



Law Enforcement

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UNITED STATES SUPREME COURT

TOTALITY OF CIRCUMSTANCES GAVE OFFICER PROBABLE CAUSE TO BELIEVE THAT FRONT-SEAT PASSENGER CONSTRUCTIVELY POSSESSED COCAINE THAT WAS FOUND IN BACK SEAT AREA OF CAR

Maryland v. Pringle, 124 S.Ct. 795 (2003)

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

At 3:16 a.m. on August 7, 1999, a Baltimore County Police officer stopped a Nissan Maxima for speeding. There were three occupants in the car: Donte Partlow, the driver and owner, respondent Pringle, the front-seat passenger, and Otis Smith, the back-seat passenger. The officer asked Partlow for his license and registration. When Partlow opened the glove compartment to retrieve the vehicle registration, the officer observed a large amount of rolled-up money in the glove compartment. The officer returned to his patrol car with Partlow's license and registration to check the computer system for outstanding violations. The computer check did not reveal any violations. The officer returned to the stopped car, had Partlow get out, and issued him an oral warning.

After a second patrol car arrived, the officer asked Partlow if he had any weapons or narcotics in the vehicle. Partlow indicated that he did not. Partlow then consented to a search of the vehicle. The search yielded \$763 from the glove compartment and five plastic glassine baggies containing cocaine from behind the back-seat armrest. When the officer began the search the armrest was in the upright position flat against the rear seat. The officer pulled down the armrest and found the drugs, which had been placed between the armrest and the back seat of the car.

The officer questioned all three men about the ownership of the drugs and money, and told them that if no one admitted to ownership of the drugs he was going to arrest them all. The men offered no information regarding the ownership of the drugs or money. All three were placed under arrest and transported to the police station.

Later that morning, Pringle waived his rights under Miranda v. Arizona and gave an oral and written confession in which he acknowledged that the cocaine belonged to him, that he and his friends were going to a party, and that he intended to sell the cocaine or "[u]se it for sex." Pringle maintained that the other occupants of the car did not know about the drugs, and they were released.

The trial court denied Pringle's motion to suppress his confession as the fruit of an illegal arrest, holding that the officer had probable cause to arrest Pringle. A jury convicted Pringle of possession with intent to distribute cocaine and possession of cocaine. He was sentenced to 10 years' incarceration without the possibility of parole. The Court of Special Appeals of Maryland affirmed.

The Court of Appeals of Maryland, by divided vote, reversed, holding that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, "the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession."

ISSUE AND RULING: Where an officer found cocaine in the backseat area of a car after earlier observing a very large wad of cash in the glove box, and where Pringle was a front seat passenger in the car and had no ownership interest or control over the car, did the officer have probable cause to believe Pringle and the others in the car were all in constructive possession of the cocaine? (ANSWER: Yes, rules a unanimous United States Supreme Court)

Result: Reversal of suppression decision of State of Maryland appellate court.

ANALYSIS: (Excerpted from Supreme Court opinion)

It is uncontested in the present case that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed. The sole question is whether the officer had probable cause to believe that Pringle committed that crime. On many occasions, we have reiterated that the probable-cause standard is a " 'practical, nontechnical conception' " that deals with " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " "[P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules."

The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. We have stated, however, that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt," and that the belief of guilt must be particularized with respect to the person to be searched or seized.

To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause.

In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was \$763 of rolled-up cash in the glove compartment directly in front of

Pringle. *[Court's footnote: The Court of Appeals of Maryland dismissed the \$763 seized from the glove compartment as a factor in the probable-cause determination, stating that "[m]oney, without more, is innocuous." The court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents. We think it is abundantly clear from the facts that this case involves more than money alone.]* Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.

We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.

Pringle's attempt to characterize this case as a guilt-by-association case is unavailing. His reliance on Ybarra v. Illinois, 444 U.S. 83 (1979), and United States v. Di Re, 332 U.S. 581 (1948), is misplaced. In Ybarra, police officers obtained a warrant to search a tavern and its bartender for evidence of possession of a controlled substance. Upon entering the tavern, the officers conducted patdown searches of the customers present in the tavern, including Ybarra. Inside a cigarette pack retrieved from Ybarra's pocket, an officer found six tinfoil packets containing heroin. We stated:

"[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."

We held that the search warrant did not permit body searches of all of the tavern's patrons and that the police could not pat down the patrons for weapons, absent individualized suspicion.

This case is quite different from Ybarra. Pringle and his two companions were in a relatively small automobile, not a public tavern. In Wyoming v. Houghton, 526 U.S. 295 (1999) **May 99 LED:02**, we noted that "a car passenger--unlike the unwitting tavern patron in Ybarra--will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.

In Di Re, a federal investigator had been told by an informant, Reed, that he was to receive counterfeit gasoline ration coupons from a certain Buttitta at a particular place. The investigator went to the appointed place and saw Reed, the sole occupant of the rear seat of the car, holding gasoline ration coupons. There were two other occupants in the car: Buttitta in the driver's seat and Di Re in the

front passenger's seat. Reed informed the investigator that Buttitta had given him counterfeit coupons. Thereupon, all three men were arrested and searched. After noting that the officers had no information implicating Di Re and no information pointing to Di Re's possession of coupons, unless presence in the car warranted that inference, we concluded that the officer lacked probable cause to believe that Di Re was involved in the crime. We said "[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person." No such singling out occurred in this case; none of the three men provided information with respect to the ownership of the cocaine or money.

We hold that the officer had probable cause to believe that Pringle had committed the crime of possession of a controlled substance. Pringle's arrest therefore did not contravene the Fourth and Fourteenth Amendments. Accordingly, the judgment of the Court of Appeals of Maryland is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

[Some citations omitted]

LED EDITORIAL COMMENT: While not squarely on point factually, this decision helps support the line of Washington Court of Appeals cases that hold that the odor of fresh marijuana smoke or the odor of a meth lab coming from the interior of an occupied car provides an officer with probable cause to arrest all of the occupants of the car and to search them and the interior of the car incident to the arrest. See State v. Huff, 64 Wn. App. 641 (Div. II, 1992) April 98 LED:08 (meth lab odor); State v. Hammond, 24 Wn. App. 596 (Div. II, 1979) (fresh marijuana smoke).

WASHINGTON STATE SUPREME COURT

NO WARRANT NEEDED FOR A "SECOND LOOK" IN THE JAIL PROPERTY ROOM AT PERSONAL EFFECTS THAT WERE TAKEN AT BOOKING; COURT ALSO LOOKS AT QUESTION OF ADMISSIBILITY OF EXPERT TESTIMONY REGARDING ASSESSING THE RELIABILITY OF EYEWITNESS IDENTIFICATION

State v. Cheatam, __ Wn.2d __, __ P.3d __ (2003) (2003 WL 22908854)

Facts and Proceedings below:

In 1996, police were investigating Jerry Dawayne Cheatam for a series of rapes, including the rape of a 16 year-old, M.M. On June 6, 1996, officers obtained a warrant to search Cheatam's apartment for evidence relating to the rapes, including M.M.'s rape. The Washington Supreme Court majority opinion in Cheatam describes as follows the subsequent developments in the case:

At the apartment, police seized a "blue, hooded jacket of some sort," several condoms, and some shoes. The shoes' tread did not match the photograph taken from the scene of the rape of M.M. On the day of the search, Cheatam was arrested at his apartment for an unrelated rape. He was booked into jail, and his clothing, shoes, and effects were inventoried and stored in the jail's property room. Four days later, Detective Page obtained the shoes from the property

room, examined the tread, compared it to the photograph, and confirmed a visual match. He requested further testing. A forensic investigator also confirmed a visual match but could not conclusively testify to a match. Before trial on the rape of M.M., Cheatam moved to suppress evidence of the shoes on the ground they were unconstitutionally obtained without a warrant. The trial court denied the motion.

Cheatam's first trial resulted in an appeal, reversal and remand for a new trial. Prior to his second trial the court granted the State's motion to exclude Dr. Jeffrey Loftus's expert testimony on the reliability of eye witness testimony. Cheatam's second trial resulted in a mistrial prior to verdict. He was convicted following the third trial. At the third trial, the defense presented an alibi defense, i.e., that Cheatam was home at the time of the rape.

Following his conviction, Cheatam appealed. The Court of Appeals affirmed in a partially published opinion. State v. Cheatam, 112 Wn. App. 778 (Div. II, 2002) **Oct 02 LED:02**.

ISSUES AND RULINGS: (1) Under the Fourth Amendment or under article 1, section 7 of the Washington constitution, does a jail inmate have privacy protection that bars police from taking a warrantless "second look" at items in the jail property room that were taken from the inmate at the time of booking? (Answer: No, rules a 7-2 majority); (2) Did the trial court abuse its discretion in determining that the jury could properly decide the identification question in this case without hearing testimony from an expert witness on assessing the reliability of eyewitness identification? (Answer: No, rules an 8-1 majority)

Result: Affirmance of Court of Appeals decision that affirmed a Pierce County Superior Court conviction of Jerry Dawayne Cheatam for first degree rape.

ANALYSIS BY MAJORITY:

1) **Warrantless "second look" at personal effects in the jail property room**

Defendant relied on a footnote in State v. Simpson, 95 Wn.2d 170 (1980) in his appellate challenge to the officers' warrantless retrieval of his shoes from the jail property room. The 1980 Simpson footnote indicated as to such retrieval and inspection that, under the federal constitution's Fourth Amendment, officers would need a search warrant if the item was being retrieved to investigate a crime other than that for which the suspect had been arrested and booked. The 1980 Simpson footnote indicated, however, that officers would not need a search warrant if the item was being retrieved to investigate the crime for which the person had been arrested and booked.

The Cheatam majority concludes that the Simpson footnote misstated the applicable Fourth Amendment rule, and that there is no support in either the Fourth Amendment or the Washington constitution for a search warrant requirement in either circumstance. After extensive analysis of the case law, the Cheatam majority states the constitutional rule as follows:

Once police have conducted a valid inventory search of an inmate's clothing and other effects at booking, and have placed them in storage for safekeeping in accord with a proper inventory procedure, the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view. He or she is no longer entitled to hold a privacy interest in the already searched items free from further governmental searches. It makes no difference, as other

courts have held under the Fourth Amendment and state constitutions, that an investigation is being conducted into a different crime than the one the inmate was arrested for, because one's privacy interest does not change depending on which crime is under investigation once lawful exposure has already occurred. Here, Cheatam's shoes had obviously been observed when the booking inventory was conducted, and he thereafter had no privacy interest in them.

The Cheatam majority also explains that, under the majority's view, the jail's policy restricting release of property room items is irrelevant to the constitutional question in this case:

Finally, Cheatam argues that the jail policy restricting release of items placed in the property room compels a different result under article I, section 7. The inquiry, however, is the same: whether Washington citizens have held or should be entitled to hold a privacy interest in property lawfully seized, inventoried and held by jail officials. Cheatam offers nothing to suggest that the jail policy was intended to protect an inmate's privacy or that inmates have historically had a protectable interest in property properly seized and inventoried on booking, and common sense suggests to the contrary. Once the inmate's clothing and other effects have already been searched pursuant to a lawful inventory search, and exposed to police view, he or she no longer has a privacy interest in the items free from further governmental examination and use as evidence.

2) Expert testimony on unreliability of eyewitness identification

On the question of admissibility of expert testimony concerning eyewitness identification, the Cheatam majority opinion rejects the approach by Division One of the Court of Appeals in its 1986 decision in State v. Moon, 45 Wn. App. 692 (1986). Moon, like this case, involved cross-racial ID. The Moon Court in 1986 had attempted to set a test under which a trial court would presumptively be required to allow expert testimony on the eyewitness ID question. The Moon test appeared to presume admissibility of such testimony where: 1) identification of the perpetrator was the main question in the case; 2) the defendant presented an alibi defense; and 3) there was little other evidence linking the defendant to the crime. The Cheatam majority concludes that the Moon test unduly restricts the trial judge's discretion, and that the standard for the trial judge to consider is along the following lines:

We decline to adopt the Moon test. We conclude, instead, that where eyewitness identification of the defendant is a key element of the State's case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc. This approach corresponds with the rules for admissibility of relevant evidence in general and admissibility of expert testimony under ER 702 in particular. After reviewing this record we find that excluding the expert's testimony in this case was not an abuse of discretion.

Reviewing the record in the case before it, the Cheatam majority explains that, under the totality of the circumstances (including the fact that, shortly after the crime occurred, victim M.M. was able to give a sketch artist a description that produced a "nearly photo perfect" sketch of the defendant), the trial court did not abuse its discretion by rejecting the expert testimony proffered by the defendant.

The subjects that Cheatam identifies as requiring expert testimony are the effects of stress and violence, weapon focus, lighting, and cross-racial identification. Dr. Loftus would have testified that stress and violence render memory less accurate. Depending on the facts of a given case, this testimony may be very helpful to a jury's assessment of credibility. Here, however, M.M. testified that she realized that she would need to memorize the face of her attacker in order to identify him later, and that she carefully examined his face in order to do so. Additionally, on the day of the rape, M.M. met with a sketch artist, producing a drawing of the defendant that was nearly photo perfect. Thus, in this case, Dr. Loftus' testimony would have had only marginal relevance and would have been of debatable help to the jury. Therefore, refusal to admit expert testimony on this point was not so untenable as to constitute an abuse of discretion. Dr. Loftus also would have testified that where a weapon is involved in a crime, witnesses focus on the weapon and recall less of other surrounding details. Here, the evidence was that when the attacker held the knife to M.M.'s neck she could not see it; she only saw the knife for the brief time it took for the attacker to pass it from one hand to the other, and then she could no longer see it as it was again held to her neck. Thus, M.M. had little opportunity to actually focus on the weapon and Dr. Loftus' testimony would have provided little help to the jury. According to the offer of proof, Dr. Loftus would have also testified that in darker or dimmer situations a person is not capable of generating an accurate memory of a person's appearance. Arguably, the testimony offered on this point was within the common understanding of jurors. Here, the jury could assess whether it was likely that M.M. could see her attacker's face at 6:45 a.m. in January, given defense evidence that the sun did not rise until nearly 8:00 a.m. that morning. And, regardless of the early winter morning time, it is noteworthy that M.M. viewed her assailant from an extremely close range. ... The jury could also consider the strong evidentiary value of the police sketch in deciding whether M.M. could see her attacker's face. ... Finally, Dr. Loftus would have testified about studies summarizing the greater difficulty in recognizing individuals from a different race than that of the observer. Here, the danger of cross-racial misidentification was minimal as shown by the very strong resemblance between the police sketch and Cheatam as discussed above. Accordingly, it is debatable whether Dr. Loftus' testimony on this point would have been helpful to the jury.

DISSENTING OPINIONS BY JUSTICES SANDERS AND ALEXANDER

Justice Sanders dissents on both of the rulings discussed above. Justice Alexander dissents on only the search-and-seizure ruling.

LED EDITORIAL COMMENT REGARDING "SECOND LOOKS" AT ITEMS IN THE JAIL PROPERTY ROOM: The Cheatam majority opinion is written fairly broadly, but we are still a bit unclear as to the scope of the warrantless search that is permitted in a "second look" at items taken at booking and placed in the jail property room. Officers may want to consider getting a search warrant for such "looks" where the evidentiary value of the item is not so obvious as the external shoe tread involved here. For instance, if trace evidence on or in personal effects is what officers are looking for, it may be advisable to obtain a search warrant. Also, the Cheatam majority opinion does not make us completely comfortable that a pure "fishing expedition" would be permitted. That is, we question whether officers can randomly or on a blanket basis conduct warrantless searches of the personal effects of a large number of inmates without having individualized suspicion as to the particular inmate. As always, we urge officers to consult their prosecutors and/or legal advisors.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

WHERE FELONY CHARGE OF HARASSMENT IS BASED ON A THREAT TO KILL, THE STATE MUST PROVE THAT THE VICTIM HAD A REASONABLE FEAR OF DEATH BASED ON THE THREAT -- In State v. C.G., __ Wn.2d __, 80 P.3d 594 (2003), the Washington Supreme Court unanimously rules that a charge of felony harassment based on a threat to kill requires that the State prove reasonable belief by the threatened person that he or she will be killed. Mere reasonable belief that the defendant will harm the victim is not enough to support the felony charge, the C.G. Court rules.

RCW 9A.46.020 (with emphasis added) provides in relevant part as follows:

(1) A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or (ii) To cause physical damage to the property of a person other than the actor; or (iii) To subject the person threatened or any other person to physical confinement or restraint; or (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. ...

(2) A person who harasses another ... is guilty of a class C felony if ... (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened... .

In the C.G. case, a high school vice-principal ordered C.G., a student, to leave a classroom. In response, C.G. yelled at the vice-principal: "I'll kill you, Mr. Haney, I'll kill you." At trial, Mr. Haney testified that he was concerned that C.G. might harm him, but he did not fear that C.G. would kill him. The Supreme Court unanimously agrees that these facts cannot support a felony harassment charge based on a threat to kill.

Result: Reversal of Court of Appeals decision (see Jan 03 LED:18) that affirmed a Whatcom County Superior Court juvenile conviction of C.G. (DOB 8/13/85) for felony harassment.

LED EDITORIAL NOTE: The Supreme Court's C.G. decision not only overturns the Court of Appeals decision in the same case, but also overrules a contrary interpretation of the felony harassment statute under similar facts in State v. Savaria, 82 Wn. App. 832 (Div. I, 1996) March 97 LED:19.

WASHINGTON STATE COURT OF APPEALS

EVIDENCE OF DELIVERY OF DRUGS WAS SUFFICIENT TO CONVICT SELLER WHO USED MIDDLEMAN; ALSO, CO-CONSPIRATOR STATEMENTS HELD ADMISSIBLE UNDER HEARSAY RULES

State v. Rangel-Reyes, __ Wn. App. __, __ P.3d __ (Div. III, 2003) (2003 WL 22952745)

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

This prosecution arose from a drug transaction between Rudolfo Gonzalez (a police informant) and Jose Garcia (a.k.a. "Joe Blow") [***the middleman***] on July 20, 2001. Mr. Gonzalez telephoned Mr. Garcia, and Mr. Garcia stated that he could obtain up to a kilo or a pound of cocaine. The two men agreed to meet at a

parking lot at a Wendy's restaurant in Pasco. Mr. Gonzalez wore a body wire to transmit and record his conversations.

Mr. Gonzalez testified at trial that, while he was waiting at the parking lot, Mr. Garcia said "the person who was going to bring--who was going to do the hookup was on his way." Mr. Gonzalez also testified he and Mr. Garcia discussed the price of the drugs while they waited. Mr. Gonzalez asked Mr. Garcia, "Who's going to come[,] Tito?" Mr. Garcia responded, "[N]o, my brother in law." Mr. Garcia also mentioned the man would be driving a car or a red extended-cab pickup.

Within a few minutes, Mr. Rangel [**the seller-source**] arrived at the parking lot in a silver car, and Mr. Garcia got in. Mr. Gonzalez testified he could hear portions of the conversation through the car's partially opened window: "[T]hey were talking about prices and how much you could get."

Mr. Gonzalez testified that, after Mr. Garcia emerged from the car, Mr. Garcia told him he could deliver only four ounces, and the price was \$625 per ounce. Mr. Garcia told Mr. Gonzalez to meet him at Garibaldi's Restaurant, and he would bring the drugs. Mr. Garcia then left in Mr. Rangel's car.

Police followed Mr. Rangel's car to Centennial Park, where Mr. Garcia got out. Except for a period of about two minutes, an officer watched Mr. Garcia while he waited in the park without contacting any other person. Meanwhile, Mr. Rangel drove to his residence, which was about three-fourths of a block from the park. Police were unable to follow the car as Mr. Rangel left the residence, but several minutes later he picked up Mr. Garcia at the park. They drove back to Mr. Rangel's residence, then to Garibaldi's Restaurant.

At the restaurant, Mr. Garcia met again with Mr. Gonzalez and handed him 125 grams of cocaine. The two men then talked about an additional purchase of a kilo of cocaine later that day. Police then arrested Mr. Garcia. Mr. Rangel, who had left the scene after dropping Mr. Garcia at the restaurant, was arrested a few minutes later.

A maroon extended-cab pickup was at Mr. Rangel's residence when police arrived to conduct a search. The registration for the truck, in Mr. Rangel's name, was inside the residence. During the search, officers also found a wad of cash totaling \$1,300 and a cell phone that showed Mr. Garcia had called earlier that day. The officers also found at least one uncashed paycheck.

Mr. Rangel was charged with delivery of a controlled substance in a drug-free zone. He waived his right to a jury trial.

Mr. Garcia did not testify at trial. Mr. Rangel testified Mr. Garcia was a friend of his brother-in-law, who had asked for a ride. The brother-in-law, who lived with Mr. Rangel, corroborated this testimony. Mr. Rangel testified he picked Mr. Garcia up as requested at the Wendy's parking lot, dropped him off at the park and picked him up a few minutes later before dropping him off again at Garibaldi's Restaurant. Mr. Rangel presented evidence that he had withdrawn \$1,000 from his bank account on July 6 so he could buy a car, and this was part of the money police had found in the search of his residence.

The trial court found Mr. Rangel guilty as charged.

ISSUES AND RULINGS: 1) Did it violate the Evidence Rules or defendant's constitutional right of confrontation to admit the CI's statements recounting what the alleged middleman said about his dealings with seller/source Rangel? (ANSWER: No); 2) Was there sufficient evidence of the alleged seller's involvement in the drug deal to support his conviction for delivery of illegal drugs? (ANSWER: Yes)

Result: Affirmance of Franklin County Superior Court conviction of Jose Rangel-Reyes for delivery of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Co-conspirator hearsay

We first consider whether Mr. Gonzalez's testimony, recounting out-of-court statements made by Mr. Garcia, violated Mr. Rangel's right of confrontation. Mr. Rangel did not object at trial to the admission of Mr. Garcia's statements. Failure to raise an issue at trial generally waives the issue on appeal. See RAP 2.5(a). Mr. Rangel apparently contends, however, that the statements were inadmissible hearsay that violated his constitutional right of confrontation. See RAP 2.5(a)(3) (appellant may raise "manifest error affecting a constitutional right" for first time on appeal).

"When out-of-court assertions are used for nonhearsay purposes, no confrontation clause concerns arise." An out-of-court statement is hearsay only if it is "offered in evidence to prove the truth of the matter asserted." ER 801(c). Here, Mr. Garcia's statements were not offered to prove the truth of their contents; they were merely Mr. Garcia's "verbal acts," whose significance was simply that they were made. Because the statements were not hearsay, their admission did not implicate Mr. Rangel's right of confrontation.

Alternatively, a statement is not hearsay if it is offered against a party and is a statement of the party's coconspirator during the course of and in furtherance of the conspiracy. ER 801(d)(2)(v). A statement that falls within this "firmly rooted" exception to the hearsay rule does not violate a defendant's right of confrontation. Mr. Garcia's statements were offered against Mr. Rangel and were made in furtherance of his conspiracy to sell cocaine.

Admission of Mr. Garcia's statements did not violate Mr. Rangel's right of confrontation.

2) Sufficiency of evidence of delivery of drugs

The trial court found Mr. Rangel guilty as an accomplice, which requires (among other things) that he knew his acts would promote or facilitate the crime. See RCW 9A.08.020(3)(a). A defendant's mere presence at the scene, even with knowledge of the criminal activity, does not establish accomplice liability.

Although there was no direct evidence that Mr. Rangel knowingly facilitated the drug transaction, the circumstantial evidence was substantial. Before meeting Mr. Rangel, Mr. Garcia was unable to give Mr. Gonzalez a price for the cocaine. But after speaking privately with Mr. Rangel, Mr. Garcia was able to give both the price and the amount of the proposed sale. Mr. Garcia and Mr. Rangel left, and Mr. Garcia waited alone at a nearby park while Mr. Rangel drove away. A few minutes later, he picked up Mr. Garcia and drove him to Garibaldi's Restaurant,

where the sale was made. A reasonable inference from this evidence is that Mr. Rangel was Mr. Garcia's cocaine supplier, and that Mr. Rangel knowingly facilitated the transaction. Other evidence found at Mr. Rangel's residence was consistent with this inference. In addition, the trial court implicitly found Mr. Rangel's explanation was not credible, and that finding is not subject to review on appeal. Based on the evidence, a rational trier of fact could have found Mr. Rangel was an accomplice to the drug deal. The evidence was sufficient.

[Citations omitted]

KNOWLEDGE, NOT PERSONAL SERVICE, OF A DVPA PROTECTION ORDER IS THE PREREQUISITE TO A CRIMINAL CHARGE FOR VIOLATION OF ORDER

City of Auburn v. Solis-Marcial, ___ Wn. App. ___, 79 P.3d 1174 (Div. I, 2003)

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

In May 2001, Kimberly Olson filed a petition in Auburn Municipal Court for a temporary protection order against her former boyfriend, Juan Jose Solis-Marcial. The court granted a 14-day protection order and set a hearing for entry of a permanent order for June 21, 2001. Solis-Marcial was personally served with the protection order and with notice of the hearing on the permanent order.

Solis-Marcial failed to appear at the hearing. The court entered a permanent order with terms identical to those of the temporary order. Since Solis-Marcial was not present, he could not be immediately served. He was not personally served with the permanent order until July 9.

Meanwhile, Solis-Marcial filed his own petition for a protection order against Olson. On June 29, a hearing on his petition was held in Auburn Municipal Court. Both Olson and Solis-Marcial appeared. The court denied Solis-Marcial's petition and offered to grant Olson a protection order instead. In response, Olson allegedly stated that she already had a protection order against Solis-Marcial.

On July 4, Solis-Marcial went to Olson's residence, and made eye contact and gestured in her direction, violating the terms of Olson's permanent protection order. Olson called police. The City charged Solis-Marcial with violation of a protection order.

Solis-Marcial moved to dismiss because he had not been personally served with the permanent order at the time of its violation. The court granted the motion and dismissed the charge. King County Superior Court affirmed.

ISSUE AND RULING: Is personal service of a DVPA protection order prior to violation a prerequisite to charging a violation of the order? (ANSWER: No, defendant's knowledge of the order is all that is required)

Result: Reversal of King County Superior Court order that affirmed an Auburn Municipal Court order dismissing DVPA charges against Juan Jose Solis-Marcial; case remanded for trial.

ANALYSIS: The Court of Appeals goes through the language of the DVPA in considerable detail to show that the Legislature did not impose either an in-court notification or a "personal service" requirement for charging a violation, making personal service or in-court notification ways in which knowledge, the statutory element, can be established. The Court of Appeals then explains as follows why its interpretation makes good sense from a public policy perspective:

The Domestic Violence Protection Act requires that a permanent protection order be personally served (unless the respondent is served at the court hearing, or an order for substitute service of the temporary order has been entered). The municipal court interpreted this provision as requiring either in-court notification or personal service as a prerequisite to criminal prosecution for violation of such an order. This is incorrect. RCW 26.50.090 requires that service be made, but makes no mention of service as a prerequisite to enforceability of the order.

We therefore look to other provisions of the Domestic Violence Protection Act for guidance. These provisions make clear that a protection order is enforceable so long as the person restrained knows of the order.

The intent of the Domestic Violence Protection Act is "to protect the victim[s] [of domestic violence] and ... communicate the attitude that violent behavior is not excused or tolerated." As the City points out, to mandate personal service as a further requirement of the offense of violation of a protection order would undermine the legislative intent by creating an incentive for domestic violence perpetrators to avoid court appearances and avoid personal service. It cannot be said that a legislative purpose to impose personal service "plainly appears" as a further requirement for establishing violation of a protection order.

[Footnotes and citations omitted]

Finally, the Solis-Marcial Court concludes by explaining that there is evidence that the defendant knew that he was violating a protection order, and therefore the case must be remanded for trial:

The City must show that Solis-Marcial knowingly violated the order. A trier of fact could find that he knew what conduct was prohibited. Solis-Marcial was personally served with the temporary order, which contained a description of prohibited conduct, gave notice of the hearing on the permanent order, and included the warning that "[f]ailure to appear at the hearing may result in the court granting such relief." He did not contest any of the provisions, and failed to appear for the hearing on the permanent order. Nothing in the record suggests any reason to expect that the terms of the permanent order would differ from those of the temporary order.

Further, in proceedings in the same court on his own petition for a protection order against Olson, Solis-Marcial obtained a 14-day temporary order which is identical in every way to Olson's temporary order (except that Solis-Marcial was granted a 1,000-yard exclusion distance, whereas Olson sought only a 500-yard distance). The forms used for both orders are identical. Then, at the hearing on Solis-Marcial's permanent protection order, the court denied his petition and offered Olson a protection order instead. Olson allegedly demurred, and told the court that she already had one. Solis-Marcial was present during this exchange. His knowledge of the order is thus a fact issue for trial.

The charge of violation of a protection order is reinstated. Reversed and remanded for trial.

[Footnote omitted]

TRAFFIC CODE DOES NOT REQUIRE A SIGNAL IN TURNING FROM A PRIVATE DRIVEWAY ONTO A PUBLIC ROADWAY; STOP FOR NOT SIGNALING HELD UNLAWFUL

State v. Brown, ___ Wn. App. ___, ___ P.3d ___ (2003 WL 22999553)

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

On September 17, Tacoma Police Officers . . . patrolled an area including the 5600 block of South Fife Street in Tacoma. The officers conducted this 'high-profile' patrol because of several neighborhood complaints regarding gang and traffic problems and speeding cars. During their patrol, the officers gave special attention to certain locations, including a 7-11 located on South 56th Street.

At approximately 11:00 p.m., Officers . . . saw a silver Honda Civic make a right turn out of the 7-11 parking lot onto South 56th Street without signaling. The officers followed the Honda, ran its plates to determine if the vehicle was stolen, [*Court's Footnote: The vehicle was not stolen.*] and then stopped the car for failing to signal when it pulled out of the 7-11.

During the car stop, the officers learned that Brown, a passenger, had an outstanding arrest warrant. In a search pursuant to Brown's arrest, the officers found several pieces of rock cocaine.

The State charged Brown with one count of unlawful possession of a controlled substance, cocaine, a violation of RCW 69.50.401(d). The trial court denied Brown's motion to suppress the evidence, and he was then convicted.

ISSUE AND RULING: Does it violate the traffic code to fail to signal when turning out of a private driveway onto a public roadway? (ANSWER: No; therefore the traffic stop was unlawful, and the cocaine seized in the search incident to the warrant-based arrest of the vehicle's passenger must be excluded.)

Result: Reversal of Pierce County Sheriff's Office conviction of Christopher M. Brown for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Brown argues that the failure to signal when turning out of a private driveway and entering a public roadway is not a violation under RCW 46.61.305 and, therefore, the police had no lawful basis for the traffic stop. The State responds that the turn signal requirement of RCW 46.61.305 was properly applied to the vehicle's turn from the 7-11 parking lot onto South 56th Street.

If an initial traffic stop is unlawful, evidence obtained in a subsequent search is inadmissible as fruit of the poisonous tree.

RCW 46.61.305(1) provides in part: 'No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety nor without giving an appropriate signal.' In contrast, RCW 46.61.365, which applies when a vehicle emerges from a driveway, provides in relevant part:

The driver of a vehicle within a business or residence district emerging from (a) . . . driveway . . . shall stop . . . immediately prior to driving onto a sidewalk . . . and shall yield the right of way to any pedestrian . . . and upon entering the roadway shall yield the right of way to all vehicles approaching on said roadway.

Plainly read, RCW 46.61.305(1) does not require a driver exiting a driveway to signal. The statute applies to a vehicle turning or moving *upon* a roadway, not a vehicle turning or moving *onto* a roadway. Thus, although the State may be correct that 'the majority of the vehicle's turning is done on the highway itself,' RCW 46.61.305(1)'s signal requirement applies only to vehicles that are already 'upon a roadway.' Section (2) of RCW 46.61.305 supports this interpretation by requiring the signal to 'be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.' If RCW 46.61.305 applied to vehicles exiting a driveway, they would be required to signal for at least one hundred feet before the exit. And this may not be possible in many driveway or parking lot exits. We conclude that RCW 46.61.365, which does not require a signal before exiting a driveway, applies to the driver of the car here.

The State cites Hurst v. Struthers, 1 Wn. App. 935 (1970), Niven v. MacDonald, 72 Wn.2d 93 (1967), and McGlothlin v. Cole, 3 Wn. App. 673 (1970), as examples of how courts have applied RCW 46.61.305(1) to vehicle movements that appear to be governed by more specific traffic statutes that do not contain an explicit signal requirement. But in each case, the issue was whether the driver had made a safe turning movement, not whether he had properly signaled.

The State argues, however, that RCW 46.61.185 [*Court's Footnote: RCW 46.61.185 provides: The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.*] which applies to left turns within an intersection, and into an alley, private road, or driveway, does not contain a signal requirement and because courts applied RCW 46.61.305(1) to similar movements in Hurst and Niven, it should apply here, too. We disagree.

Hurst and Niven both involved vehicles already traveling on roadways; while attempting left turns, the cars were involved in accidents with following or passing vehicles. [*Court's Footnote: So did McGlothlin.*] And RCW 46.61.185 concerns the duty to yield the right-of-way to oncoming vehicles. Therefore, the Hurst and Niven courts had no reason to apply RCW 46.61.185 or its predecessors in conjunction with RCW 46.61.305(1). Rather, the drivers in these cases were presumably held to the requirements of RCW 46.61.305(1), not because they were making left turns specifically, but because they were attempting to turn while 'upon a roadway.' See RCW 46.61.305(1).

The State next makes a similar argument in regard to passing movements based on McGlothlin and RCW 46.61.110, 46.61.115, and 46.61.120. [*Court's Footnote: RCW 46.61.110 and .120 concern passing on the left; .115 concerns passing on the right.*] Again, the McGlothlin court likely applied RCW 46.61.305(1) simply because the vehicle was 'upon a roadway.'

We conclude that the initial car stop was unlawful. RCW 46.61.305(1) does not require a vehicle exiting a driveway or parking lot to signal. Accordingly, the trial judge should have suppressed the evidence.

[Some citations omitted]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) “PRETEXT” CHALLENGE ASSERTING POLICE WERE ACTUALLY HOPING TO SEE DRUG EVIDENCE IN PLAIN VIEW DOES NOT SUCCEED BECAUSE POLICE GOT THE WARRANT TO SEARCH FOR A PERSON ON THE PREMISES BASED ON PC TO ARREST AND ON PC THAT THE PERSON WAS ON THE TARGET PREMISES – In State v. Busig, ___ Wn. App. ___, ___ P.3d ___ (Div. III, 2003) (2003 WL 22920451), the Court of Appeals rules that controlling Washington case law precludes a criminal defendant from arguing that a search warrant based on probable cause is invalid based on the underlying motives of police to search for something in addition to the item(s)/person(s) expressly targeted in the search warrant.

In Busig, an officer with the Tri-City Metro Drug Task Force applied for a search warrant to search one of two neighboring residences for Jon Bradley Wahl, who had two outstanding arrest warrants (for DWLS and for possessing methamphetamine). The officer had observed Wahl going freely and regularly into the two residences from Wahl’s motor home parked on the lot containing the two residences.

When officers executed the search warrant to look for Wahl, they found evidence consistent with methamphetamine manufacturing in the two residences. The officers then obtained a second warrant, telephonically, and subsequently searched and seized additional evidence of meth manufacturing under the second warrant. Janice L. Busig, a resident of one of the searched residences, was later charged with and convicted of manufacture of methamphetamine with separate enhancements for school zone and child on the premises. She was also convicted of possession of methamphetamine.

On appeal, defendant Busig did not question that the officer established probable cause in the affidavit as to Wahl’s outstanding arrest warrants and as to his likely presence in the targeted premises. Ms. Busig argued, however, that the real reason that police wanted inside the two residences was to search for evidence of methamphetamine manufacturing.

The Busig Court explains as follows why it rejects the idea that a defendant can argue “pretext” in challenging a search warrant:

. . . [T]he, the warrant is challenged by Ms. Busig as pretextual. She contends [the officer-affiant] withheld information from the affidavit regarding his true motive: to search for evidence of narcotics violations. In Washington, an arrest may not be used as a pretext to conduct a warrantless search for evidence. State v. Ladson, 138 Wn.2d 343 (1999) **Sept 99 LED:05**. Ms. Busig argues that the reasoning of Ladson is applicable to this case. However, Ladson concerned the use by police of narrow exceptions to the warrant requirement as a pretext to search for evidence of other crimes. In State v. Goodin, 67 Wn. App. 623 (1992) **March 93 LED:17**, Division Two held that the purpose of the pretext rule does not apply when there is a preexisting warrant. The officers in Goodin obtained a search warrant to look for a woman who had an outstanding arrest warrant. While executing the search warrant, the officers discovered controlled substances in plain view. The trial court found that the officers really wanted to search the residence for drugs but lacked probable cause. Even so, the trial court did not suppress the evidence. Goodin affirmed, holding that the officers had authority to search and arrest on a valid warrant, regardless of their subjective motives.

Ms. Busig argues that Goodin has been supplanted by the reasoning [about the relevance pretext] in Ladson. However, a recent case from the Supreme Court supports the rule in Goodin. In State v. Lansden, 144 Wn.2d 654 (2001) **Nov 01 LED:03**, officers obtained a warrant to search for code violations. While

executing the warrant, the officers saw evidence in plain view of the manufacture of methamphetamine. The defendant claimed that the warrant was a pretext to search for evidence of drugs. Rejecting the defendant's argument that Ladson controlled, Lansden held that when "a valid warrant is issued, the result reached in Ladson is not applicable, as the search in Ladson was warrantless." Consequently the issue is now settled: "We decline to apply a pretext analysis to searches pursuant to a valid warrant."

[Some citations omitted]

The Court of Appeals also rejects an argument by Ms. Busig that is related to her pretext argument. She argued that the officer-affiant on the initial search warrant affidavit should have stated in the affidavit his suspicions regarding the participation by Wahl and others in methamphetamine manufacturing. The Busig Court explains as follows why it rejects this argument:

Ms. Busig alleges that [the officer-affiant] committed misconduct by withholding his true motive for the search warrant: to search for evidence of methamphetamine manufacture. The operative question is whether inclusion of those facts would have affected the magistrate's finding of probable cause.

To invalidate a warrant for material omissions or misstatements, the accused must show deliberate material omissions or statements made in reckless disregard of the truth. If the affidavit with the false material deleted or omitted material inserted remains sufficient to support a finding of probable cause, the warrant stands. Here, the affidavit of probable cause provided specific information regarding Mr. Wahl's outstanding warrants and observation of his free access to various residences on Kent Street. [The officer-affiant's] suspicion that methamphetamine was being manufactured in those residences and his desire to discover evidence of that activity had no bearing on the issuance of a search warrant to arrest Mr. Wahl on his outstanding warrants. Probable cause existed whether or not this information was included in the affidavit. Consequently, the officer's failure to include this information in the affidavit did not prejudice Ms. Busig and neither dismissal nor suppression of the evidence under CrR 8.3(b) was justified.

[Some citations omitted]

Result: Affirmance of Benton County Superior Court convictions of Janice Louise Busig for: 1) manufacturing of methamphetamine (with school-zone and child-on-premises enhancements); and 2) possession of methamphetamine.

(2) KNOWLEDGE THAT ONE IS IN POSSESSION OF UNLAWFUL FIREARM (HERE, A SHORT-BARRELED SHOTGUN) IS AN ELEMENT OF THE CRIME UNDER RCW 9.41.190; EVIDENCE IN THIS CASE IS SUFFICIENT TO SUPPORT JURY VERDICT OF KNOWLEDGE AS TO SOME CHARGES UNDER RCW 9.41.190 AND RCW 9.41.040 – In State v. Warfield, ___ Wn. App. ___, 80 P.3d 625 (Div. II, 2003), the Court of Appeals holds that the crime of possession of an unlawful firearm, RCW 9.41.190 (here, possession of a short-barreled shotgun), contains an implied element of knowledge of one's possession of the unlawful firearm. Accordingly, the Warfield Court rules that, because the jury was not given an instruction on this element the conviction in this case must be reversed. The Court remands the case for possible retrial on the charge under RCW 9.41.190.

The Warfield Court upholds convictions of defendant on two counts of unlawful possession of a firearm (as a convicted felon) under RCW 9.41.040. On these counts, the jury was properly instructed, per State v. Anderson, 141 Wn.2d 357 (2002) **Oct 00 LED:13** as to the knowledge element of the crime. On appeal, the defendant challenged the sufficiency of the evidence to satisfy the knowledge-of-possession element on the two counts under RCW 9.41.190. In salient part, the Court of Appeals analysis rejecting defendant's challenge to the sufficiency of the evidence is as follows:

The jury had the following evidence to consider in determining whether Warfield knew that he possessed or controlled the firearm:

1. Warfield leased the apartment in which the firearm was found.
2. Detective Adams found the firearm in the master bedroom's closet.
3. Five or six people, excluding Warfield, were in his apartment when Warfield was assaulted, none of whom testified at trial or were interviewed by officers.
4. Warfield's mother, also his apartment manager, testified that she was in the process of evicting Warfield when he was arrested because of all the people coming and going from his apartment and, on the night of her son's arrest, "[t]here would be like five or six people pounding on the door every fifteen to twenty minutes."
5. Warfield's mother testified that she looked inside Warfield's closet on the day of his arrest and saw no shotgun; but she stated that the closet was cluttered and she "didn't dig through anything."
6. Warfield's mother testified, however, that "[a]s far as I know that was the bedroom he occupied. Most of his stuff was in that room."
7. Finally, Warfield testified that, at the time of his arrest, he was splitting time between the apartment and his girlfriend's residence in Elma, though he was not staying at the apartment "very much at all." He stated that he "would stop in maybe twice a week" and that he had two friends who "were there on a full time basis and two that were staying there off and on."

From this evidence, a rational jury could conclude that Warfield knowingly possessed the firearm. Officers found the firearm in Warfield's bedroom closet, which was inside the apartment that Warfield leased and was currently, though possibly sporadically, residing at; and evidence shows that the bedroom and closet were filled with Warfield's personal effects. The State was not required to produce direct evidence of Warfield's knowledge. These circumstances sufficiently establish knowledge, and Warfield's sufficiency challenge therefore fails.

Result: Reversal of Mason County Superior Court conviction of Jerry L. Warfield on one count under RCW 9.41.190 and remand on that count for possible re-trial; affirmance of convictions on two counts under RCW 9.41.040.

LED EDITORIAL NOTES RE CHAPTER 9.41 AND KNOWLEDGE ELEMENT OR LACK THEREOF IN SELECT FIREARMS CRIMES:

RCW 9.41.040 prohibits possession of firearm by person previously convicted of a felony or of certain specific DV-related misdemeanors or by person charged with certain specified felonies pending certain specified court proceedings. Knowledge that one is in possession is an element of the crime – see State v. Anderson, 141 Wn.2d 357 (2000) Oct

00 LED:13. However, knowledge that it is wrong to be in possession is not an element of the crime – see State v. Semakula, 88 Wn. App. 719 (Div. I, 1997) March 98 LED:21; State v. Reed, 84 Wn. App. 379 (Div. II, 1997) April 97 LED:11.

RCW 9.41.190 prohibits possession of certain types of unlawful firearms, including short-barreled shotguns and rifles. The analysis by the Warfield Court (noted above) indicates that the same knowledge standard applies to RCW 9.41.040 as applies to RCW 9.41.190. That is, knowledge that one is in possession is an element of the crime, but knowledge of the illegality of such possession is not an element of the crime.

RCW 9.41.050 prohibits carrying a pistol concealed without a permit. Neither knowledge of possession nor knowledge of illegality is an element of this *strict liability* crime. See City of Seattle v. Briggs, 109 Wn. App. 484 (Div. I, 2001) Aug 02 LED:21.

(3) **EVIDENCE RULE 408 DOES NOT BAR ADMISSION OF EVIDENCE THAT DV DEFENDANT INDEPENDENTLY PAID FOR DAMAGES** – In State v. O'Connor, ___ Wn. App. ___, ___ P.3d ___ (Div. I, 2003) (2003 WL 22994574), the Court of Appeals agrees with the trial court's ruling admitting evidence that the defendant in a domestic violence malicious mischief case paid his ex-girlfriend \$800 to help her replace tires that he was charged with destroying.

On appeal from his felony conviction, defendant argued that Evidence Rule 408 prohibits the admission of compromise evidence such as his \$800 payment to the victim. ER 408 provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Court of Appeals summarizes its ruling in O'Connor as follows:

Courtney O'Connor appeals his conviction for a Class C felony, domestic violence malicious mischief in the second degree, arising from a tire-slashing incident. He contends that the trial court erred by denying a defense motion to exclude compromise evidence under ER 408, thereby permitting the State to present evidence that O'Connor paid the victim \$800 to assist her in replacing her tires, and to argue to the jury that this payment proved that it was O'Connor who slashed the tires. Whether ER 408's prohibition against admitting evidence of compromise of civil claims applies at criminal trials based on the same conduct is an issue of considerable debate around the country, and one that has not heretofore been addressed by Washington appellate courts. Based on the same grounds of public policy favoring the compromise of civil claims that underlie ER 408, i.e., encouraging non-litigious settlement of disputes and reducing courtroom congestion, our Legislature has approved the compromise of certain misdemeanor offenses as between the offender and victim, but has expressly prohibited the compromise of felonies, and of misdemeanors that constitute domestic violence. Accordingly, the offense here at issue was not subject to

compromise because it was both a felony and a domestic violence offense. Comment 408 suggests that the exclusionary rules contained in Title 4 of the Rules of Evidence do not apply in the face of contrary statutory provisions. We conclude that the policies favoring settlement of civil claims that underlie ER 408 do not require exclusion of compromise evidence at trials for criminal offenses that are not themselves subject to compromise. Accordingly, we affirm the trial court's evidentiary ruling.

Result: Affirmance of King County Superior Court conviction of Courtney J. O'Connor for domestic violence malicious mischief in the second degree.

(4) STATE MAY NOT INTRODUCE EVIDENCE IN ITS CASE IN CHIEF THAT DEFENDANT'S SELECTIVELY EXERCISED HIS RIGHT TO SILENCE DURING POLICE INTERROGATION – In *State v. Silva*, ___ Wn. App. ___, ___ P.3d ___ (Div. III, 2003) (2003 WL 22999276), the Court of Appeals reverses a conviction because the trial court allowed an officer to testify regarding a defendant's selective invocation of his right to silence.

The *Silva* Court summarizes its ruling as follows:

With a few narrowly construed exceptions, the State may not use a criminal defendant's post-arrest silence as substantive evidence of guilt. Here, police induced Carlos Silva to begin talking by assuring him that he could assert his right to remain silent at any time without penalty. After Mr. Silva answered a few innocuous background questions, the interviewing detective summarized the incriminating facts surrounding his arrest, inviting a response. Mr. Silva remained silent. At trial, the detective was permitted to relate the question, the incriminating facts, and Mr. Silva's non-response to the jury. This was an impermissible comments on Mr. Silva's exercise of his right to remain silent and a violation of his right to the due process of law. And there has been no showing that it was not prejudicial. We therefore reverse the conviction.

The Court of Appeals analyzes the right-to-silence issue as follows:

A criminal defendant's assertion of his constitutionally protected due process rights is not evidence of guilt. The State may not, therefore, invite a jury to infer that a defendant is more likely guilty because he exercised his constitutional rights. The inference always adds weight to the prosecution's case and is always, therefore, unfairly prejudicial.

It is, accordingly, well settled that due process precludes the State from impeaching a defendant's testimony at trial with the fact that he chose to remain silent following *Miranda* warnings. The decision to remain silent at the time of arrest is 'insolubly ambiguous,' reflecting merely reliance on the right to remain silent rather than a fabricated trial defense. But if the defendant waives the right to remain silent and makes a post-arrest statement, the prosecutor may draw the attention of the jury to the fact that a story told at trial was omitted from that statement. *State v. Belgarde*, 110 Wn.2d 504 (1988). Such selective silence is not inherently ambiguous, but strongly suggests a fabricated defense.

Moreover, the *Miranda* warnings themselves carry the implicit assurance that the defendant's silence will carry no penalty. Telling the jury that the defendant remained silent after being informed of his *Miranda* rights, then, necessarily violates fundamental due process by undermining this implicit assurance.

Here, as part of the State's case in chief, the court admitted both the police recitation of incriminating evidence and Mr. Silva's silence in response to that recitation as substantive evidence of guilt. Moreover, here, Detective Jones

expressly assured Mr. Silva that he would suffer no penalty if he exercised his right to silence, which is precisely what he did.

The State cites to Belgarde as carte blanche authority to use a defendant's later decision to remain silent against him at trial if the defendant can be induced to answer some question before asserting the right. Belgarde addresses the exception outlined in Doyle. When a defendant waives the right to remain silent, makes a self-serving partial statement at the time of his arrest, then presents additional exculpatory testimony at trial, Belgarde allows the State to impeach the defendant with both the statement and the pertinent omissions. This simply permits the State to draw attention to the defendant's failure to incorporate the events he relates at trial into the statement he originally gave to police.

In support of this same proposition, the State cites to a number of other cases with different facts. But the facts here are distinguishable from all the cases cited.

Mr. Silva did not give an incomplete self-serving statement followed by inconsistent trial testimony. The State should not, therefore, have been permitted to fill in the blanks in his responses. Mr. Silva answered innocuous identification questions, then declined to incriminate himself. Moreover, Mr. Silva's silence was offered in the State's case in chief as "confession by silence or as substantive evidence of guilt." No case cited permits a defendant's post-arrest silence to be introduced as substantive evidence of guilt in the State's case in chief.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site 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 from 1939 to the present. 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 the Rules of Evidence and the 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/rules/>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/>]. This web site 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 website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>].

Easy 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 January 2003, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "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 WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov/>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

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