

September, 1992

HONOR ROLL

390th Session, Basic Law Enforcement Academy - May 5 through July 24, 1992

President: Officer Michael Gerloff - Mountlake Terrace Police Department
Best Overall: Officer Steven A. Redmond - Seattle Police Department
Best Academic: Officer Robert M. Inn - Redmond Police Department
Best Firearms: Officer Steven A. Redmond - Seattle Police Department
Best Mock Scenes: Officer Thomas M. Beavers - South Bend Police Department

Corrections Officer Academy - Class 170 - July 6 through 31, 1992

Highest Overall: Officer William T. Stockwell - Coyote Ridge Correction Center
Highest Written: Officer Michael Michener - Coyote Ridge Correction Center
Highest Practical Test: Officer James A. Rollins - Coyote Ridge Correction Center
Highest in Mock Scenes: Officer Leon Dodroe - Coyote Ridge Correction Center
Highest Defensive Tactics: Officer Rand Palmer - Washington State Penitentiary

Corrections Officer Academy - Class 171 - July 13 through August 7, 1992

Highest Overall: Officer Jason D. Harms - Auburn Police Department
Highest Written: Officer Jason D. Harms - Auburn Police Department
Highest Practical Test: Officer Jason D. Harms - Auburn Police Department
Highest in Mock Scenes: Officer Jason D. Harms - Auburn Police Department
Highest Defensive Tactics: Officer Rita N. Swerin - Clallam Bay Corrections Center

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ARTICLES

ARTICLE: MORE ON MIRANDA "CUSTODY" TRIGGER

Comparison of the discussion in the recent Court of Appeals opinion in State v. Richmond, 65 Wn. App. 541 (Div. I, 1992) [digested below at 12-14] with the discussion in the recent unpublished Court of Appeals decision in State v. Smith (No. 27679-4) demonstrates that the judicial confusion on the custody trigger to the Miranda warnings requirement is worse than we had suggested in our recent comments on this area of law (see May '92 LED at 2-3 and July '92 LED at 21-22). In fact, some of the discussion in Richmond causes us to wonder whether there are some uncited court decisions out there: (1) that everybody but us knows about but is keeping secret, and (2) that state a "not free to leave" test for Miranda. Nonetheless, we forge ahead in this comment with the assumption that there are no such phantom precedents (and with the hope that the folks in white coats will not come to take us away while we continue to mutter and moan from month to month about how others in the legal end of the criminal justice system seem to be screwed up on the Miranda custody test).

The Richmond opinion quotes two clauses from the State Supreme Court opinion in State v. Short, 113 Wn.2d 35 (1989) Oct. '89 LED:13, as if the two clauses are synonymous descriptions of the point in time at which a person will be deemed to be in custody" for Miranda purpose. Those two clauses can be paraphrased as follows:

CLAUSE 1:

. . . as soon as a suspect's freedom of action is curtailed to a degree associated with a formal arrest . . .

CLAUSE 2:

. . . as soon as a suspect's freedom of action is curtailed or restricted . . .

These two clauses are not synonymous and do not state the same test for Miranda custody. Clause 1 states a "formal arrest" test. Formal arrest does not include interrogation during a Terry stop and roadside field sobriety testing situations which fall short of a formal arrest. The U.S. Supreme Court has expressly declared that Miranda is not triggered in the latter situation. (See cases discussed in the May '92 LED at 3). And because the Washington Courts follow the Federal rule for Miranda and have not established a separate "independent grounds" rule under the Washington Constitution, clause 1 states the sole test for Washington officers.

Unfortunately, the Richmond Court ignored or was not aware of the controlling U.S. Supreme Court authority. In Richmond the Court of Appeals relied on clause 2 and implied that whenever a suspect is "not free to leave" an enforcement situation, then Miranda must precede any questioning by a law enforcement officer. On its facts, Richmond was a close case, because the suspect in that case was being held at gunpoint as he was being questioned (and hence he was close to "formal arrest"), but in its suggestion of a legal standard of "not free to leave," the Court of Appeals in that case was WRONG, WRONG, WRONG.

Significantly, the prosecutor in the Richmond case apparently conceded the "custody" issue because the State's brief addressed only the "interrogation" issue on which the State eventually prevailed. Of even greater significance (though of no precedential value) is the fact that when the same prosecutor's office (different deputy) did argue the custody issue on very similar facts to those in Richmond, the Court of Appeals agreed with the prosecutor that formal arrest was the standard. Thus, in its unpublished (and therefore non-precedential) decision in State v. Smith, (No. 27679-4) the Court of Appeals: (a) declared that formal arrest is the sole standard and (b)

cited State v. Belieu, 112 Wn.2d 587 (1989) Sept. '89 LED:17 in support of the proposition that a seizure of a dangerous suspect at gunpoint is not necessarily an arrest.

Again, we hope that prosecutors throughout the state are aware of the law in this area and are arguing it forcefully. We refuse to believe that imprecise language in the State Supreme Court opinion in the Short case can be separated from the clear holding in the case or that it can be disengenuously transformed by defense counsel into a major new restriction on law enforcement interrogation practices.

ARTICLE: 1992 DV AMENDMENTS DID NOT CHANGE MANDATORY ARREST

We have received several phone call inquiries regarding chapter 111, Laws of 1992, noted in the June '92 LED at 8-10. This 1992 enactment amended the definition of "family or household members" at RCW 26.50.010 in the following manner (shown here in bill-draft form to emphasize changes).

(2) "Family or household members" means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage (~~and~~) adult persons who are presently residing together or have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a respondent sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

The same RCW section, 26.50.010, was also amended by the addition of a new term, "dating relationship," and it is defined as follows:

(3) "Dating relationship" means a social relationship of a romantic nature. Factors that the court may consider in making this determination include: (a) The length of time the relationship has existed; (b) the nature of the relationship; (c) the frequency of interaction between the parties.

These 1992 changes do not affect the mandatory arrest provision of RCW 10.31.100. Rather, the 1992 changes merely enable a person who is 16 or 17 years old to obtain a domestic violence protection order under another section of RCW 26.50 if the person comes within this amended definition of "family or household members." If a "no contact" order is obtained by the 16 or 17-year-old, then the "no contact" order, of course, may itself make arrest mandatory. Again, however, arrest otherwise remains mandatory only in those circumstances set forth in RCW 10.31.100 (last amended in 1988) which provides as follows:

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 10.99.040(2), 10.99.050, 26.09.060, 26.44.063, chapter 26.26 RCW, or chapter

26.50 RCW restraining the person and the person has violated the terms of the order restraining the person from a residence or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) The person is eighteen years or older and within the preceding four hours has assaulted that person's spouse, former spouse, or a person eighteen years or older with whom the person resides or has formerly resided and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that spouses, former spouses, or other persons who reside together or formerly resided together have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor. In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear or physical injury; and (iii) the history of domestic violence between the persons involved.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) ST PAUL'S MALICIOUS HARASSMENT ORDINANCE VIOLATES FREE SPEECH CLAUSE OF FIRST AMENDMENT -- In R.A.V. v. St. Paul Minn., 51 CrL 2225 (1992) the U.S. Supreme Court overturns the conviction of a St. Paul juvenile who had burned a cross in the yard of a black family. While noting that the juvenile probably could have been constitutionally prosecuted under trespass laws and other laws, the majority holds that the St. Paul malicious harassment ordinance under which he was prosecuted is unconstitutional because the ordinance is a content based restriction on speech. Because the ordinance impermissibly prohibits speech directed toward certain classes of people, but not others' the majority finds it to be unconstitutional. Result: harassment conviction reversed.

LED EDITOR'S COMMENT: Washington's "malicious harassment" law (RCW 9A.36.080) is currently under review by the Washington State Supreme Court in a free speech challenge similar to that made in the St. Paul case. While there are some differences between the Washington statute and the ordinance addressed by the U.S. Supreme Court in R.A.V. v. St. Paul, we believe that our State Supreme Court will strike down our state statute on related grounds. Of course, until that happens, officers should assume that the Washington law is in full effect, unless, of course, their agency policy is to the contrary.

(2) KRISHNA CONSCIOUSNESS, INC. WINS ONE ISSUE, LOSES ONE ISSUE IN AIRPORT SOLICITING CASE -- In International Society for Krishna Consciousness v. Lee and Lee v. International Society for Krishna Consciousness, 51 CrL 2252 (1992) the U.S. Supreme Court rules in separate decisions: (1) that a public airport terminal is a non-public forum in which a regulation banning repetitive solicitation of funds inside the terminal is a reasonable restriction on expressive activity that does not violate the First Amendment's Free Speech Clause; but (2) that a

total ban on distribution of literature (without solicitation of funds) does violate the Free Speech Clause. Result: Federal Court of Appeals ruling affirmed.

(3) U.S. FEDERAL COURT HAS JURISDICTION TO TRY DEFENDANT ABDUCTED FROM MEXICO AT BEHEST OF FEDS -- In U.S. v. Alvarez-Machain, 51 CrL 2144 (1992) the United States Supreme Court votes 6-3 to reject a Mexican doctor's challenge to Federal court jurisdiction to try him for his involvement in the torture and murder of a DEA agent. The doctor had allegedly prolonged the life of the DEA agent so that the agent could be further tortured and interrogated.

The Mexican government had refused to extradite the doctor, claiming that the Mexican system would prosecute him. Instead, the U.S. government arranged to have the doctor abducted from Mexico. The majority in Alvarez-Machain holds that such an abduction is neither expressly nor impliedly forbidden by the extradition treaty between the United States and Mexico, and that therefore the treaty does not deprive a U.S. court of jurisdiction to try the abducted person for violations of U.S. criminal laws, notwithstanding the objection of Mexican authorities. Result: case remanded to Federal district court for trial.

(4) PARADE PERMIT ORDINANCE REQUIRING ADVANCE PERMIT WITH STANDARD-LESS ADJUSTABLE PERMIT FEE OF UP TO \$1000 FAILS FIRST AMENDMENT -- In Forsyth County, Georgia v. Nationalist Movement, 51 CrL 2195 (1992) the U.S. Supreme Court strikes down a county ordinance on a 5-4 vote on First Amendment grounds. The county ordinance at issue requires applicants for a permit to conduct a parade or assembly on public property to pay an advance fee of up to \$1000. The county administrator has broad discretion under the ordinance to set the fee from \$1 to \$1000 based on his personal estimate of the cost of providing security, including his assessment of the amount of hostility likely to be created by the parade or assembly, and hence the need for security.

The majority rules that the ordinance violates the Free Speech clause of the First Amendment as a content-based restriction on speech for two reasons: (1) the ordinance does not provide any standard to guide the administrator's purely discretionary decision nor does it provide for review of that decision; and (2) the ordinance is impermissibly content-based because it permits an increased fee based on prospective listeners' anticipated hostile reactions to speech which may occur in the parade or assembly.

Result: Court of Appeals ruling affirmed; county ordinance invalidated.

WASHINGTON STATE SUPREME COURT

STATE'S FAILURE TO PRESERVE EVIDENCE, COURT'S ADMISSION OF HUMAN-TRACKER'S TESTIMONY, DO NOT TAINT MURDER CONVICTION; PREMEDITATION PROVEN

State v. Ortiz, 119 Wn.2d 294 (1992)

Facts and Proceedings: The State Supreme Court, in a split decision, declines defendant's request for reversal of his aggravated first degree murder conviction on grounds, among others, of: (1) failure to preserve evidence, (2) improper admission of opinion testimony, and (3) insufficient evidence of premeditation. The lead opinion of the Court (signed by only four Justices) describes the facts and proceedings in the case as follows:

The victim's body was discovered wrapped in blankets in a bedroom of her house. She had been stabbed several times in her throat, arm, chest and abdomen, and there were defensive wounds on her arms. Her face had been crushed. After she had been stabbed, she was dragged from room to room, probably by her hair. The victim had also been raped. When her body was discovered, she was naked from the waist up, but a pair of slacks had been put on her. There was a laceration in the opening to her vagina. The victim was 77 years old.

The knife used as the murder weapon had been taken from the victim's kitchen. The murderer left extensive bloody shoe prints throughout the scene which indicated that only one perpetrator was involved.

While investigating the scene, the police called in Joel Hardin, an agent with the United States Border Patrol. Hardin has extensive experience tracking human beings. He is the most senior tracker in the Border Patrol and has tracked over 5,000 people during his career. Hardin testified that his observations of the victim's house indicated that only one person other than the victim was present. He followed the trail left by that person across a field and through a raspberry patch to the housing development where Ortiz lived.

Hardin testified that he was able to tell that the person he was following was between 5 feet 7 inches and 5 feet 8 inches in height, and weighed 140 to 160 pounds. In addition, he said that he could tell that the suspect was familiar with raspberry bushes by the manner in which he avoided wire supports. He also observed that the person had probably been approached by a dog and had reassured that dog. On cross examination, Hardin testified that he had made the determination that he was tracking a young Mexican male, and said that this conclusion was based on his interpretation of the trail.

The Whatcom County Deputy Medical Examiner, Dr. Gibb, performed an autopsy. He obtained fluid samples from the victim's vagina and discovered spermatozoa and acid phosphatase in the samples, which indicated that intercourse had occurred.

The vaginal samples collected from the victim's body were diluted with saline, frozen by Dr. Gibb and turned over to the police. They sent the samples, along with other evidence in the case, to the Federal Bureau of Investigation Laboratory in Washington, D.C., by parcel post registered mail shortly after receiving them. The samples had thawed when they were received and were refrigerated. They were not examined for almost 2 months from the time there were collected. When the specimens were examined, they were not suitable for testing due to putrefaction from bacterial growth.

Both the defendant and the victim have type O blood, and the defendant is a secretor. Based on that information, and statistical data about the general population, the court concluded that there is a 55 to 60 percent chance that someone other than Ortiz could have been the contributor of the semen found in the victim.

Ortiz was arrested in Othello a few days after the murder on different charges. On

the way to the police station, with no prompting or questioning, Ortiz said, "I didn't want to screw the old lady. She wanted to screw me." This statement motivated the police to question Ortiz further and he made other incriminating statements.

Additional evidence described in the lead opinion is as follows:

A neighbor of the murder victim positively identified Ortiz as the man who had tried to get into her house at 5 a.m. on the morning of the murder. The track leading away from the murder site led to the housing development where Ortiz lived, and indicated that someone of his height and weight had committed the crime. The shoe-print patterns found sealed in the victim's blood matched both of Ortiz' shoes precisely -- they were made from the same mold and had the same wear characteristics. Moreover, traces of human blood were found on the arm of the victim. . . .

Ortiz was tried a first time and convicted, but that conviction was overturned on appeals on an evidentiary error. (There were some additional incriminating statements made in custodial interrogation which were excluded as a result of proceedings in Ortiz I and were not before the courts in any subsequent proceedings.) He was tried again and convicted, but juror misconduct required that the second conviction be set aside. He was then tried a third time and convicted.

ISSUES AND RULINGS: (1) Were Ortiz' due process rights violated by the government's failure to preserve the semen taken from the victim's body? (ANSWER: No, rules a majority of five justices, one of whom declines to address the state constitutional law question); (2) Were Ortiz' rights violated by the tracker's expert testimony? (ANSWER: No); (3) Was there sufficient evidence of premeditation to support the conviction? (ANSWER: Yes) Result: Whatcom County Superior Court conviction of aggravated first degree murder affirmed.

ANALYSIS:

(1) Failure to Preserve Evidence

Ortiz argued that Washington's Supreme Court should not follow the U.S. Supreme Court's rule regarding the duty of the State to preserve evidence. The U.S. Supreme Court held in Arizona v. Youngblood, 488 U.S. 51 (1988) Feb. '89 LED:01 that the government's duty to preserve possibly exculpatory evidence, which arises under the Federal constitution's "due process" clause, is a "good faith" duty. Under Youngblood, If the State loses or destroys possible exculpatory evidence, but does not do so because of "bad faith," then the loss or destruction of the evidence does not provide a basis for challenging the prosecution of the case. On the other hand, when the government suppresses evidence in the face of a discovery request, a different and more onerous standard of review is applied.

Defendant could not prove bad faith under the facts of this case, but on the basis of past rulings of the Washington Supreme Court on the preservation of evidence issue (referred to as the Vaster test), he urged the Court to adopt a different "preservation of evidence" rule under the Washington Constitution's "due process" clause. His proposed standard would have required (1) an initial showing that there is a "reasonable possibility" that the evidence would have helped the defense, and, if this showing was made, then (2) a balancing test considering a variety of factors relating to the government's loss or destruction of the evidence.

The lead opinion signed by four justices rejects defendant's invitation to adopt the more

demanding Vaster test under the State constitution. These four justices find no basis for an independent grounds reading of the Washington Constitution's due process clause. Moreover, these four justices also reject defendant's argument that his case would qualify for reversal under the higher standard of Vaster, holding that the evidence against him was strong and the government's error in preservation of evidence was quite understandable.

A fifth Justice, Dolliver, writes the following concurring opinion:

I would affirm the conviction based on the majority opinion, which states either the Youngblood test (Arizona v. Youngblood, 488 U.S. 51 (1988)) or the Vaster test (State v. Vaster, 99 Wn.2d 44 (1983)) would apply. This being so, I see no need to decide here whether under the due process clause in the state constitution (Const. art. 1, § 3) the Vaster analysis can be maintained.

Four Justices -- Johnson, Utter, Dore and Smith -- dissent on the "preservation of evidence" issue, arguing: (1) that the higher Vaster standard for preservation of evidence should be adopted in an independent grounds reading of the State Constitution, and (2) that under that higher standard the evidence in this case required reversal of the conviction and dismissal of the charge. They characterize the government's evidence preservation efforts as "sloppy," and they find considerable question of guilt. Among the uncertainties that they perceive and articulate regarding the State's case is the following:

The State presented evidence that Ortiz told the police: "I didn't want to screw the old woman. She wanted to screw me." The State never showed, however, that this statement was made in reference to Fannie Slotemaker. Indeed, the circumstances surrounding the statement and Ortiz's mental condition suggest otherwise. Ortiz made this comment after he had just been arrested, not for the Slotemaker murder, but for an entirely unrelated crime. He was being arrested for allegedly trespassing on the property of a different woman living in another city. While he was being transported to the police station, and in the midst of proclaiming his innocence to the arresting officer, who was not even aware of the Slotemaker killing, Ortiz made the statement referred to above. The context of the statement therefore does not suggest that he was referring to Fannie Slotemaker.

LED EDITOR'S COMMENT ON PRESERVATION OF EVIDENCE ISSUE:

The dissent's speculation that Ortiz might have been referring to what they elsewhere imply was an imaginary "screwing" of another "old lady", rather than the one who was recently murdered, is called "baseless" by the majority. (That is, there was absolutely no evidence in the record to indicate that Ortiz was referring to some other "old lady" that he might have "screwed" or might have imagined that he had "screwed.") Ironically, we think that no more eloquent argument against the highly subjective Vaster rule could be made than that inadvertently made by example by the dissent in its bizarre explanation of the "old lady" admission. No jury verdict is safe under a standard where an appellate court is free: (1) to explain away powerful evidence of guilt, (2) to label police work as "sloppy" whenever evidence is not preserved, and (3) to conjure up exculpatory value for any missing evidence.

We fear that the Youngblood rule is in jeopardy in Washington. Justice Dolliver did not tip his hand, but we fear that Justice Dolliver would go along with an independent grounds reading under our State Constitution's Due Process clause in a case where the crime is not

so brutal and the State's case is not so strong. So the fall elections for the State Supreme Court may decide the fate of the "preservation of evidence" rule in Washington.

(2) Human Tracker's Testimony

There is extensive discussion in the lead opinion regarding admissibility of the human tracker's expert opinion as to the characteristics of the person he was tracking. A special dissent by Justice Smith criticizes the tracker's conclusions that he was tracking an hispanic or a Mexican.

LED EDITOR'S COMMENT: This is a legitimate criticism though not a basis for reversal, in our opinion. Human trackers and prosecutors should study this case for a sense of which conclusions and opinions are permissible and which are not.

(3) Premeditation

The lead opinion rejects defendant's argument that there was insufficient proof that he "premeditated," or planned, the killing. He cited the case of State v. Bingham, 105 Wn.2d 820 (1986) Aug. '86 LED:07 which, as was predicted by the dissent in that case, has been distinguished in all subsequent cases where the premeditation issue has been raised. The lead opinion points to the following evidence as being sufficient evidence to support submitting the premeditation issue to the jury:

The killing was committed with a knife and multiple wounds were inflicted. Although the knife was procured on the premises, the jury could have found that the act of obtaining the knife involved deliberation. Moreover, the murder occurred in a bedroom, and not in the kitchen where the knife was found. The victim was struck in the face with something other than the knife. Finally, the defensive wounds found on the victim indicate a prolonged struggle. In light of all these factors, we hold that there was sufficient evidence to convict.

USE OF FORCE TO RETAIN PROPERTY PREVIOUSLY STOLEN WITHOUT FORCE IS ROBBERY

State v. Handburgh, 119 Wn.2d 284 (1992)

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

On August 11, 1989, 12-year-old Chaska Leonard left her bicycle unattended outside a Tacoma recreation center while she went inside. When Leonard came back outside a short time later, she and several other children saw 12-year-old Zyion Handburgh riding off on her bicycle. Handburgh claimed Leonard had given him permission to ride the bicycle. Leonard denied that assertion. The trial court found Handburgh did not have permission to ride the bicycle.

Leonard demanded Handburgh return her bicycle. She said Handburgh retorted she would have to "suck his wee-wee" in order to get her bicycle back. Handburgh claimed he jokingly demanded that Leonard give him money. A witness said Handburgh made the statement attributed to him by Leonard.

Handburgh did not return the bicycle to Leonard. Instead, he rode it into an alleyway and dropped it into a ditch. When Leonard went to retrieve her bicycle, Handburgh threw rocks at her. She continued trying to get the bicycle and in the

process pushed Handburgh in an effort to stop him from throwing rocks at her. A struggle ensued and blows were exchanged. As a result, Leonard suffered a split lip, bloody nose, and black eye. She and a friend eventually left, leaving the bicycle behind. Handburgh then abandoned the bicycle. The police later recovered the bicycle and returned it to Leonard. Handburgh was charged in Pierce County Juvenile Court with second degree robbery.

. . . The Juvenile Court found Handburgh guilty of second degree robbery . . .

Handburgh appealed, arguing he did not take Leonard's bicycle "in her presence" because he initially acquired the bicycle while she was in the recreation center. The Court of Appeals, Division Two, agreed, holding the taking was completed outside Leonard's presence; therefore, Handburgh's subsequent use of force did not transform the completed taking into a robbery. The Court of Appeals reversed Handburgh's conviction.

ISSUES AND RULING: Did Handburgh's forceful retention of the stolen bicycle constitute robbery? (ANSWER: Yes) Result: adjudication of guilt from the Pierce County Juvenile Court affirmed; Court of Appeals ruling reversed.

ANALYSIS:

The Supreme Court begins its analysis by discussing the case law from Washington and elsewhere on the issue whether a person commits robbery where he has initially stolen property without force, and he subsequently uses force to prevent a person from retaking the property. The Court indicates that the case law generally supports the conclusion that such action may constitute robbery. The Court then turns to the Washington statute, RCW 9A.56.190.

The Court's analysis under the statute is as follows:

The plain language of the robbery statute says the force used may be either to obtain *or retain* possession of the property. We hold the force necessary to support a robbery conviction need not be used in the initial acquisition of the property. Rather, the retention, via force against the property owner, of property initially taken peaceably *or* outside the presence of the property owner, is robbery.

The defendant also argues that even if we find a forceful retention of stolen property is robbery, his conviction should not stand because the evidence was not sufficient to show it was he who first used force. We disagree. When reviewing the sufficiency of the evidence in a criminal prosecution, we view the evidence in the light most favorable to the prosecution. The appropriate query is whether, when the evidence is so viewed, any rational trier of fact could have found the element of the crime established beyond a reasonable doubt.

It was undisputed the defendant made a verbal threat to Leonard when she asked him to return her bicycle; only the nature of the threat was disputed. In addition, there was testimony the defendant threw rocks at Leonard before she ever approached him. She eventually left the scene -- and her bicycle -- because she was hurt and scared.

Any force or threat, no matter how slight, which induces an owner to part with his

property is sufficient to sustain a robbery conviction. The trial court correctly found the defendant's threats and physical violence supplied the element of force or intimidation essential to make the offense a robbery. We find the evidence was sufficient to support such a finding.

Accordingly, we reverse the decision of the Court of Appeals and affirm the defendant's conviction by the trial court.

[Some citations omitted]

WASHINGTON STATE COURT OF APPEALS

NO MIRANDA WARNINGS REQUIRED WHERE REASONABLE OFFICER WOULD NOT EXPECT INCRIMINATING RESPONSE TO QUESTION AS TO WHO HAD CALLED POLICE

State v. Richmond, 65 Wn. App. 541 (Div. I, 1992)

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

On March 13, 1990, at approximately 8:10 p.m., Officer Ross Wayne Robinson responded to a report of a stabbing. When he arrived at the address he had been given, he heard a woman screaming inside the apartment. He knocked on the door, and, when there was no response, he forced the door open and went inside. As he entered the bedroom, he saw Richmond strike a woman, Tracy Lynn Merritt, in the face. Richmond pulled his hand back to strike her a second time and Officer Robinson pulled his gun and told Richmond to freeze.

Officer Robinson asked Richmond and the woman who had called the police. They stated that they did not know but they thought it might have been the other person in the apartment. Officer Robinson asked where this other person was and Richmond pointed and stated that he was down the hallway. Officer Robinson went down the hallway and found Michael Cameron, the victim in the first degree murder charge, lying in a pool of blood in the bathroom. Officer Robinson also noticed a telephone in the bathroom with the receiver hanging by its cord.

Defense counsel moved to suppress Richmond's statements in response to Officer Robinson's questions, arguing that they were inadmissible as they were not preceded by a Miranda warning.

The court denied the motion to suppress, finding that,

the officers, rather than having to advise of Miranda at this point in time were within their rights in trying to ascertain who had phoned the police, where the person was who had phoned the police. All of this indicated that, essentially, there was a crime in progress.

It does seem to me those actions are reasonable under the circumstances. To require the officers to stop to advise of Miranda rights, while they hadn't

determined who had phoned and where the person was who called 911, was not required under Miranda.

I'm going to uphold the statements that were made by the defendant. . . . and the next one concerning who phoned 911. Not me; and, where is he? seems to me reasonable under the circumstances. After that the rights were read off the Miranda card and the defendant was fully advised of his rights under Miranda. It seems to me those are preliminary questions necessary to contain the situation and will be admissible in evidence.

[COURT'S FOOTNOTE: The (trial) court also entered the following written conclusion: "The initial questions of the police at the scene were general inquiries to assess the situation. They were not specifically addressed to the defendant and were made only as preliminary inquiries to the investigation and prior to the defendant being taken into custody."]

ISSUES AND RULINGS: (1) Was defendant in "custody" for purposes of the Miranda warnings rule? (ANSWER: Yes); (2) Was defendant being "interrogated" for purposes of the Miranda warnings rule? (ANSWER: No) Result: King County Superior Court convictions for first degree murder and attempted first degree murder affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Custody

A suspect is in custody for First Amendment purposes and Miranda safeguards apply "as soon as a suspect's freedom of action is curtailed to ". . . 'degree associated with formal arrest.'" The sole inquiry is "whether the suspect reasonably supposed his freedom of action was curtailed."

Here, Richmond was in custody when Officer Robinson asked the two questions at issue. Officer Robinson burst into the apartment, pulled his gun, and told Richmond to "freeze". Officer Bissenger then subdued Richmond while Officer Robinson checked the apartment. At this point, Richmond was not free to leave the apartment. Although Richmond was not yet a suspect in Cameron's murder when the questions were asked, as Officer Robinson had not yet confirmed there had been a stabbing, the restriction on Richmond's freedom constitutes custody for Miranda purposes. **LED EDITOR'S COMMENT: See comment below at 14.**

(2) Interrogation

Officer Robinson's questions do not constitute an "interrogation", however. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Supreme Court defined interrogation as:

not only to express questioning, but also . . . any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

(Footnotes omitted.) Interrogation reflects a "measure of compulsion above and beyond that inherent in custody itself."

Here, Officer Robinson addressed his questions to both Richmond and Merritt. Officer Robinson asked the questions to confirm the whereabouts of the person who made the call. Officer Robinson was responding to the report of a stabbing. Thus, it was reasonable and prudent for Officer Robinson to be concerned that someone inside the apartment might be seriously injured.

Moreover, Officer Robinson's questions do not fall within the definition of interrogation as they are not questions which Officer Robinson should have known were reasonably likely to elicit an incriminating response from Richmond. Nor do the questions reflect a measure of compulsion above and beyond that inherent in custody. The officer's questions were straightforward, nondeceptive, and were asked to determine whether there was a stabbing victim inside the apartment. Thus, we hold that the interrogation element required for a Miranda warning does not exist.

LED EDITOR'S COMMENTS:

For our comments on the Richmond's interpretation of the "custody" trigger to Miranda and a contrary interpretation in an unpublished opinion by a different panel of the same division of the Court of Appeals in another case, see the article beginning at page 2 of this LED. We write an additional comment here to address the Court's statement in a footnote that one of the purposes of the Miranda rule is "protecting the individual from deceptive practices of interrogation." We believe that the case cited by the Court of Appeals for this proposition -- State v. Hensler, 109 Wn.2d 357 (1987) -- was implicitly overruled by the State Supreme Court in State v. Short, 113 Wn.2d 35 (1989) Oct. '89 LED:13 (Holding Miranda not required in undercover situation). We believe that Short establishes that the sole purpose of the Miranda rule is to protect the individual from the compulsion or coercion which is inherent in in-custody interrogation. There are limits on the use of trickery in questioning suspects, but they do not derive from the Miranda rule.

DEFENDANT NOT ENTITLED TO ENTRAPMENT INSTRUCTION; EVIDENCE SUFFICIENT TO SUPPORT VUCSA CONVICTION ON THEORY THAT HE WAS ACCOMPLICE TO DRUG DEAL

State v. Galisia, Norgard, 63 Wn. App. 833 (Div. I, 1992)

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

The State's case was based largely on the testimony of David Palmer, a paid informant for the King County Police. Palmer first came into contact with Norgard in early March 1989 when Palmer picked up Norgard to give him a ride while Norgard was hitchhiking home from work. A conversation concerning drugs ensued. Palmer told Norgard that he was a drug buyer and asked Norgard if he knew where he, Palmer, could buy drugs. Norgard's initial response was "maybe". Palmer promised to pay Norgard \$100 an ounce for any cocaine he was able to purchase with Norgard's help. When Palmer asked Norgard for his phone number, Norgard gave it to him. Palmer called Norgard three times during the

following week in an effort to obtain drugs. Each time Norgard told Palmer that he couldn't help him.

Five days later, on March 14, 1989, Palmer ran into Norgard in downtown Seattle around 8:30 or 9 p.m. Norgard was with a friend identified only as "Paul" with whom he testified he frequently used drugs. There is some question as to who initiated contact on that occasion. Both sides agree, however, that when the question of whether Norgard could help Palmer buy any cocaine arose, Norgard told Palmer that he might be able to help him. Norgard introduced Palmer to Paul, who then left and returned with another individual, later identified as codefendant Antonio Molina. The four men then got into Palmer's car and, under Paul's direction, drove to 8th Avenue and East Madison. At 8th and Madison, Molina left the car and returned shortly thereafter saying he could get the cocaine for \$650 an ounce. Palmer left to go get the money, after telling Norgard that if he waited he would give him half an ounce of cocaine and \$100 for each ounce of cocaine he purchased.

Palmer returned with the money and undercover detective Nelson at 10:15 p.m. Palmer then left with Molina to go to an apartment at 8th Avenue and Cherry Street to discuss price and quantity, while Norgard remained with Nelson in Nelson's car. While in the car, Norgard asked Nelson if he could buy some cocaine from Nelson after the deal was completed, to which Nelson replied that he could.

After Palmer returned to the car, Molina approached with two individuals with whom Palmer had met earlier to negotiate the terms of the drug deal. After the men showed Palmer a bag of white powdery substance, Palmer told Nelson that the deal was to take place by the side of a nearby building. Nelson activated the Agent Alert before joining Palmer, Norgard, Molina and the other two men at the side of the building. Before the drugs and money actually changed hands, additional officers arrived and Norgard was arrested along with the others. Norgard later stated to Detective Gordon that although he did not personally have any cocaine, he knew Palmer wanted cocaine and he knew some people who could sell cocaine, so he brought them together so they could make the deal.

PROCEEDINGS:

Norgard was charged and convicted of delivery of a controlled substance.

ISSUE AND RULING: (1) Did the facts support Norgard's request for an entrapment defense instruction? (ANSWER: No); (2) Were the facts sufficient to support Norgard's conviction? (ANSWER: Yes) Result: King County Superior Court conviction for delivery of a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Entrapment Defense

While a defendant need not present that quantity of evidence necessary to create a reasonable doubt in the minds of the jurors to be entitled to an entrapment instruction, some evidence must be adduced to support it. . . .

. . . It is enough that a defendant admit acts which, if proved, would constitute the crime. Norgard met this threshold by admitting the acts which made him an accomplice to the drug deal.

However, under the facts of this case, we hold that Norgard was not entitled to an entrapment instruction. The evidence in the record before us would not permit a reasonable jury to conclude that on the day in question, Norgard was "lured or induced to commit a crime which [he] had not otherwise intended to commit." RCW 9A.16.070(1). Specifically, we note that Norgard clearly stated on cross examination that he initially gave Palmer his phone number after Palmer requested his assistance in buying drugs; that he later told Palmer on the street that he might be able to help him and introduced Palmer to Paul, who in turn put Palmer in touch with Molina; that he remained on the scene in order to obtain the cocaine and money he had been promised; and that he negotiated a second deal with Nelson while waiting in the car for the first deal to be completed. While there is no question that the criminal design originated in Palmer's mind, Norgard's continuing participation in the developing transaction leads us to conclude that he became a willing actor in the drug deal. The evidence is clear that, after Norgard introduced Palmer to Paul and realized that he could benefit by supporting and encouraging the completion of the deal, Norgard remained at the scene for that purpose and willingly associated himself with the transaction. This was not entrapment.

(2) Sufficiency of Evidence of Complicity in Delivery

Norgard further contends that there was insufficient evidence to support his conviction for possession of cocaine with intent to deliver based on accomplice liability because no evidence was presented that Norgard was ever personally in possession of the cocaine.

Norgard was convicted as an accomplice on one count of possession with intent to deliver cocaine in violation of RCW 69.50.401(a), which provides:

[I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

The accomplice liability instruction given is as follows:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance, whether given by words, acts, encouragement, support or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the

commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

Physical presence and awareness of the transaction alone are insufficient to establish accomplice liability. . . .

The appellant argues that there was insufficient evidence to support his conviction for aiding and abetting the possession of cocaine with the intent to deliver, as contrasted simply with the delivery of cocaine. Specifically, the appellant urges this court to adopt the analysis of the Fifth Circuit in United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976). In Jackson, the court held that, although the defendant was associated with the criminal venture, participated in it as in something he wished to bring about, and sought by his action to make it succeed, his conviction could not be upheld because there was no evidence that he helped his codefendant obtain the cocaine or that he exercised any control over it. The appellant here argues that he, too, did not help his codefendants obtain the cocaine, nor did he at any point exercise control over it.

The distinction that Jackson makes is appealing in its conceptual clarity. Clauses in both the Washington and the federal statutes distinguish between delivery or distribution alone, and possession with the intent to deliver or distribute. See RCW 69.50.401(a); 21 U.S.C. § 841(a)(1). Washington courts, however, have not adopted the distinction made by the Jackson court and we decline to do so here. Accomplice liability in Washington is premised on the notion that a defendant need not participate in each element of the crime, nor need he share the same mental state that is required of the principal. . . . Rather, it is the intent to facilitate another in the commission of a crime by providing assistance through his presence or his act that makes the accomplice criminally liable.

Jackson is also distinguishable on its facts. Unlike Jackson, Norgard was at the scene when the cocaine was produced and offered for sale. Norgard's continuing and purposeful presence and his expressed interest in seeing the transaction succeed so that he could obtain the cocaine and money he was to receive are sufficient to tie Norgard to the possession aspect of the crime which, of course, is an essential precursor to its delivery. We also note that, but for the efforts of Norgard and Paul, the cocaine would not have been brought from the apartment to the site where the transaction was to take place for the express purpose of selling it.

The two Washington cases that the appellant relies on in support of his position, State v. Amezola, 49 Wn. App. 78 (1987) and State v. Gladstone, 78 Wn.2d 306 (1970), are also distinguishable. In Amezola, we held that evidence showing only that the defendant cooked and kept house for household members dealing in heroin was insufficient to establish accomplice liability with respect to a charge of possession of a controlled substance with intent to deliver. There is no evidence that the defendant participated in the drug dealing activities at all, including going on deliveries or answering the phone. Norgard, in contrast, directly facilitated the transaction by bringing the parties together and remaining at the scene to obtain a benefit from the transaction.

Similarly, the defendant in Gladstone did nothing more than draw a map directing the informant to a house where he could purchase marijuana. Unlike Norgard, Gladstone neither accompanied the informant nor sought to obtain anything for his part in bringing the parties together. Norgard's actions here do not fall within the range of minimal activities engaged in by the defendants in Amezola and Gladstone. Because there was more than mere physical presence and knowledge of the transaction, there was sufficient evidence to support the conviction.

[Emphasis by Court of Appeals; footnotes, some citations omitted.]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) ILLEGAL DRUG USE HISTORY OF WITNESS NOT PER SE ADMISSIBLE TO IMPEACH -- In State v. Tigano, 63 Wn. App. 336 (Div. II, 1991) the Court of Appeals rejects defendant's argument that the defendant should have been allowed to impeach a prosecution witness by introducing evidence of past illegal drug use by the witness. The Court of Appeals analysis on this issue is as follows:

Tigano contends that he should have been allowed to impeach Poli's veracity with evidence of his drug use. He bases the contention on Poli's general drug use. He bases the contention on Poli's general drug use over a period of years, and on an affidavit submitted by defense counsel. In the affidavit, defense counsel stated that he had been told by Poli that Poli had "used LSD at about the time of the shooting of Richard Wood."

For evidence of drug use to be admissible to impeach, there must be a reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial. Evidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial.

In the case at bar, there was no reasonable inference that Poli was under the influence of drugs at the time of the events he testified about, or at the time of trial. Poli did not testify about the shooting itself, since he was not there. Poli testified that he was not using drugs at the time of the events that he did testify about, and no one testified to any contrary observations. Defense counsel's affidavit does not show that Poli used drugs at a time when such use might have affected his ability to perceive, because drug use "at about the time of the shooting" might have been a week, a month, or any other time before or after the events in question.

[Some citations omitted]

Result: Pierce County Superior Court convictions for first degree murder and conspiracy to commit first degree murder affirmed.

(2) STATE CONSTITUTION'S DUE PROCESS CLAUSE DOES NOT REQUIRE TAPE-RECORDING OF POLICE INTERROGATIONS -- In State v. Spurgeon, 63 Wn. App. 503 (Div. I, 1991) the Court of Appeals rejects defendant's argument that the due process clause of the

Washington Constitution requires that custodial police interrogations be tape recorded as a condition to admissibility of the defendant's statements.

Such a state constitutional interpretation was adopted by the Alaska Supreme Court in 1986, but all seven of the other states (and now Washington) which have considered the argument have rejected it. Washington's constitutional due process provision provides no greater protection of citizen's rights than the Federal constitution's due process clause, the Court of Appeals declares. Of interest in the Court's six-page opinion addressing this issue is the Court's acknowledgement that the Washington courts follow the recent U.S. Supreme Court ruling on preservation of evidence in Arizona v. Youngblood, 488 U.S. 51 (1988) (requiring that defendant show bad faith by the government to successfully pursue a claim of destruction of evidence or failure to preserve evidence by the police). Note, however, that this issue is not well-settled, as is suggested by the split vote in the Ortiz decision of the State Supreme Court digested above at 6-10.

Result: affirmance of King County Superior Court conviction for aggravated first degree murder and first degree robbery of a taxicab driver.

(3) NO STANDING TO CHALLENGE SEARCH OF VEHICLE WHERE DEFENDANT HAD DENIED ANY CONNECTION TO VEHICLE AT THE TIME OF ARREST -- In State v. Foulkes, 63 Wn. App. 643 (Div. I, 1991) the Court of Appeals rules that a burglary defendant lacked standing to challenge an allegedly unlawful search of a motor vehicle under the following facts, as described by the Court of Appeals:

On October 5, 1990, police arrested Foulkes after he was caught fleeing the area of a burglary in progress. At the time of the arrest, Foulkes identified himself as William Franklin. While [Officer A] was transporting Foulkes to the King County Jail, Detective Rudy Hasenwinkle returned to the area of the arrest and spotted a car that he suspected was related to the burglary for which Foulkes had just been arrested. The car was a tan 1971 Ford LTD with a rear window broken out or open and keys visible on the floor. The car was registered to Naomi Elkins. Detective Hasenwinkle radioed [Officer A] and asked him to obtain Foulkes's consent to search the car.

[Officer A] questioned Foulkes about the car. Foulkes said that he did not own a car and did not know who owned the car. [Officer A] then asked Foulkes if he would give his consent to search the car. [Officer A] testified Foulkes consented when [Officer A] told him that he would get a search warrant for the car and impound it if Foulkes did not give his consent. Foulkes testified that he initially refused to give his consent, but did so after the officer assured him that the car would not be impounded and the owner would not have to pay a fee to get it back.

[Officer A] relayed to Detective Hasenwinkle that Foulkes had consented to a search of the car. Detective Hasenwinkle searched the car and found its keys, a gray fanny pack, and a blue Winoka scuba driving knife, all partially hidden under the front seat. He took the fanny pack, which contained a library card issued to Wilbert Foulkes, and put the knife in the trunk of the Ford since the passenger compartment could not be secured. Noma Elkins, the owner of the Ford LTD, was notified of its location.

Under these facts, the Court of Appeals holds, defendant lacked standing to challenge the arguably flawed "consent" search of his vehicle. The Court of Appeals declares:

. . . one need not be the owner of a vehicle in order to have a legitimate expectation of privacy in it. See United States v. Portillo, 633 F.2d 1313, 1317 (9th Cir. 1980).

Here, Foulkes never asserted any privacy interest in the vehicle or its contents. He denied more than just ownership; he stated that he did not drive the vehicle to the place of his arrest, and that he did not know who did. The fact revealed during the suppression hearing that Foulkes knew the owner of the car does not indicate that Foulkes possessed a privacy interest in either the vehicle or its contents. The trial court did not err in ruling that Foulkes lacked standing to contest the search and seizure.

LED EDITOR'S NOTE: Defendant had conceded that he was not entitled to assert standing under the "automatic standing" rule of State v. Simpson, 95 Wn.2d 170 (1980), because possession is not an essential element of burglary. [Note that Simpson's automatic standing rule is currently under review by the State Supreme Court in State v. Zakel, 61 Wn. App. 805 (Div. II, 1991) Nov. '91 LED:13].

LED EDITOR'S COMMENT: In the process of seeking consent to search the arrestee's vehicle, Officer A apparently told the suspect that the police would "impound the vehicle and obtain a search warrant" if the suspect would not consent to a search. We would recommend that officers in this situation say only that they will "impound the vehicle and seek a search warrant". To state that one will obtain a warrant is to improperly imply that the magistrate is a "rubber stamp" and the right to refuse consent is illusory.

Result: King County Superior Court conviction for residential burglary affirmed.

(4) IDENTIFICATION PROCEDURE WHERE SINGLE PHOTOGRAPH SHOWN TO WITNESS WAS "IMPERMISSIBLY SUGGESTIVE" BUT DID NOT VIOLATE DUE PROCESS - In State v. Maupin, 63 Wn. App. 887 (Div. III, 1992) the Court of Appeals rejects defendant's challenge to the use by police of a single photograph to establish his identity as the perpetrator of a heinous murder of a six-year-old. The Court of Appeals analyzes the identification issue as follows:

Mr. Maupin contends the identification made by witness Todd Grendahl should be suppressed because his identification was based upon a single photograph shown to him by police. Mr. Grendahl, a neighbor of Ms. Fraijo, testified he observed a man sitting on the Fraijo porch during the middle of the night the child disappeared. He described him as 5 foot 8 inches, 160 pounds, and wearing a green jumpsuit. Mr. Grendahl saw him again at 3 a.m. when he returned to his home. The man passed him on the street, Mr. Grendahl attempted to speak to him, but the man said nothing and continued down the street. Two days later, the police showed him only Mr. Maupin's photograph and Mr. Grendahl identified him as the man he had observed. Mr. Grendahl admitted during cross examination he was initially confused as to the man's race, whether black or white. Mrs. French testified Mr. Maupin possessed a green jumpsuit.

The presentation of a single photograph is, as a matter of law, impermissibly suggestive. However, impermissible suggestiveness may not constitute a violation of due process. Rather, this court must review the totality of the circumstances to determine whether that suggestiveness created a substantial likelihood of

irreparable misidentification. To determine reliability, the factors set out in Manson v. Brathwaite, 432 U.S. at 114 must be considered:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Here, Mr. Grendahl observed Mr. Maupin on two different occasions the night the child disappeared. During the second opportunity, Mr. Maupin passed directly by him and Mr. Grendahl attempted to speak to him. He gave an accurate description to the police prior to being shown the photograph, including height, weight, color and type of hair and manner of dress. He was uncertain of the man's race. He was certain of his identification when he viewed the photograph only 2 days after his confrontation with Mr. Maupin. He also unhesitatingly identified Mr. Maupin in court and was available for cross examination on his identification. Finally, Mr. Maupin's unusual manner of dress was confirmed by another witness. Thus, these circumstances are distinguishable from the facts of McDonald which dealt with an impermissible suggestive and unreliable identification. There was no error.

Result: Spokane County Superior Court conviction for felony murder in the first degree reversed for reasons unrelated to the identification issue; case remanded for retrial.

NEXT MONTH

Among other cases of interest, we will digest the following recently published opinions: State v. Rodriguez, 65 Wn. App. 409 (Div. III, 1992) (Court of Appeals refuses to extend Boland rule protecting privacy of one-family garbage can to multi-unit dumpster); State v. Ryland, ___ Wn. App. ___ (Div. I, 1992) (Court of Appeals rules that an overnight house guest did not have "apparent authority" to consent to threshold entry of house by officers); and State v. Preston, ___ Wn. App. ___ (Div. II, 1992) (Court of Appeals rules that the 1986 State Supreme Court decision in State v. Hornaday does not preclude an MIP conviction for consumption based on beer breath, association with empty beer bottles and admissions by the minor suspect).

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