



Law Enforcement

June 2004

Digest

HONOR ROLL

568th Basic Law Enforcement Academy – December 3, 2003 through April 13, 2004

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Best Academic: Jeffrey D. Menge – Kitsap County Sheriff's Office
Best Firearms: Benjamin Kokjer – Langley Police Department
Tac Officer: Corporal Donna Rorvik – Kirkland Police Department

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2004 WASHINGTON LEGISLATIVE UPDATE – PART TWO

LED EDITORS' INTRODUCTORY NOTE: This is Part Two of a two-part compilation of 2004 Washington State legislative enactments of interest to law enforcement. At the end of Part Two is an Index of the 2004 Washington Legislative Update.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for providing us with helpful information.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits. We will include in next month's LED a cumulative index of enactments covered in the first two parts of the 2004 legislative update.

Text of the 2004 legislation is available on the Internet, chapter by chapter, at [http://www.leg.wa.gov/pub/billinfo/2003-04/chapter_to_bill_table.htm]. We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED are the views of the editors and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

INCREASING SCHOOLS', PARENTS' ACCESS TO INFORMATION ON DISCIPLINARY ACTIONS AGAINST SCHOOL EMPLOYEES

CHAPTER 29 (E2SSB 5533)

Effective Date: June 10, 2004

The Final Bill Report describes as follows this enactment adding new sections to several chapters in Title 28A RCW:

Certificated and classified school district employees who apply to another school district must sign a release authorizing the disclosure of any sexual misconduct information, including any related documents in their personnel files. Hiring school districts must request from all of the applicant's previous school district employers any information about that employee's sexual misconduct including related documents. The information must be provided within 20 days of receiving the request.

School districts that provide the required information are provided immunity when the information is provided in good faith. Sexual misconduct information is only used to evaluate the applicant's qualifications for the position for which he or she has applied and the information is not disclosed to anyone not directly involved in the evaluation process. A person who wrongfully discloses information is guilty of a misdemeanor.

School districts that are considering applicants for certificated positions must request verification of the applicant's certification status and sexual misconduct information in the applicant's files from the Office of the Superintendent of Public Instruction (OSPI).

Applicants may be employed on a conditional basis pending review of any sexual misconduct information. School districts must not hire an applicant who refuses to sign the release.

Starting on September 1, 2004, school districts are prohibited from entering into employment contracts or severance agreements which call for sealing records of verbal or physical abuse or sexual misconduct. This prohibition does not apply to existing contracts or agreements.

At the conclusion of a district's investigation, school personnel are allowed to review their personnel, investigative, or other files relating to sexual misconduct and attach rebuttals as the employee deems necessary. These rebuttal documents must also be disclosed.

The State Board of Education defines "verbal abuse," "physical abuse" and "sexual misconduct" for application to both classified and certificated employees for purposes of this bill. The definition adopted by the board must include a requirement that the school district make a determination that there is sufficient information to conclude that the abuse or misconduct occurred and that the employee is leaving due to that misconduct.

Districts must provide parents with information regarding their rights under the Washington Public Disclosure Act to request employee records regarding disciplinary action.

OSPI must report all types of disciplinary action taken to the national database to the extent that information is accepted.

If there has been a report of sexual misconduct, the school district must notify the parents of the student who is the victim of that misconduct within 48 hours of receiving the report.

REQUIRING THAT OFFICE OF SUPERINTENDENT OF PUBLIC INSTRUCTION (OSPI) TIMELY COMPLETE INVESTIGATIONS OF SEXUAL MISCONDUCT ALLEGATIONS AGAINST CERTIFICATED EMPLOYEES

Chapter 134 (SSB 6171)

Effective Date: June 10, 2004

Amends RCW 28A.410.095 and RCW 28A.410.090. Under the amendments, OSPI must complete an investigation of a certificated employee for sexual misconduct towards a child within one year of the initiation of the investigation unless there is an ongoing law enforcement investigation. If OSPI does not complete the investigation within the allowed time, OSPI is subject to a civil penalty of \$50 per day for each day beyond the allowed time. Written notice of the final disposition of any complaint must be provided by OSPI to the person who filed the complaint. Parents and community members are authorized to file complaints alleging physical abuse or sexual misconduct directly with OSPI, and OSPI is given the authority to initiate an investigation based solely on the complaint from a parent or community member. Prior to conducting an investigation, OSPI must verify that the incident has been reported to the proper law enforcement agency as required by the mandatory child abuse reporting law at RCW 26.44.130.

REQUIRING THAT SCHOOL EMPLOYEES REPORT TO SCHOOL ADMINISTRATOR SEXUAL ABUSE OF STUDENTS BY OTHER SCHOOL EMPLOYEES; ALSO REQUIRING TRAINING OF SCHOOL EMPLOYEES AS TO RELATED REPORTING REQUIREMENTS UNDER STATE LAW

Chapters 135 (2SSB 6220)

Effective Date: June 10, 2004

Adds a new section to RCW 28A.410. When school employees have reasonable cause to believe that a student has been a victim of physical abuse or sexual misconduct committed by another school employee, the employees must report the abuse or misconduct to the school administrator. The school administrator must advise law enforcement if there is reasonable cause to believe that misconduct or abuse has occurred that is subject to the existing mandatory child abuse reporting requirements of RCW 26.44.030. During the process of determining whether a report must be filed, the school administrator must contact all parties involved in the complaint. Within existing training programs and related resources, school employees must receive training regarding their reporting obligations under State law in their orientation training when hired and then every three years.

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JUNE 2004 LEGISLATIVE UPDATE (PART TWO)

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

FEDERAL BORDER AGENTS DO NOT NEED REASONABLE SUSPICION TO JUSTIFY REMOVING AND DISASSEMBLING CAR'S GAS TANK – In U.S. v. Flores-Montano, 124 S.Ct. 1582 (2004), the U.S. Supreme Court unanimously holds that U.S. border agents do not need any level of suspicion in order to justify removing and disassembling the gas tank of a car that is trying to cross an international border into the United States.

At the international border in southern California, customs officials seized 37 kilograms of marijuana from the gas tank of Manuel Flores-Montano by removing and disassembling the tank. After Flores-Montano was indicted on federal drug charges, he moved to suppress the drugs recovered from the gas tank, relying on a Ninth Circuit panel decision holding that a gas tank's removal requires reasonable suspicion under the Fourth Amendment. The District Court granted the motion, and the Ninth Circuit affirmed.

Reversing the suppression decision of the Ninth Circuit, the U.S. Supreme Court begins its analysis by noting that the Government's interest in preventing the entry of unwanted persons and effects is at its peak at the international border. Congress has always granted the Executive unlimited authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. Defendant's assertion that he has a privacy interest in his fuel tank, and that the suspicionless disassembly of his tank is an invasion of his privacy, is rejected, as the privacy expectation is less at the border than it is in the interior, and the Supreme Court has long recognized that automobiles seeking entry into this country may be searched.

Finally, the Supreme Court explains that while the Fourth Amendment "protects property as well as privacy," the interference with a motorist's possessory interest in his gas tank is justified by the Government's paramount interest in protecting the border. Thus, the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank, the Supreme Court rules.

Result: Reversal of Ninth Circuit decision that had affirmed a district court suppression ruling; case remanded to district court for trial of Manuel Flores-Montano.

WASHINGTON STATE SUPREME COURT

NO SEARCH, NO UNLAWFUL SEIZURE – INSTRUCTOR’S SHOW-AND-TELL WITH RIFLE THAT HE HAD MODIFIED INTO A MACHINE GUN PRECLUDES PRIVACY ARGUMENT AS TO THE FIREARM; ALSO, INVESTIGATORS’ SEIZURE OF THE FIREARM HELD JUSTIFIED UNDER “EXIGENT CIRCUMSTANCES” EXCEPTION

State v. Carter, 151 Wn.2d 118 (2004)

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

Bruce Jackson and Frank Clark are criminal investigators with the Pierce County prosecutor's office. They are not considered law enforcement officers, nor do they have law enforcement powers. The defendant, Marcus Carter, was the chief instructor for Kitsap Rifle and Revolver Club and was certified by the Washington State Criminal Justice Training Commission to teach firearms training.

On May 15, 1999, Jackson and Clark attended a National Rifle Association certified firearms instructor class in Kitsap County taught by Carter. Jackson and Clark were attending the class for personal reasons in order to become certified as instructors for the junior rifle program at the Tacoma Rifle and Revolver Club.

Carter began class by asking each student to prepare an introduction of a fellow student. Accordingly, another student introduced Jackson, informing the group and Carter that Jackson was a chief criminal investigator for the Pierce County prosecutor's office. Sometime later, Carter brought out various firearms and set them on tables before the class. He asked the students to familiarize themselves with the firearm of their choice and prepare a demonstration during which they would describe the proper handling and safety functions of the firearm. Among the firearms was an AR-15 owned by Carter. Jackson was very familiar with the AR-15 and chose that weapon to demonstrate to the class.

The AR-15 rifle is the semiautomatic, civilian version of the automatic, military M-16 rifle. An automatic weapon will continue to fire as long as the trigger is held, and is commonly known as a machine gun. It is generally illegal to own an M-16. RCW 9.41.190.

Jackson noticed that the safety lever on the AR-15 rotated into a position that corresponds to the automatic fire selection on an M-16. The AR-15 safety lever cannot rotate into this position without having been modified. Jackson also noticed that the lever had the silver color and the finish of an M-16, rather than the traditional charcoal-black color of an AR-15. Jackson suspected that the AR-15 had been modified to allow it to fire automatically. He operated the firing mechanism and determined the weapon was capable of automatic fire. Jackson showed the gun to Clark, who concurred with Jackson's observations.

Jackson then opened the gun by removing a pin that allows the gun to pivot open. Jackson noticed immediately that a small aluminum block called an autosear had been added. An autosear, which prevents an automatic gun from jamming, is not available for purchase. Jackson asked Carter if the gun had been modified and Carter admitted that it had. As Jackson began to close the gun, Carter removed the autosear from the gun and put it in his pocket.

After class when the other students had left, Jackson and Clark approached Carter about the rifle. Carter admitted that he had put M-16 parts in the rifle to replace those AR-15 parts that were designed for semiautomatic operation, specifically identifying the bolt carrier, hammer, selector switch, and autosear. Carter admitted that the rifle could fire in fully automatic mode. With the gun still in their possession, Jackson and Clark told Carter that it was a felony to own such a weapon.

Carter then denied that the gun was illegal and insisted that the gun would not fire in a full-automatic mode. Carter wanted to demonstrate it to Jackson and Clark if they would let him take it to the range with a loaded magazine. Carter went to his car to collect some ammunition. Carter then engaged in what Jackson and Clark described as furtive movements. Carter began rummaging through items in the backseat of his car, and then returned to the classroom, and called out to another man that he needed a punch, a straight steel pin that would disable the autosear. Jackson told Carter that he would not be allowed to destroy or modify the autosear.

Jackson and Clark testified to feeling that the situation was quickly getting out of control and that Carter was very agitated and antagonistic. Carter grabbed the gun from Clark's hands and walked briskly back to his car. Jackson and Clark noticed a loaded 30-round magazine for the rifle in Carter's rear pocket. As Carter knelt on the front seat in his car and fumbled with metal objects on the floor, Jackson saw that Carter had a loaded pistol under his shirt. Jackson told Carter that he felt Carter was posing a potentially lethal hazard to them. Jackson told Carter to turn around and bring his hands into view, which Carter failed to do. Jackson and Clark then gave Carter a choice: either he give them the rifle and autosear and they would give him a receipt for it and submit it for testing to the Washington State Patrol Crime Lab, or they would call the police. Carter delayed, so Clark placed a 911 call and asked that a deputy be sent. When Carter discovered the call had been made, he relinquished the rifle and autosear, and Jackson and Clark gave Carter a receipt. A deputy arrived, who asked Jackson and Clark to maintain custody of the AR-15. Jackson and Clark filed a report on the incident.

Carter was charged with one count of possessing a machine gun in violation of RCW 9.41.190(1) and .010(7). Carter moved to suppress the rifle, contending that the search and seizure of the rifle were unlawfully conducted without a warrant. The trial court agreed and dismissed the charges against Carter with prejudice.

ISSUES AND RULINGS: 1) Were the off-duty investigators "state agents" for purposes of constitutional search-and-seizure analysis? (ANSWER: The Court avoids answering this question); 2) Did Carter have an expectation of privacy under the Washington or U.S. constitution in the exterior or interior of the rifle/machine gun after he displayed the firearm to the class and invited the class members to inspect the firearm? (ANSWER: No, rules an 8-1 majority); 3) Was the investigators' seizure of the firearm justified under the exigent circumstances exception to the search warrant requirement? (ANSWER: Yes)

Result: Reversal of unpublished Court of Appeals' decision that had affirmed the decision of Kitsap County Superior Court suppressing the evidence and dismissing the charge; case remanded to Superior Court for trial under reinstated firearms charge against Marcus A. Carter.

ANALYSIS: (Excerpted from Supreme Court opinion)

1) Privacy protection

It is not necessary for us to review the trial courts finding of state action because even if Jackson and Clark were state actors, their actions in examining and seizing the gun did not require a warrant. Therefore, we turn to the question of whether Carter had a recognizable privacy interest in the AR 15 he provided to the class.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision protects a person's home and private affairs from warrantless searches. An unlawful search occurs when the State has unreasonably intruded into a person's private affairs. A search must be conducted pursuant to a warrant, or else meet one of the exceptions to the warrant requirement. The Court of Appeals concluded that Carter had a privacy interest in the AR-15, and the viewing of the gun's interior without a warrant was an unlawful search. We disagree.

Article I, section 7 recognizes privacy interests that Washington citizens have held, and should be entitled to hold, free from governmental intrusion. Thus, the first step is to determine whether the claimed privacy interest is one that has been recognized in our state. We find no historical precedent establishing a privacy interest in a gun itself. Furthermore, we do not find a basis for recognizing a privacy interest in an object which has voluntarily been placed in open view of the public and which the public has been encouraged to handle.

Generally, one does not have a privacy interest in what is voluntarily exposed to the public. No search occurs, and the protections of article I, section 7 are not implicated, when a law enforcement officer is able to detect something by using one or more of his senses while lawfully present at a vantage point. The protections of article I, section 7 are triggered only when a person's private affairs are disturbed or the person's home invaded.

In this case, Carter cannot claim his private affairs were disturbed when he voluntarily placed the gun on a table in open view of the class and then invited the class members to handle and explore the gun. Carter did nothing to exhibit a privacy interest in the AR-15. In fact, he did just the opposite. He not only put the rifle in open view of the class, he also encouraged the class to pick it up, examine it, and perform safety checks on it. Carter cannot now claim an expectation that either the exterior or the interior of the rifle would remain private. The contraband nature of the gun was immediately apparent from its exterior and firing capability, and was confirmed by viewing the interior of the gun, which was easily accessible during the examination Carter asked the students to perform. Therefore, we hold that one does not have a privacy interest in a gun or its interior mechanisms, when placed in open view of the public and members of the public have been invited to handle it. Accordingly, no "search" occurred for purposes of article I, section 7 when Jackson examined the AR-15, and Jackson's warrantless examination was lawful.

The Fourth Amendment to the federal constitution also provides protection against warrantless searches and seizures. A "search" within the protection of the Fourth Amendment requires that the person seeking the protection of the Fourth Amendment have a justifiable, reasonable, or legitimate expectation of

privacy in the thing examined. In addition, the defendant must establish his subjective expectation of privacy. A subjective expectation of privacy is unlikely to be found where the person asserting the right does not solely control the area or thing being searched. The Fourth Amendment does not protect what a person knowingly exposes to the public.

The Court of Appeals relied on Kealey, a Fourth Amendment case holding that a person has a reasonable expectation of privacy in the interior of a purse that was inadvertently left in a store. State v. Kealey, 80 Wn. App. 162 (Div. II, 1995) **May 96 LED:05**. When the store clerk looked inside the purse, she found drugs. The Kealey court's conclusion was based on the United States Supreme Court's view that "[p]urses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.."

However, a gun is not like a purse, briefcase, or luggage. A gun is not something in which belongings are stored or things are kept from public view. While certain items, like personal repositories, may retain their private character even when in a public place, most things lose any expectation of privacy when placed in open, public view. Thus, Kealey does not support the contention that a search subject to the protections of the Fourth Amendment occurred when Jackson examined the AR 15 that had been placed in public view.

Therefore, we hold that under article I, section 7 of the state constitution and under the Fourth Amendment to the federal constitution, there is no privacy interest in a firearm, or the interior of a firearm, which has been placed in open view. Jackson's and Clark's examination of Carter's rifle was not a search subject to the warrant requirement.

2) Exigent circumstances

Again, without deciding whether Jackson and Clark were state actors, we also hold that Jackson and Clark did not need a warrant to seize Carter's gun because the warrantless seizure of Carter's weapon was appropriate under the exigent circumstances exception to the warrant requirement.

A warrantless search qualifies for an exception to the warrant requirement if delay will probably result in the destruction of evidence or endanger the safety of officers or third persons. Whether exigent circumstances exist must be determined by the totality of the circumstances.

Here Carter was informed during introductions that Jackson was a chief criminal investigator for the Pierce County prosecutor's office. Carter told Jackson to inspect and do a safety-check of a firearm. Jackson inspected Carter's AR-15 and noticed that the silver finish on the selector switch did not match the charcoal-black finish on the body of the AR-15 rifle. Jackson knew from experience that the M-16 is usually silver, and he suspected that a selector switch from an M-16 had been illegally attached to the AR-15. Jackson also observed that the selector switch rotated around, past both the safety and semiautomatic firing positions, into a position that corresponds to the M-16 fully automatic firing position. Indeed, when Jackson operated the firing mechanism as part of the safety check, he noted that the rifle was capable of firing in the fully automatic position. Moreover, Carter admitted he had altered the rifle to function in fully automatic mode. Under these circumstances, Jackson and Clark had probable cause to suspect that the AR-15 was illegally modified.

In addition, Jackson and Clark were concerned for their safety and feared the destruction of the evidence. Carter had removed the autosear from the rifle and put it in his pocket. Carter tried to disable the sear with a punch. Carter, who had a loaded pistol on him, became antagonistic with Jackson and Clark, and they reasonably felt the situation was getting out of control. Under these circumstances, the seizure of Carter's rifle fell within the exigent circumstances exception to the warrant requirement.

[Some citations omitted]

DISSENT BY JUSTICE SANDERS

Justice Sanders writes a dissenting opinion, arguing in vain that the Court should have held that the investigators violated Carter's privacy interests by disassembling the firearm.

CIVIL LIABILITY – WHERE PERSON IS JAILED AFTER ARREST ON WARRANT, JAIL PERSONNEL MUST RELEASE DETAINEE AT POINT WHEN THEY SHOULD KNOW DETAINEE IS NOT PERSON NAMED ON WARRANT

Stalter v. Washington, Pierce County, and others, 151 Wn.2d 148 (2004)

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

Stalter

On August 9, 1997, Kevin Lee Stalter was arrested by a Washington State Patrol trooper under a Pierce County warrant that had been issued for the arrest of one Robert John Stalter. Although the warrant did not set forth any aliases for the person named in the warrant, a printout from a state patrol dispatcher listed the name "Kevin Lee Stalter" as an alias for Robert John Stalter. Kevin Stalter indicated to the arresting trooper that he was not Robert John Stalter but explained that he had a brother with that name who had used the alias "Kevin" in the past. Kevin Stalter's physical appearance differed from the individual described in the warrant by 27 pounds, four inches in height, and eye color. Furthermore, Kevin Stalter's birth date differed by over three years from the birth date listed on the warrant for Robert John Stalter.

After his arrest, Kevin Stalter was brought to the Pierce County Jail for booking. While at the jail, Stalter was adamant that he had been misidentified. Consequently, the booking officer asked a senior officer for advice on how to deal with the situation. Stalter was then booked under the name Kevin Lee Stalter, rather than Robert John Stalter.

At the time of Kevin Stalter's booking there was a file relating to Robert John Stalter at the jail. This file contained Robert John Stalter's photograph and information regarding the subject's birth date, height, weight, hair color, eye color, and scars. The jail booking officer was provided with a copy of the warrant under which the arrest of Kevin Stalter had been affected, and it referenced Robert John Stalter's file. Nevertheless, the booking officer did not retrieve or request the file because he was not aware of any policy requiring him to do so. The jail did, however, have a policy and procedure manual that required booking officers to obtain an extensive list of information from the individual being admitted to jail in order to make "a positive identification." [*Court's footnote: The manual*

provides that "[i]n order to provide for a positive identification of the person being admitted, the following information will be obtained at intake/booking:" (1) name and aliases; (2) current address; (3) date, duration of confinement, and a copy of the court order or other legal basis for commitment; (4) name, title and signature of delivering officer; (5) charges; (6) court order or remand order number for juveniles; (7) sex; (8) age; (9) birth date; (10) place of birth; (11) race; (12) employment; (13) health status; (14) emergency contact; (15) telephone calls made by arrestee at time of admission; (16) social security number; (17) notation of all cash and other property; (18) other information concerning special custody requirements, service needs, or other identifying information such as a birthmark or tattoo.]

Two days after being booked into the jail, Stalter was brought before the Pierce County Superior Court for his arraignment. At that time, Robert John Stalter's probation officer informed the court that the wrong man was in custody. Kevin Stalter was then released from jail.

Kevin Stalter thereafter brought suit against Pierce County and others in Pierce County Superior Court for, inter alia, false imprisonment and negligence. Pierce County then moved for a summary judgment dismissing Stalter's complaint. The trial court granted the county's motion, reasoning that the jail had no duty to investigate Kevin Stalter's claim of misidentification because any such duty resided with the arresting officer.

Brooks

On October 9, 1998, David W. Brooks, Jr. was stopped for a traffic violation by a Fife police officer. When the officer was informed by a dispatcher that there was a North Carolina warrant for the arrest of a David W. Brooks, Jr., he placed Brooks under arrest. The officer was advised that the North Carolina warrant described an individual remarkably similar in appearance to the person before him in terms of name, race, and date of birth. Despite Brooks's assertion that he had never been to North Carolina, the officer was not deterred from arresting him. At the Pierce County Jail, Brooks was booked notwithstanding his claims of misidentification.

Brooks appeared in Pierce County Superior Court on October 12, 1998. He did not, however, inform the court at that time that there had been a misidentification. Apparently, he had advised his appointed counsel prior to the hearing that he was not the individual named in the warrant, but the attorney failed to call this to the attention of the court, and Brooks was not provided with an opportunity to speak directly to the court. The trial court set an extradition hearing for November 12, 1998, and ordered Brooks held without bail until that date.

Although Pierce County received a facsimile copy of the warrant on the same day that Brooks was arrested, Pierce County contacted the North Carolina authorities on October 14, 1998, to request another copy of the warrant and a photograph and fingerprints of the person named in the warrant. Pierce County received a copy of the fingerprints on November 3, 1998. A technician, who reviewed the fingerprints that same day, concluded that they were not Brooks's fingerprints. Brooks was then released from custody.

After his release, Brooks filed a complaint against Pierce County in Pierce County Superior Court alleging false imprisonment, negligence, and a violation of 42 U.S.C. § 1983. Subsequently, Pierce County moved for summary judgment. In response, Brooks proffered the same sections of the jail's policy and procedure manual as had Stalter. Brooks also offered the deposition testimony of a county official who indicated that there is no policy or procedure to govern a situation where there is a question as to a person's identity. Another county official stated in a deposition that if a detainee's fingerprints do not match a file in their database, then no other action is taken to identify the detainee. *[Court's footnote: The Pierce County database only includes fingerprints obtained from individuals who have been fingerprinted by the Tacoma Police Department or the Pierce County Sheriff's Department.]*

The trial court granted Pierce County's motion, concluding that there was no evidence of a constitutional violation, and that any possible liability for the county ended when Brooks was brought before a judge because he was thereafter held pursuant to a court order. Brooks appealed that decision to Division Two of the Court of Appeals, which later consolidated his case and Stalter's case.

At the Court of Appeals

The Court of Appeals reversed the orders granting summary judgment to Pierce County on Stalter's and Brooks's negligence and false imprisonment claims. Stalter v. State, 113 Wn. App. 1 (2002) **Oct 02 LED:13**. It did, however, affirm the dismissal of Brooks's 42 U.S.C. § 1983 claim. Fundamental to its decision [on the negligence and false imprisonment claims] was its reasoning "that once jail management is on notice that it may be holding a detainee under authority of a warrant erroneously, it has a duty, at a minimum, to investigate further."

ISSUES AND RULINGS: 1) Does mere notice to jail personnel that they may be holding the wrong individual impose a civil liability duty on them to investigate claims of misidentification? (ANSWER: No); 2) Do jail personnel have a civil liability duty to take steps to promptly release a detainee once they know or should know that the person they are holding is not the person named in the arrest warrant? (ANSWER: Yes)

Result: Affirmance in part and reversal in part of Court of Appeals opinion (see **Oct 02 LED:13**); reversal of Pierce County Superior Court summary judgment order for Pierce County in lawsuit by Kevin L. Stalter; affirmance of Pierce County Superior Court summary judgment order for Pierce County in lawsuit by David Brooks.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

Pierce County contends that the Court of Appeals erred in reversing the dismissal of both plaintiffs negligence and false imprisonment claims, asserting that imposing a duty on jailers to investigate particularly persistent claims of misidentification would place an unreasonable burden on jail management. Stalter and Brooks contend that it is only reasonable to require jail officials to know who it is that they are detaining, and that imposition of such a duty would not be burdensome, particularly considering that the written policies of the Pierce County Jail require "a positive identification" of an individual during booking.

The elements of negligence are duty, breach, causation, and injury. It is well established that a jail is liable for false imprisonment if it holds an individual for an unreasonable time after it is under a duty to release the individual. Tufte v. City of Tacoma, 71 Wn.2d 866 (1967). Therefore, Stalters and Brookss claims of

negligence and false imprisonment each turn on the existence of a duty on the part of the county. [W]hether a particular class of defendants owes a duty to a particular class of plaintiffs is a question of law and depends on mixed considerations of logic, common sense, justice, policy, and precedent.

Stalter and Brooks each point to the written policies and procedures of the Pierce County Jail as support for their contention that the county's jailers were under a duty to positively identify them as the persons named in the warrants upon which their arrests were made. Pierce County responds that these policies only serve to identify the person while in custody so as not to confuse the arrestee with others in the jail population. The Court of Appeals agreed with the county on this issue, concluding that Stalter and Brooks failed to show that the County's manual requires booking officers to verify the detainees identity.

In our view, the jail's policies are ambiguous in that they do not clearly require booking officers to make a determination of every detainees actual identity. Ambiguity exists when language is subject to more than one reasonable interpretation. The county explains that requiring a positive identification only obligates the jail personnel to differentiate between detainees so that one detainee is not confused with another. The county's explanation is as reasonable as the contention of Stalter and Brooks that these policies require the jail to ascertain every inmates true identity. Furthermore, Stalter and Brooks fail to explain how an ambiguous policy is sufficient to create a legal duty. These policies are, therefore, insufficient to support a duty on jail personnel to establish every detainees true identity.

Stalter and Brooks argue, additionally, that case law supports the imposition of a duty on the jail to investigate the identity of detainees. Under Washington case law, jailers have a duty to take steps to release a detainee once they know or should know that confinement of the detainee is unwarranted. Tufte, 71 Wn.2d at 870. In Tufte, the facts were that the plaintiff, Paul Tufte, was arrested because Tacoma police officers believed he was driving while intoxicated. The record showed, however, that Tufte was a diabetic and that he was carrying a diabetic identification card, sugar lumps, and a bottle of saccharine tablets when he was booked into jail. During the time Tufte was confined, his wife and physician called the Tacoma Police Department to inform it that Tufte was a diabetic who was missing and probably suffering from insulin shock. These calls did not gain Tufte's release. Approximately 12 hours after his arrest, Tufte regained consciousness and managed to bail himself out of jail. Tufte then brought suit for damages against the City of Tacoma for false imprisonment and wrongful arrest, and ultimately obtained a judgment.

On appeal to this court, we held that [i]ntentionally to hold another [person] in confinement for being drunk when one knows or should know that he is not drunk, is to confine him unjustifiably. Tufte, 71 Wn.2d at 870. We determined that even though the initial arrest of Tufte was justified, once jail personnel knew or should have known that he was not drunk, based on information provided to them, they were under a duty to release [Tufte] from confinement.

In resolving the case before us, we must delicately balance the need for effective law enforcement against the obvious societal interest in avoiding the incarceration of persons who should not be incarcerated. Although Tufte was not a misidentification case, it does provide guidance concerning the duties that jailers owe to persons being detained pursuant to an arrest warrant.

The Court of Appeals correctly summarized the holding in Tufte as prohibiting jail authorities from ignoring evidence which establishes that continued confinement of an individual is unjustified. The Court of Appeals went beyond Tufte, however, to impose an affirmative duty on jails to investigate whenever jail personnel are put on notice that they may be holding a person under a warrant erroneously. In our view, the imposition of such an affirmative obligation is not warranted, and we, therefore, decline to put our imprimatur on the duty imposed by the Court of Appeals. Rather, we affirm the essential holding of Tufte to the extent that jail personnel have the duty to take steps to promptly release a detainee once they know or should know, based on information presented to them, that there is no justification for holding the individual.

Applying that duty to the present case, we are satisfied that Stalter presented sufficient evidence to create a question of material fact as to whether this duty was breached by Pierce County. Along with his adamant protests of misidentification, Stalter's physical characteristics varied significantly from the characteristics of the individual described in the warrant. As noted above, Stalter's name, weight, height, eye color, and birth date differed from that of the individual described in the warrant. Although these discrepancies were brought to the attention of the jail personnel, they took no steps toward releasing Stalter. In our view, these facts are sufficient to present a jury question as to whether the jail knew or should have known that it was detaining an individual who was the same individual named in the arrest warrant.

The Brooks facts do not, however, justify a trial. Significantly, Brooks matched the description in the warrant completely. In light of that, his protests of misidentification were not sufficient to establish that the jailers knew or should have known that there was a misidentification. Because Brooks failed to provide the jail personnel with sufficient evidence of a misidentification and Stalter was released immediately after his first court appearance, we believe it is unnecessary to discuss the effect a court hearing might have on a jail's liability for erroneously holding an individual.

DISSENT/CONCURRENCE BY JUSTICES CHAMBERS AND SANDERS:

Justice Chambers writes a separate opinion joined by Justice Sanders. The opinion argues that the Court should have imposed greater duties on jails in some respects.

LED EDITORIAL NOTE RE ISSUE UNDER FEDERAL CIVIL RIGHTS ACT:

The Stalter Court also rejects a federal § 1983 claim by Brooks under analysis that we do not address in this LED entry.

INFANCY DEFENSE – SUBSTANTIAL EVIDENCE HELD TO SUPPORT SUPERIOR COURT'S RULING THAT 11-YEAR-OLD SEX OFFENDER LACKED CRIMINAL CAPACITY

State v. Ramer, 151 Wn.2d 106 (2004)

Facts and Proceedings below:

Following an investigation, 11-year-old Andrew Ramer was arrested and charged for having sex with a 7-year-old acquaintance. The Washington Supreme Court describes as follows the Superior Court proceedings below that followed:

Because of Ramer's age, a hearing to determine his capacity to commit first degree rape of a child was held before Superior Court Commissioner Scott Nielson. [A detective] testified about her conversation with Ramer at the police station. The defense was allowed to call two witnesses out of order: Dr. Brett Trowbridge, Ph .D., J.D., a forensic psychologist, and Peg Cain, M.A., a mental health specialist at St. Peter's Hospital psychiatric unit, who also performs juvenile and adult "safe to be at large" evaluations for Thurston County. Both witnesses for the defense had evaluated Ramer and had prepared written reports.

Dr. Trowbridge based his opinion upon his evaluation of Ramer. He testified that, in his opinion, Ramer did not understand the act of having sexual contact with a much younger child. He also testified that he believed Ramer did not understand that it was wrong, especially if the other child enjoys and voluntarily participates in the act. Specifically, Dr. Trowbridge opined:

Q. Based on your evaluation and investigation, it's your conclusion that [Ramer] does not possess sufficient information or ability to come to the understanding of what rape of a child meant in terms of his committing the act in this instance?

A. Yes. Because at that time of the alleged offense I don't think he did have that understanding.

He did not understand if something felt good why it was wrong.

[H]e thought if the child consented that that made it not wrong.

Similarly, Cain testified that Ramer had "no concept of how serious the charge was." She also testified that Ramer asked her why sexual contact with ZPG was considered rape when it felt good, ZPG wanted to participate, and ZPG "really liked it." Cain also testified that Ramer's attitude and demeanor led her to believe that he did not understand that sexual contact was inappropriate behavior and that he did not know that what he had been doing with ZPG was wrong.

The State then called Thomas Nore, M.S.W., a juvenile court probation counselor with 26 years of experience. Nore did not evaluate Ramer, nor did he take notes of his conversations with Ramer. He based his opinion on the written reports of Dr. Trowbridge and Cain and his conversations with Ramer while transporting him to and from a psychosexual evaluation by Trudy Howe and on other occasions. Nore testified that he believed Ramer understood that his conduct was wrong. Nore also testified that Ramer had been told by his parents that "sexual contact with each other in the home or anyone else" was wrong. Nore opined that Ramer "had knowledge and experience far beyond any 11 year old I'd ever met. In fact far beyond some 16-, 17-year- olds." It was Nore's opinion that Ramer knew the serious consequences of sexual contact and had the capacity to commit the crime.

The [Superior Court] commissioner concluded that Ramer understood his conduct was wrong and "understood the act of Rape of a Child first degree." Ramer moved for revision in the superior court before the Honorable Christine Pomeroy. Judge Pomeroy read the record and heard arguments before finding Ramer lacked capacity to commit the crime. Judge Pomeroy found that Ramer

was "a highly sexualized young person, who clearly was confused about appropriate sexual behaviors and could not understand the prohibitions on sexual behavior with other children." The State appealed the superior court's finding. Finding Ramer did have capacity to commit the crime, the Court of Appeals reversed. Ramer sought and we granted discretionary review.

ISSUE AND RULING: Does substantial evidence in the record support the superior court's determination that Ramer lacked capacity to commit the crime of rape of a child in the first degree? (ANSWER: Yes, rules a unanimous Supreme Court)

Result: Reversal of unpublished Court of Appeals decision and reinstatement of Thurston County Superior Court determination that Andrew Ramer lacked criminal capacity.

ANALYSIS: (Excerpted from Supreme Court opinion)

By statute, a child "under 12 years of age is presumed incapable of committing any crime." State v. Erika D.W., 85 Wn. App. 601 (1997); RCW 9A.04.050. The statute provides, in part:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

RCW 9A.04.050. The statute codifies what is known as "the infancy defense." The purpose of the infancy defense is "to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior."

In order to overcome the presumption of incapacity, the State must provide clear and convincing evidence that the child had sufficient capacity to understand the act and to know that it was wrong. A capacity determination is fact-specific and must be in reference to the specific act charged. It is not necessary, however, for the child to understand that the act would be punishable under the law. The focus is on "whether the child appreciated the quality of his or her acts at the time the act was committed," rather than whether the child understood the legal consequences of the act.

We have identified seven factors to consider in determining capacity: (1) the nature of the crime, (2) the child's age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told the victim (if any) not to tell, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could lead to detention. "Also relevant is testimony from those acquainted with the child and the testimony of experts."

Capacity requires the actor to understand the nature or illegality of his acts. In other words, he must be able to entertain criminal intent. A "sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient," although actual knowledge of the legal consequences is not necessary.

Washington courts have held that when a juvenile is charged with a sex crime, the State carries a greater burden of proving capacity, and must present a higher degree of proof that the child understood the illegality of the act.

Because the superior court found, consistent with the statutory presumption, that Ramer lacked capacity, we review this record to determine whether there was evidence from which a rational trier of fact could find Ramer incapable of first degree rape of a child. We do not substitute our judgment for that of the superior court's. While reasonable minds might differ over conflicting evidence, we will reverse the superior court only if, based upon the record, no rational trier of fact could reach the conclusion that the State failed to meet its burden.

In [State v. J.P.S., 135 Wn.2d 34 (1998)] **July 98 LED:21**, this court noted that the nature of the crime is an important factor, but with sexual crimes it is very difficult to tell if a child understands the prohibitions on sexual behavior with other children. In J.P.S., the eleven year old, mildly retarded defendant was charged with first degree rape of a three year old. The defendant took the younger child to a shed, sent the other children away, pulled down both their pants, and then touched the three year old on the vagina. The defendant lied about what contact had occurred but did not admonish the victim not to tell. After talking with the police, the defendant admitted that the conduct was "bad." This court unanimously concluded that the State had failed to establish by clear and convincing evidence that the defendant understood that his conduct was wrong.

We conclude that there is sufficient evidence in the record to support the superior court's finding in this case that the State failed to establish by clear and convincing evidence that Ramer understood that his conduct was wrong. Four witnesses testified at the capacity hearing. [The detective] did not express an opinion as to Ramer's capacity, and her testimony was equivocal, quoting Ramer as saying his conduct was "kind of sort of wrong." Dr. Trowbridge, who evaluated Ramer for the defense, opined that Ramer did not have the capacity to commit the crime charged. Dr. Trowbridge was further of the opinion that Ramer did not understand that sex with someone who consents and likes the sex is wrong. Cain, who performed Ramer's "safe to be at large" evaluation for Thurston County, also expressed the opinion that Ramer did not have the capacity to commit the crime charged. Nore, who did not evaluate Ramer, was the only witness to express the opinion that Ramer had the capacity to commit the crime of first degree rape of a child. While Nore's testimony supports the State's contention, we conclude a rational trier of fact could find the State failed to meet its burden based upon [the detective's] testimony and the expert opinions of Cain and Dr. Trowbridge.

[Some citations omitted]

MADSEN CONCURRENCE: Justice Madsen writes a concurring opinion to clarify that the State bears a heavy burden in the appellate courts to try to overcome a trial court finding of criminal incapacity of a child.

WASHINGTON STATE COURT OF APPEALS

UNDER UNIQUE CIRCUMSTANCES, SEARCH WARRANT UPHOLD EVEN THOUGH IT DID NOT IDENTIFY A SPECIFIC CRIME UNDER INVESTIGATION; ALSO, EVIDENCE HELD SUFFICIENT TO CONVICT OF SECOND DEGREE THEFT, CRIMINAL HARASSMENT, STALKING, AND CRIMINAL LIBEL

State v. Askham, ___ Wn. App. ___, 86 P.3d 1224 (Div. III, 2004)

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

Mr. Askham's relationship with Sue Melhart ended in January 2000. His efforts to revive the relationship failed. Ms. Melhart developed a romantic relationship with her neighbor, Gerald Schlatter. Mr. Schlatter was Facilities Development Director at Washington State University (WSU).

On January 17, 2001, WSU President Lane Rawlins; Greg Royer, Vice President for Business Affairs and Gerald Schlatter's upper level supervisor; and Assistant Attorney General Antoinette Ursich, WSU counsel, received an anonymous e-mail accusing Mr. Schlatter of inappropriate use of a state computer. The e-mail accused Mr. Schlatter of visiting pornography and racist World Wide Web (Web) sites. An administrative investigation concluded the accusations were unfounded.

Mr. Schlatter turned over additional e-mails received on his office computer welcoming him as a member of various porn and racist Web sites. One of the sites--lycos.com--displayed two manufactured images of Mr. Schlatter's face electronically pasted onto a picture of a man receiving oral sex from a young male. The manufactured images were uploaded from an IP (Internet Protocol) address that was assigned to Leonard Askham. A lycos.com "photo center" account was also set up. There, more manufactured sex scenes were posted purportedly featuring Mr. Schlatter. Mr. Schlatter also received anonymous e-mails threatening to ruin his professional and social life and to inform the Federal Bureau of Investigation of these manufactured activities.

These e-mails originated from two locations with public Internet access--a business in Spokane and a public library in Coeur d'Alene, Idaho. With the cooperation of the Internet service provider and the Web site provider, investigators learned that the IP addresses were assigned to a user identified as "askham" at the relevant time. The handwritten account names and passwords were later found in Mr. Askham's home office.

The Pullman Police Department and the university president's office were also mailed hard copies of the manufactured images with a note: "Do you want a man like this, who is also a white supremacist [sic], working for your University?" The Web site subsequently displayed more homoerotic images purportedly of Mr. Schlatter. The account "askham" was traced to Bird Shield Repellent Corp., with an address and phone number in Pullman belonging to Leonard Askham.

Police obtained a search warrant to seize Mr. Askham's computer and search his residence for evidence relating to all of this. [See "Analysis" below for a description of the search warrant. **LED** Eds.] The evidence recovered included an envelope addressed to Mr. Schlatter containing Mr. Schlatter's image and pornographic shots that matched those on the Internet sites. In a trash can searchers found numerous pictures from which the manufactured images had

been obtained. A large number of entries of personal information about Mr. Schlatter were found in Mr. Askham's handwriting, as well as documents Mr. Schlatter had disposed of in his trash. Handwritten drafts of the threatening e-mails were also found in Mr. Askham's home office. The investigation of Mr. Askham's computer showed that it had altered the Internet images.

The State charged Mr. Askham with felony harassment, stalking, second degree theft, and libel. He challenged the particularity of the search warrant and moved to suppress the information. The court denied his motion.

The issue before the court at Mr. Askham's bench trial was whether Mr. Askham was the perpetrator. Mr. Askham's defense was that his computer was hacked by some person or persons unknown who wanted to injure Mr. Schlatter and frame Mr. Askham.

The court found the evidence compelling that someone had used Mr. Askham's home, identity, and computer to wage an electronic campaign to destroy Mr. Schlatter. The court found no evidence supporting the existence of a third party with a motive or opportunity to do this. The court then entered findings and conclusions and a judgment of guilt for felony harassment, stalking, second degree theft, and libel.

ISSUES AND RULINGS: 1) Did the search warrant meet the particularity requirement of the Fourth Amendment despite the fact that it did not name a particular crime? (ANSWER: Yes, because the warrant otherwise identified the items to be seized and connected them sufficiently to criminal behavior); 2) Is there sufficient evidence in the record to support Askham's convictions for felony harassment, stalking, criminal harassment, and criminal libel? (ANSWER: Yes)

Result: Affirmance of Whitman County Superior Court convictions of Leonard Ralph Askham for second degree theft (RCW 9A.56.040(1)(c)), criminal harassment (RCW 9A.46.110), stalking (RCW 9A.46.110), and criminal libel (RCW 9.58.010).

ANALYSIS:

1) Fourth Amendment

The Askham Court explains as follows its view that the search warrant was sufficiently particular for Fourth Amendment purposes to guide the officers executing the search warrant:

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The purpose of the particularity requirement is to prevent the State from engaging in unrestricted "exploratory rummaging in a person's belongings" for any evidence of any crime. The description of the items to be seized should leave nothing to the executing officers' discretion. The officers should be able to "identify the property sought with reasonable certainty."

The required degree of particularity may be achieved by specifying the suspected crime. Otherwise, the warrant must contain some other means of limiting the items to be seized. The description should be as specific as the circumstances permit. If the nature of the underlying offense makes descriptive precision impractical, however, generic classifications may be acceptable.

The warrant at issue here does not specifically name the crimes under investigation. But it does describe the suspected criminal activity in some detail. And this description adequately limited the scope of the warrant. The warrant distinguishes those items the State has probable cause to seize from those it does not. Mr. Askham compares the warrant's authority to the following, held to be overbroad in Riley:

any fruits, instrumentalities and/or evidence of a crime; to-wit:

notes, records, lists, ledgers, information stored on hard or floppy discs, personal computers, modems, monitors, speed dialers, touchtone telephones, electronic calculator, electronic notebooks or any electronic recording device.

This warrant permits the seizure of "broad categories of material" and is "not limited by reference to any specific criminal activity."

But the warrant here is more particular. The Askham warrant and complaint name Mr. Schlatter, detail the false accusations against him, identify the Web sites, and describe the offending images and threats. The warrant sets forth the evidence establishing probable cause, including the victim's own suspicions and the experts' backtracking through various online activities. The Askham warrant does propose to seize a broad range of computer equipment, central processing units, drives, disks, and other memory storage devices. But it also specifies the material to be searched for on that computer equipment. It lists text files relating to Mr. Schlatter and specific Web sites: lycos.com; hotmail.com; focalex.com; bodybuilding.about.com; eroticamail.com; and davidduke.com. It also specifies text files relating to manipulation of digital images or to uploading them to the Internet. It specifies also graphic images and graphic image files "of Gerald Schlatter; pornographic images including images of men engaged in oral sex, or images of nude men that may have been used in the manufacture of images of Gerald Schlatter uploaded to the internet." The warrant also authorized seizure of software related to the manipulation of digital images, typewriters, Mr. Askham's fingerprints, a handwriting sample, and certain postage stamps. [T]he detailed description of the criminal activity leaves no doubt as to the items to be seized. The trial court correctly concluded that this was not a license to rummage for any evidence of any crime.

[Some citations omitted]

2) Sufficiency of evidence

The Askham Court finds the following evidence (together with evidence that the victim suffered substantial emotional distress) to be sufficient to support the defendant's convictions of felony harassment, stalking and criminal libel – a) threatening e-mail sent from a password-controlled account at a public library, an account that was used only by defendant; b) discovery in defendant's desk and garbage can of handwritten threatening letters, pornographic images, and pictures of the victim, and defendant's admissions to going through the victim's garbage and writing threatening letters. This evidence was compelling circumstantial evidence that defendant had stalked and waged an electronic campaign to destroy the man who had become involved in a romantic relationship with defendant's ex-girlfriend by portraying the man as involved in pornographic and racist websites.

The Askham Court also finds the following evidence sufficient to support defendant's conviction of theft of an access device -- evidence that the victim's credit card number was found on a slip of paper in defendant's residence, and evidence that defendant used the number to charge a membership fee to a racist website.

INDIRECT WITNESS TAMPERING IS STILL "WITNESS TAMPERING"; ALSO, 1990 REMPEL DECISION DISTINGUISHED

State v. Williamson, ___ Wn. App. ___, 86 P.3d 1221 (Div. II, 2004)

Facts and Proceedings below:

While living with a young girl's mother, defendant Williamson sexually abused the girl (MK) during the period when the girl was ages six through eight. After an older boy (DR) accused Williamson of molesting him, Williamson met privately with the boy and tried to convince him to change his story. In addition, Williamson asked the boy to contact the young girl and tell her that her mother and father would go to jail if she did not take back her earlier statement against Williamson. The boy, DR, never did pass the message on to the girl, MK.

The jury convicted Williamson of first degree child rape (count 1), third degree child rape (count 2), first degree child molestation (count 3), third degree child molestation (count 4), three counts of tampering with a witness (counts 10-12), and bribing a witness (count 13).

ISSUE AND RULING: Was the evidence sufficient to convict Williamson of witness tampering for his attempted influence of MK through DR? (ANSWER: Yes)

Result: Affirmance of all Clallam County Superior Court convictions (and exceptional sentence, 340 months) of Thomas R. Williamson.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Williamson argues that there was insufficient evidence that he induced a witness (MK) not to testify. He contends that his words "contained no express threat nor any promise of reward." In addition, he maintains that insufficient evidence supports the conviction because neither he nor DR ever contacted MK.

Here, Williamson asked DR to tell MK that her "daddy and mommy are going to jail if you don't recant your statement, take it back." State v. Rempel, 114 Wn. 2d 77 (1990). Williamson argues that his message to MK was a "true statement of the legal situation, not an inducement or attempted inducement."

In Rempel, the court held that the defendant's apology, a statement that it was going to ruin his life, and a request that the victim drop the charges did not amount to a request to withhold testimony or a threat or promise to induce the victim to withhold testimony. But Williamson's message went beyond the message in Rempel. He specifically asked MK to take back her statement. And he coupled the request with an explanation of the adverse consequences to him and his wife if MK did not. Moreover, the consequences were not true. Williamson's wife did not risk jail if MK testified. Accordingly, Rempel does not help Williamson.

We also disagree with Williamson that witness tampering requires an actual contact with the witness. Tampering is an attempt to induce the witness not to testify. RCW 9A.72.120. The statute states: "(1) A person is guilty of tampering with a witness if he ... attempts to induce a witness ... to: (a) Testify falsely or ... to withhold any testimony."

A person violates the witness intimidation statute even if the threat is not communicated to the victim. State v. Anderson, 111 Wn. App. 317, 44 P.3d 857 (2002) **Aug 02 LED:12**. And a person is guilty of intimidating a judge even if the threat is not communicated. State v. Hansen, 122 Wn. 2d 712 (1993) **Feb 94 LED:06**. The statutory language here compels the same result.

A person tampers with a witness if he *attempts* to alter the witness's testimony. "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Williamson completed his attempt to alter MK's testimony when he asked DR to talk with MK about changing her testimony.

Viewed in the light most favorable to the State, the evidence was sufficient to convict Williamson on the charge of tampering with the witness MK.

[Some citations omitted]

CRIME OF ENGAGING IN SEXUAL INTERCOURSE WITH PATIENT INCLUDES INAPPROPRIATE PERSONAL DETOUR FROM PROFESSIONAL DUTIES

State v. Castilla, ___ Wn. App. ___, 87 P.3d 1211 (Div. I, 2004)

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

Cheryl Nelson suffers from significant developmental delays and schizophrenia, and functions essentially as a child. Since 1998, she has resided at Chartley House, a facility operated by Seattle Mental Health. In 2002, Nelson had surgery to repair a broken ankle, and was sent to North Auburn Rehabilitation and Health Center (NARC) to recover. She arrived May 31. Julio Castilla was employed at NARC as a certified nursing assistant (CNA). He cared for Nelson for part of his shifts on June 1 and 2.

On June 3, Nelson reported to a nurse that she had been sexually assaulted. Suspicion fell upon Castilla, because of the description given by Nelson and the fact he was on duty at the time of the assault. Investigation revealed that the male component of the vaginal swab taken from Nelson matched Castilla's DNA profile.

Castilla was charged with second-degree rape under the health care provider alternative in RCW 9A.44.050(1)(d), which provides, in relevant part:

A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person ... [w]hen the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination.

At trial, Castilla conceded that he was a health care provider, that Nelson was a patient, and that they had sexual intercourse. Castilla's defense was that the intercourse did not occur during a "treatment session," the final element of the crime.

The jury found Castilla guilty. The court imposed an exceptional sentence, finding that Castilla knew or should have known that Nelson was a particularly vulnerable victim, that Nelson suffered substantially greater mental and physical injuries than typically seen in second-degree rape cases, and that the rape violated Nelson's zone of privacy.

ISSUE AND RULING: Does the crime of engaging in sexual intercourse with a patient cover the circumstance where a medical provider engages in sex as a personal detour from his professional duties? (ANSWER: Yes)

Result: Affirmance of King County Superior Court conviction and exceptional sentence of Julio Castilla for second degree rape for engaging in sexual intercourse with a patient during a treatment session.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The principal issue here is Castilla's contention that the evidence did not establish that sexual intercourse occurred during a "treatment session."

The statute defines "treatment" as "the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide." The jury was so instructed. The statute does not define the phrase "treatment session," but the common and ordinary meaning of "session" is "a period ... devoted to a particular activity." The question, therefore, is whether the jury could conclude that intercourse occurred during a time when Castilla was delivering services a CNA is qualified to provide.

The State presented evidence establishing that CNAs at NARC are responsible for "the hands-on care, activities of daily living, dressing, bathing, grooming, [and] assistance with feeding." CNAs are expected to respond to patients who ask for help or who signal a request for assistance with a call button.

Castilla admits he entered Nelson's room in response to her call of "I need help, I need help." But because Nelson was not assigned to his care for that shift, he argues he was not providing treatment to her under the statute. CNAs at NARC worked in teams, however, and are responsible for assisting patients assigned to their partner's care, as well as those on their own assigned list. Nelson was assigned to Castilla's partner's care at the time of the incident. She had been assigned to Castilla's care the day before. Whether she was on Castilla's list that day was thus immaterial.

Castilla testified that Nelson had been flirting with him since her arrival and that when she called him into her room, she insisted upon having sex with him and threatened to scream if he refused. He contends this was not a treatment session. The jury, of course, was not required to believe Castilla. But in any case, he testified he entered her room while on duty and in response to her call for help. She told the nurse that after intercourse, he cleaned her and diapered her. A rational trier of fact could find that Castilla was engaging in a treatment session when he responded to Nelson's call, and could reasonably conclude that the intercourse occurred during a treatment session.

Castilla argues that this approach to the statute is insufficient, because the State failed "to prove the sexual intercourse occurred during a period devoted to the active delivery of professional health care services." Essentially, Castilla argues that the sexual interlude was a personal detour from his professional duties, and

therefore did not occur during a period devoted to the active delivery of professional health care services. This means, apparently, that if professional services are interrupted by a sexual encounter, the intercourse itself does not occur during a treatment session. But under this theory, the only health care providers who could be prosecuted under the statute would be those who claim to engage in intercourse for professional reasons. We are confident that was not the legislative intent, if only because if that were the objective, the legislature had no need to include certified nursing assistants such as Castilla under the definition of health care provider; no nursing assistant could claim such a therapeutic objective.

We reject Castilla's reading of the statute. The court properly left to the jury the determination of whether the intercourse occurred during a treatment session. The evidence amply supports its finding that it did.

[Footnotes and citations omitted]

REVISITING THE RULES REGARDING CITIZENS' COLLECTING OF SIGNATURES FOR INITIATIVES AND REFERENDUM PETITIONS

In the August 2000 LED at pages 19 and 20, we provided some information relating to the qualified rights of initiative and petition signature gatherers to go on private and public property to gather signatures. We set out brief summaries of holdings in four Washington appellate court decisions, and we provided a website address for information from the Washington Secretary of State. We recently received correspondence from a member of the public criticizing our August 2000 summary of the holding in the case of Waremart v. Progressive Campaigns, 139 Wn.2d 623 (1999). Upon further review of the decision, we agree with our critic. Our summary of the holding in Waremart in the August 2000 LED was misleadingly oversimplified.

We will not attempt to provide a detailed analysis of Waremart in this LED entry. Instead, we refer our readers to the new address of the initiatives-FAQs website of the Secretary of State [<http://www.secstate.wa.gov/elections/initiatives/faq.aspx>]. A more carefully nuanced analysis of Waremart is provided there, along with additional information. Others may have different interpretations of the finer points of the law in this area. Law enforcement personnel should consult legal counsel for their respective agencies on the issues involved in this area of law.

NEXT MONTH

The July 2004 LED will include an entry on the Washington Supreme Court's May 13, 2004 decision in Hangartner v. City of Seattle (2004 WL 1064829), in which the Supreme Court concludes that documents covered by attorney-client privilege are exempt from disclosure under the public disclosure act. The court also concludes that a public disclosure request for "all books, records, (and) documents of every kind" was too broad. Finally, the Court concludes that under the facts of the case, the "controversy" exemption to the public disclosure act does not apply.

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 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>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://www4law.cornell.edu/uscode>]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2004, 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>].

The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to [ledemail@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [<http://www.cjtc.state.wa.us>].