the time of the new driving event that is later prosecuted as a felony.

Result: Affirmance of King County Superior Court order dismissing the felony DUI count from charges against Robert Lewis Castle.

(4) CONVICTION FOR UNLAWFULLY POSSESSING FIREARM REVERSED SOLELY BECAUSE PREDICATE-CONVICTION COURT DID NOT ADVISE THE DEFENDANT OF THE FIREARMS-RIGHTS-CONSEQUENCES OF THE CONVICTION – In State v. Breitung, 155 Wn. App. 606 (Div. II, 2010), the Court of Appeals rules that, even though there was no evidence that defendant was affirmatively misled by the municipal court in 1997 as to the loss of his right to possess firearms following his 1997 municipal court domestic violence conviction, the mere fact that he was not informed by the municipal court as required by RCW 9.41.047(1) precluded his subsequent prosecution for unlawful possession of a firearm under RCW 9.41.040.

Past Washington appellate court decisions have required, in recognition of the rule of law that knowledge of wrongfulness is not an element of unlawful possession of a firearm under RCW 9.41.040, a defendant charged with unlawful possession show that he was affirmatively misled in some way by the predicate-conviction court (i.e., the trial court in the original case). An example of such misleading was found by the Washington Supreme Court in State v. Minor, 162 Wn.2d 796 (2007) **April 08 LED:15** based on the predicate-conviction court's failure to check a box on a form that was given to the defendant, and that – if the box had been checked – would have informed the defendant of the loss of firearm rights due to the original conviction.

There was no such evidence of misleading conduct by the predicate-conviction court in Breitung, but the majority judges conclude nonetheless that the notice requirement of RCW 9.41.047(1) can be given effect only by precluding prosecution under RCW 9.41.040 whenever (1) the predicate-conviction court did not give the required notice, and (2) the defendant did not subsequently gain actual knowledge (however obtained) of the firearm prohibition.

The majority judges in Breitung are VanDeren and Houghton. Judge Penoyar dissents.

Result: Reversal of Pierce County Superior Court convictions of Robert Charles Breitung on two counts of second degree assault (on grounds not addressed in this LED entry) and one count of second degree unlawful possession of a firearm; remand for re-trial.

(5) STATE HAS JURISDICTION TO PROSECUTE INDIAN WHO COMMITTED TRAFFIC CRIMES ON INDIAN RESERVATION – In State v. Abrahamson, ___ Wn. App. ___ , ___ P.3d ___, 2010 WL _____ (Div. I, 2010), the Court of Appeals rejects a Spokane Indian Tribe member's argument that the State of Washington lacked jurisdiction under RCW 39.12.010 to prosecute him for traffic crimes committed on an Indian reservation. In the opening paragraph of its opinion, the Court of Appeals summarizes its decision and its rationale as follows:

> Under RCW 37.12.010, the State of Washington assumed criminal and civil jurisdiction over Indians on Indian lands for eight specific areas of law, including the "[o]peration of motor vehicles upon the public streets, alleys, roads and highways." RCW 37.12.010(8). As a member of the Spokane Indian Tribe, Manuel S. Abrahamson asserts the state court did not have jurisdiction to convict him of the crimes of driving while under the influence, attempting to elude, and driving while license revoked, committed on the Tulalip Indian Reservation. Abrahamson claims the State's assumption of jurisdiction over Indians on an Indian reservation for the operation of motor vehicles does not apply to criminal offenses. We disagree. We hold that under the plain and unambiguous language of RCW 37.12.010 the State assumed jurisdiction over all criminal offenses committed by Indians while operating a motor vehicle on public roads on an Indian reservation, and affirm.

Result: Affirmance of Snohomish County Superior Court convictions of Manuel Steven Abrahamson for driving while under the influence, attempting to elude, and driving while license revoked.

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

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

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

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission's LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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