Law Enforcement Digest

February 2006

587th Basic Law Enforcement Academy – August 30, 2005 through January 10, 2006

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WASHINGTON STATE SUPREME COURT

WHERE APARTMENT LEASEHOLDER WAS PRESENT IN BEDROOM, OFFICERS AT ENTRY DOOR COULD NOT GET VALID CONSENT TO SEARCH FROM TEMPORARY GUEST; ALSO, "APPARENT AUTHORITY" RULE DOES NOT APPLY TO SEARCHES GOVERNED BY ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION

State v. Morse, __ Wn.2d __, 123 P.3d 832 (2005)

INTRODUCTION TO OPINION: (Excerpted from majority opinion)

> Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. Exceptions to the warrant requirement are jealously and carefully drawn. Properly obtained, consent to a warrantless search is one of those carefully drawn exceptions. Although Robert James Morse was at home, police gained entry into his apartment by obtaining the consent of a houseguest who, with her husband, had been at Morse's apartment for only five days. The police did not have a search warrant, were looking for another person, and did not obtain Morse's permission to search his apartment until after they found contraband in his bedroom. The State argues (1) that the houseguest had actual and apparent authority to consent and (2) that the police had no duty to obtain Morse's consent until they came upon him and then only if he objected to the search. We disagree. One who has equal or lesser control over a premises does not have authority to consent for those who are present and have equal or greater control. "Presence" is used in accordance with its ordinary meaning. Persons are not absent merely because the police do not know they are present, nor are they absent until police have come upon them during a warrantless search. "Authority" to consent is a matter of status or control and a question of law. The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of "authority." Law enforcement officers, who seek to conduct a warrantless search based upon the exception of consent, are well advised to ask for the woman and/or man of the house before seeking consent to search a home. If the man or woman of the house is not present, a brief inquiry could determine the identity of the person present and their authority to give consent; this would give police officers the information needed to properly proceed and to assure protection of constitutional rights. The search of Morse's apartment was unlawful and we reverse.

Facts and Proceedings below: (Excerpted from majority opinion)

> On January 29, 2002, two City of Everett police officers contacted the property manager for the Deer Creek Apartments. The officers had information that Sarah Wall, who was wanted on multiple outstanding felony warrants, was staying in the apartment complex. The manager told the officers that while Wall may have stayed there in the past, she did not believe that Wall was there anymore because bounty hunters had unsuccessfully searched for her in apartment C-108 a few days earlier. She also told officers that she did not recognize Wall from a

picture that they showed her. The manager told the officers that Morse was the only tenant on the lease for apartment C-108 and that she was not aware of anyone else living in that apartment.

The officers then went to Morse's apartment and knocked on the door. A woman, Pam Dangel, answered the door and told the officers that Wall was neither in the apartment, nor had she been there in over a week. While standing at the door, the officers did not ask Dangel if she lived at the apartment, nor did they inquire as to the nature of her relationship to Morse. Police asked only whether they could enter to search for Wall. According to the police, Dangel agreed to let them enter to look for Wall.

After police entered, they learned that Dangel and her husband had been staying at Morse's apartment for only a few days. Dangel and her husband planned to stay for one additional night while their apartment was being painted. As one of the officers talked to Dangel, the other proceeded directly to the master bedroom. From outside the bedroom he saw Morse, who was sitting on his bed. The officer identified himself, indicated that he was looking for Wall, and entered the room. As he entered the bedroom, the officer looked toward a closet where he saw a scale, packaging material and a large bag with bluish powder sitting on a desk. Morse claimed that what appeared to be drug paraphernalia was his, but that what appeared to be drugs were not. Morse was then arrested and only after his arrest was his consent to search the rest of his bedroom sought and obtained.

Morse was convicted of possession of methamphetamine. On appeal, Morse argued that the warrantless search of his bedroom violated article 1, section 7 of the state constitution. He argued that Dangel lacked authority to consent to the search. He also argued that because he was present and able to object to the search, the police erred by failing to get his permission prior to entering and searching his bedroom. In an unpublished opinion, the Court of Appeals rejected both arguments, finding that Dangel had both actual and apparent authority to consent to the search, and that because Morse did not explicitly object to the search, the police did not have to secure his consent before entering his bedroom.

ISSUES AND RULINGS: 1) Under article 1, section 7 of the Washington constitution, in light of the fact that Morse was present in the apartment at the time that officers were asking a houseguest for consent to search the apartment, did the houseguest have actual authority to consent to a search of Morse's apartment, such that one officer's entry of Morse's bedroom was lawful? (ANSWER: No); 2) Does article 1, section 7 of the Washington constitution recognize the "apparent authority" doctrine followed by the U.S. Supreme Court under the Fourth Amendment? (ANSWER: No)

Result: Reversal of Snohomish County Superior Court conviction of Robert James Morse for possession of methamphetamine.

ANALYSIS: (Excerpted from majority opinion)

COMMON AUTHORITY

Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. Article I, section 7 provides that "[n]o person shall be

disturbed in his private affairs, or his home invaded, without authority of law." Under this provision, the warrant requirement is especially important as it is the warrant which provides the requisite "authority of law." Exceptions to the warrant requirement are to be "'jealously and carefully drawn.'" The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement.

In search and seizure cases involving cohabitants, this court has adopted the common authority rule. State v. Thompson, 151 Wn.2d 793 (2004) **Aug 04 LED:13**; State v. Walker, 136 Wn.2d 678 (1998) **Jan 99 LED:03**; State v. Leach, 113 Wn.2d 735 (1989). Because a person's expectation of privacy is necessarily reduced when authority to control a space is shared with others, such persons necessarily assume some risk that others with authority to do so will allow outsiders into shared areas. We have said that the authority does not rest upon the law of property, with its attendant legal refinements, but rests rather on mutual use of the property. We have, thus, justified the common authority rule based upon the theories of "reasonable expectations of privacy" and "assumption of risk." In the context of a search, consent is a form of waiver. Ordinarily, only the person who possesses a constitutional right may waive that right. Cf. Walker (wife's consent not effective as waiver of husband's constitutional right to be free from invasion of privacy). Common authority under article I, section 7 is grounded upon the theory that when a person, by his actions, shows that he has willingly relinquished some of his privacy, he may also have impliedly agreed to allow another person to waive his constitutional right to privacy.

The United States Supreme Court, interpreting the Fourth Amendment to the federal constitution also applies the doctrine of common authority in searches involving cohabitants. Because of differences in the text of the Fourth Amendment and article I, section 7 discussed below, the United States Supreme Court adopted the apparent authority doctrine. This doctrine is grounded upon the reasonableness of the search rather than on reasonable expectations of privacy and the appropriate scope of consent. Illinois v. Rodriguez, 497 U.S. 177 (1990).

AUTHORITY TO CONSENT

The narrow issue in this case is whether a temporary guest has authority to authorize a search of the private areas of her host's home while the host is present. More broadly, this case involves the differing analytical frameworks used in applying two different constitutional provisions: the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.

FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." The Fourth Amendment does not prohibit "reasonable" warrantless searches and seizures. The analysis under the Fourth Amendment focuses on whether the police have acted reasonably under the circumstances. **[LED EDITORIAL COMMENT: At this point, the majority opinion inexplicably includes a quotation - - omitted from this LED entry – that the Court takes from a U.S. Supreme Court opinion addressing the idea that**

probable cause, not certainty, is the standard for justifying a warrantless arrest. We would hope that the Washington Supreme Court does not have doubts about this critically important principle of search-and-seizure law under the Washington and federal constitutions.]

In Rodriguez, Justice Scalia, writing for the Court, observed that "what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated." Thus, since there may be circumstances where a police officer's reasonable good faith belief that a person authorizing a search has the authority to do so, such a good faith belief may mean the search itself is reasonable under the Fourth Amendment.

ARTICLE 1, SECTION 7

Unlike in the Fourth Amendment, the word "reasonable" does not appear in any form in the text of article I, section 7 of the Washington Constitution. We have also long declined to create "good faith" exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement. We have also repeatedly held that article I, section 7 provides greater protection of individual privacy than the Fourth Amendment.

Under article I, section 7, whether a person can consent to the search of a premises is based upon that person's independent authority to so consent and the reasonable expectation of his co-occupant about that authority. First, the consenting party must be able to permit the search in his own right. Second, it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. State v. Mathe, 102 Wn.2d 537 (1984). "In essence, an individual sharing authority over an otherwise private enclave inherently has a lessened expectation that his affairs will remain only within his purview, as the other cohabitants may permit entry in their own right." Leach. In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7 we focus on expectations of the people being searched and the scope of the consenting party's authority.

In Leach, we analyzed common authority in terms of "control" over the premises. The right of control may be based upon consent by one with an equal or superior interest in the premises or upon some independent authority. The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area. That access must be significant enough that it can be concluded that the nonconsenting co-occupant assumed the risk that the consenting co-occupant would invite others into the shared area. When a guest is more than a casual visitor and has "run of the house," her lesser interest in the property is sufficient to render consent to search effective only as to the areas of the home "where a visitor would normally be received." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.5(e), at 235 (4th ed.2004). Compare State v. Hoggatt, 108 Wn. App. 257 (2001) **Nov 01 LED:08** (defendant assumed the risk that cohabitant would allow entry to others into common areas of the apartment, such as the living room, but not into private

areas such as the bedroom). **[LED EDITORIAL COMMENT: We would hope that that if the officers in Morse had requested consent from the houseguest only to step through the entrance door of the apartment into the living room, and, after stepping into that room had spotted and seized illegal drugs in plain view in that room, the Morse Court would, per Hoggatt, not to be have suppressed the evidence.]** Likewise, the scope of consent given must not exceed the scope of the consenting person's authority. A person may have free access to some areas of the premises but not all areas. For example, the possessor of a home may share control and access to areas such as the kitchen, the dining room, the living room, and the bathroom but not other, private areas such as the possessor's bedroom, office, basement, or attic. The existence and scope of common authority is a legal question which must be determined by the court based upon the facts of each case.

This court has never used the words "apparent authority" in the context of a cohabitant's authority to consent to a search. **[LED EDITORIAL COMMENT: It is curious that the lead opinion in Morse neglects to note that the Court of Appeals asserted in its unpublished opinion in the Morse case that the Washington Supreme Court "adopted [the apparent authority] standard in State v. Ryland, 120 Wn.2d 325, 840 P.2d 197 (1992)" - - see Jan 93 LED:09, digesting a Supreme Court panel's remand order in the Ryland case. We can only guess that the reason that the Supreme Court in Morse did not discuss the Supreme Court's 1992 action in Ryland is that the 1992 remand order was a ruling by a four-judge panel and therefore deemed not to be a precedent.]** However, the Court of Appeals based its opinion below, in part, on an earlier case of that court interpreting the Fourth Amendment. See State v. Holmes, 108 Wn. App. 511 (2001) **Jan 02 LED:05**. In Holmes, the court stated that a person has apparent authority to consent to search if he or she "appears to have authority, so long as police have a reasonable belief in the authority of the person giving consent." Finding that the officers' subjective belief about the consenting party's authority was unreasonable, the Holmes court determined that even if the doctrine of apparent authority existed under the Washington Constitution, a question the court explicitly declined to answer, that subjective belief did not validate the objectively unreasonable warrantless search. We pick up where the Holmes court left off by holding that, standing alone, a police officer's subjective belief made in good faith about the scope of a consenting party's authority to consent cannot be used to validate a warrantless search under article I, section 7.

In this case, the court below erroneously applied the doctrine of "apparent authority" to article I, section 7. This may have been done because in Mathe, we adopted the "common authority" test used under the Fourth Amendment, see United States. v. Matlock, 415 U.S. 164 (1974), as the proper guide for determining questions of consent under article I, section 7. **[LED EDITORIAL COMMENT: This is likely not the main reason that the Court of Appeals applied the "apparent authority" doctrine. See our comment in the preceding paragraph for the most likely explanation why the Court of Appeals applied the "apparent authority" standard.]** Matlock, however, did not involve the doctrine of apparent authority, but rather whether a wife who was a cohabitant with her husband had actual authority over the marital residence. Because our constitution focuses on the rights of the individual, rather than on

the reasonableness of the government action, the apparent authority doctrine, as articulated in Rodriguez and applied in the Fourth Amendment context is not appropriate to any analysis under article I, section 7.

COMMON AUTHORITY WHERE A COHABITANT IS PRESENT

The State argues that Dangle had common authority to consent to a search of the premises and that when they came upon Morse, the police officers had no duty to obtain his consent. The State argues that it was Morse's affirmative duty to explicitly object to the search. It is essentially the State's position that Morse was not present in his own apartment until police found him. While such a suggestion may make sense from the perspective of the Fourth Amendment's "reasonableness" requirement, simply inquiring into whether a police officer's subjective beliefs are reasonable is not sufficient under article I, section 7.

We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke consent, or limit the scope of consent. State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02 [LED EDITORIAL COMMENT: This last statement is an oversimplification of the implications of the knock-and-talk ruling in Ferrier. The Washington appellate courts, including the Supreme Court, have held under a variety of non-knock-and-talk circumstances that officers can lawfully obtain consent without giving Ferrier warnings. See State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) Nov. 99 LED:02 (Ferrier rule does not apply to request for residential entry where officer's intent is to make arrest on INS order, not to search); State v. Leupp, 96 Wn. App. 324 (Div. II, 1999) Oct. 99 LED:05 (Ferrier rule does not apply to request for residential entry to search for a possible DV victim); State v. Williams (Harlan M.), 141 Wn.2d 17 (2000) Dec. 00 LED:14 (Request to homeowner to search residence for a felon-guest wanted on an arrest warrant is not subject to the Ferrier rule); State v. Khounvichai, 149 Wn.2d 557 (2003) Aug. 03 LED:06 (Ferrier warnings were not required for officers to obtain valid consent from a suspect's grandmother for purposes of entry of the grandmother's home just to "talk to" her grandson who lived there and who was a suspect in a malicious mischief case; the majority opinion suggests, however, that if probable cause for a search had developed in this situation, the officers would have been required to obtain a search warrant rather than then obtaining consent to search); State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) July 04 LED:13 (Ferrier warnings were not required to obtain consent to search purse of person to whom officer had offered a ride from the freeway to a nearby restaurant).]**

We have never held that a cohabitant with common authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

In Leach, we held that where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, "that consent remains valid against a cohabitant, who also possesses equal control, only while

the cohabitant is absent." In Walker, Mrs. Ellen Walker consented to a search of her home. Before the search began, however, Mr. Gus Walker, Mrs. Walker's husband, arrived. The police failed to obtain Mr. Walker's consent to search and he did not affirmatively object to the search. Contraband was found in the couple's bedroom. Only Mrs. Walker was convicted and she argued, relying on Leach, that without her husband's consent, the search was invalid as against her. While we rejected her argument, we concluded the following about Leach: "It follows from [Leach] that because Ellen and Gus were cohabitants and both present during the search, Ellen's consent to the search was invalid as to Gus." Walker.

In the case before us, Morse was the sole signatory on the lease and the sole tenant in the apartment searched. As guests in Morse's apartment for five days, Dangel and her husband had limited control and, therefore, limited authority over that portion of the apartment they shared with Morse. The record, however, is unclear as to the precise scope of their authority. There is certainly insufficient evidence in the record to support a conclusion that the Dangels shared control over Morse's bedroom. Moreover, since Morse was at all times present in his apartment, the State must prove that Dangel had greater authority over the areas of the premises searched in order to consent to a search that would bind Morse. We hold that the State has failed to meet its burden and that Dangel's consent to search was ineffective as to Morse. Since there is insufficient evidence to support the conviction without the fruits of the unlawful search we reverse Morse's conviction.

CONCLUSION BY MAJORITY

The Washington Constitution guarantees to its citizens that they will neither be disturbed in their private affairs, nor have their homes invaded, without authority of law. Warrantless searches are per se unreasonable. While consent is a recognized exception to the warrant requirement, all such exceptions are narrowly drawn. Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others will consent to a search. The scope of the authority of a cohabitant to consent extends only to areas shared by the cohabitants. When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant. "Presence" is used according to its ordinary meaning. A person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises. If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police. [Court's footnote: *We recognize that issues of "common authority" and "presence" will not always be simple and straightforward. It may be difficult to determine, for example: (1) whether a child has "common authority" over her parent's home sufficient to authorize that child to consent to a warrantless search, (2) whether a farmer operating a tractor on his back forty is "present" when the police arrive at the*

front door of his farmhouse, or (3) whether an employee at a factory has authority to consent for an employer who is on the factory's campus, but in a another building at the time. However, such difficulties may be avoided by the police by obtaining either a search warrant or the consent of the person whose property is to be searched.]

Robert Morse was present in his home when police arrived at his door without a search warrant and looking for someone else. Despite his actual presence, police failed to get Morse's consent to search his apartment. Instead, they relied upon the consent of a houseguest who lacked the authority to consent to a search of Morse's home that would bind Morse under the Washington Constitution. Because the search of Morse's apartment did not satisfy the requirements of article I, section 7 of the Washington Constitution, nor did police obtain valid waiver of those requirements by an effective consent, the search of Morse's home was unlawful, and the fruits of that search should have been suppressed. We therefore reverse the courts below and reverse the conviction.

CONCURRENCE BY JUSTICE FAIRHURST: Justice Fairhurst is alone in her concurring opinion in which she asserts that the Court should have decided this case by suppressing the evidence based on Fourth Amendment rules for common authority to consent and apparent authority to consent.

ADDITIONAL LED EDITORIAL COMMENTS: We placed some of our commentary on Morse in bolded print within brackets throughout the excerpts of the Court's analysis above. We add three comments here.

1. Trying to determine if cohabitants are present at fixed premises.

Whenever officers are seeking consent or have obtained consent to search from a person they have determined to be a habitant of a fixed premises, the officers should try to determine: A) if there are cohabitants of the premises; and, if so, B) whether those cohabitants are currently on the premises. Even a farmer out plowing his field may be covered by the Morse application of the Leach rule.

2. The mutual consent rule is limited to fixed premises.

It is important to note that the Morse Court does not discuss the Court's decision in State v. Cantrell, 124 Wn.2d 183 (1994) Sept 94 LED:05. In Cantrell, the Court limited the Leach decision's all-persons-present-mutual-consent rule to fixed premises, holding that the rule does not apply to mobile vehicle consent searches. We assume that Cantrell is still good law in Washington.

3. Trying to determine whether a person has joint access and/or control.

The King County Prosecutor's Office (KCPO) handled the Holmes "apparent authority" case addressed in Morse. In the January 2002 LED, we digested Holmes, and we also provided the KCPO's checklist tips for determining whether a person has sufficient access and/or control over a premises or item to have authority to consent to a search. We have made a few minor changes in the non-exhaustive KCPO checklist to guide officers in their determination of whether an individual has "joint access and/or control" over a place or item such that the individual has authority to consent to a search:

Residence - -

1. Does the address on the person's driver's license (or other ID) match the residence?
2. Do records from DOL match the residence?
3. Does the person have a key or other access device (alarm code, access code, garage door opener…)?
4. Does the person have mail with the listed address on it?
5. Is the person's name on the mailbox? Do the person know the layout of the inside?
6. Is the person already in the home? Does the person have his or her own room?
7. Do the neighbors (or landlord) of the residence know the person?
8. Can the person give a coherent description of his or her present connection to the residence?

Car - -

1. Is the person driving the car?
2. Do DOL records match up?
3. If there are other occupants in the car, when separated, do they support the information that the person has given you?

In general - -

1. Are you certain that you do not have probable cause to obtain a search warrant (obtaining a search warrant would, of course, avoid the need to wrestle with these difficult questions concerning "consent" authority)?
2. What is the person's motive for giving you consent?
3. Has the person lied to you in some other respect?
4. Has the person signed the consent form listing the person as the owner?
5. Does the person's criminal history have any prior crimes of dishonesty?
6. If any of the above factors are not established, does the person's explanation for it make sense? (example: different name on mailbox because "just moved 2 days ago"… signs of a recent move)
7. Focus should be on the person's current connection with the residence or car.

If the situation is ambiguous, you must continue to make inquiries until you are convinced the person has authority to consent.

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WASHINGTON STATE COURT OF APPEALS

EVIDENCE TAKEN FROM COMPUTER'S HARD DRIVE, TOGETHER WITH 10-YEAR-OLD CHILD'S TESTIMONY, HELD SUFFICIENT TO SUPPORT CONVICTION FOR ACCESSING DEPICTIONS OF CHILDREN ENGAGED IN SEXUALLY EXPLICIT CONDUCT

State v. Mobley, 129 Wn. App. 378 (Div. III, 2005)

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

> Ten-year old S.E. accused her step-father, Sean Mobley, of sexually molesting and raping her weekly over the course of two years at their home in Benton

County. Mr. Mobley was arrested in December 2002 in Walla Walla, where he had been living since separating from S.E.'s mother in September 2002. When arrested, investigators seized two hard drives from a computer in his bedroom. Although much of the space on the hard drives was empty, the State's forensic expert was able to recover three pictures of young, naked girls from one of the hard drives.

Mr. Mobley was charged in Benton County with two counts of first degree child rape under RCW 9A.44.073, and three counts of possessing depictions of minors engaged in sexually explicit conduct under RCW 9.68A.070. The crimes allegedly took place in Benton County between January 1, 2001 and September 4, 2002.

At trial, the State presented testimony from several witnesses who related S.E. had told them Mr. Mobley sexually molested her. Barbara Mallory, a physician's assistant who interviewed S.E. at the emergency room, testified S.E. said her stepfather had touched her vagina with his finger and mouth. She related S.E. told her this happened approximately every week for two years. Ms. Mallory testified she examined S.E. for signs of rape and noted that S.E. did not have an intact hymen.

Sara Zirkle, M.D. interviewed and examined S.E. at a child sexual abuse clinic. Dr. Zirkle testified S.E. told her she received bad touches "underneath her clothing" by Mr. Mobley with his finger or a Sharpie pen, and that it hurt. Dr. Zirkle also testified S.E. had hymenal irregularities; specifically, S.E. had erosion of the hymen, suggestive of a penetrating injury.

During 68 pages of trial testimony, S.E. testified, partly saying Mr. Mobley had "hurt her" in her "privates" using "his finger," and he done "bad things" to her, but was unable to give more detail or answer more specific questions about the alleged rapes or statements she made to others. S.E. related Mr. Mobley had made her look at "bad pictures" of both naked children and adults on the computer at their house. In cross-examination, S.E. answered nearly every question posed, but she was not asked any questions about instances of abuse.

Detective Jason Sprowl testified he was able to pull a partial internet history from one of the hard drives seized from Mr. Mobley, which began in September 2002. He said the internet history indicated a program called, "History Kill" had been downloaded in November 2002, which is designed to eliminate internet history. The available internet history included approximately six hits for "Lolita" internet sites, which he testified are associated with child pornography.

Although the majority of the photo images on the second hard drive had previously been deleted, Detective Sprowl was able to retrieve several images of adult pornography, as well as three images of naked, prepubescent children. One of the photos was captioned, "Free Lolita pictures." He testified he was familiar with one of the photos from a previous child pornography investigation. Detective Sprowl related he could not determine how long the images had been on the hard drive or how long these images were viewed before they were deleted. However, he stated that the images were "downloaded or purposefully put on the computer." He also related these images were no longer viewable to

> the "everyday user," because there was no operating system and the pictures had been deleted.
>
> Based on his training and experience, Detective Sprowl testified the girls in the three pictures appeared to be adolescents. Dr. Zirkle was also asked to identify the age of the three girls depicted. She testified all three girls were probably within the range of nine to twelve years old because of their stages of sexual development.
>
> Mr. Mobley testified he had purchased the hard drives used, and he conceded the two seized hard drives were in his computer when he lived with S.E. and her family in Benton County. Mr. Mobley admitted looking at adult pornography, but he denied intentionally visiting any "Lolita" websites or downloading child pornography. He testified he must have inadvertently followed a link to those sites. Mr. Mobley conceded he used the internet with those hard drives prior to September 2002, but he denied trying to eliminate his internet history. He denied showing S.E. any type of child pornography or sexually molesting her. The jury found Mr. Mobley guilty as charged.

ISSUE AND RULING: Is the evidence in the record sufficient to support Mr. Mobley's conviction for possessing depictions of children engaged in sexually explicit conduct in violation of RCW 9A.68A.070? (ANSWER: Yes)

Result: Affirmance of Benton County Superior Court conviction of Sean Owen Mobley for possessing depictions of children engaged in sexually explicit conduct, and for child rape.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The issue is whether sufficient evidence exists to support Mr. Mobley's conviction for possessing depictions of children engaged in explicit conduct. Mr. Mobley specifically contends the evidence was insufficient to show possession of child pornography at the place and time alleged in the information, and insufficient to establish that the images depicted children engaged in sexually explicit conduct.
>
> . . .
>
> Possession. "A person who knowingly possesses visual or printed matter depicting a child engaged in sexually explicit conduct is guilty of a class C felony." RCW 9.68A.070. Washington's child pornography statute does not define "possession." Generally, possession may be actual or constructive. Actual control indicates physical custody, while constructive control indicates dominion and control over an item. . . . Constructive possession need not be exclusive.
>
> Mr. Mobley admits dominion and control over the hard drives found in his bedroom, but he contends he did not have actual or constructive possession of the three images of naked children found there. Essentially, he contends because he could not access the images, he did not have control over them. He argues "passing control" is insufficient to establish constructive possession.
>
> The level of proof necessary to show knowing possession of child pornography where images have been viewed on the internet, stored on a hard drive, and then deleted has been analyzed in United States v. Tucker, 305 F.3d 1193 (10th Cir.2002). The defendant in Tucker argued he did not possess child

pornography, but merely viewed these images on his Web browser. The court concluded the defendant had sufficient control over the images in his Web browser's cache files, noting among other things, that he had reached out for the images by visiting child pornography websites.

In United States v. Perez, 247 F.Supp.2d 459 (S.D.N.Y.2003), the court addressed the quantity of evidence needed to prove knowing possession of child pornography under similar circumstances. The court noted, "one cannot be guilty of possession for simply having viewed an image on a web site, thereby causing the image to be automatically stored in the browser's cache, without having purposely saved or downloaded the image."

When synthesized with Washington's constructive possession law, the core question seems to be whether the totality of the circumstances establishes that a defendant reached out for and exercised dominion and control over the images at issue. This approach recognizes and promotes the purposes behind Washington's child pornography statute, to protect children by discouraging their sexual exploitation for commercial gain and personal satisfaction. See RCW 9.68A.001. Therefore, evidence of "reaching out for" and "controlling" child pornographic images is incriminating, while inadvertent viewing questions are left to the fact finder.

Here, Detective Sprowl retrieved three images of naked adolescents from unallocated space on Mr. Mobley's hard drive, indicating the images had been twice deleted. Detective Sprowl found six instances on Mr. Mobley's internet history for "Lolita" sites, indicative of child pornography web site use. One photo was labeled: "Free Lolita pictures," and Detective Sprowl recognized one picture as internet child pornography from a previous child molestation investigation. Detective Sprowl testified the images had been "downloaded or purposefully put on the computer." And, S.E. testified Mr. Mobley made her look at "bad pictures" of naked children on the computer when he was living with her family.

Although Mr. Mobley testified he inadvertently viewed the child pornography and suggested the images may have been on the hard drives when he bought them, other evidence was sufficient for the jury to find he sought out these images, controlled them by downloading and/or saving them on his computer. Further, the jury could find he showed them to S.E. before deleting them from the hard drive. From circumstantial evidence, the jury could infer Mr. Mobley possessed the images of naked children in Benton County during the time he lived there with S.E., when it was alleged he showed her the images.

Sexually Explicit Conduct of a Child. A conviction under RCW 9.68A.070 requires the State to prove a defendant possessed images of children depicting "sexually explicit conduct." Sexually explicit conduct is partly defined as the "actual or simulated ... [e]xhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." RCW 9.68A.011(3)(e). However, [b]y itself, an exhibition is inanimate and without any purpose of its own. Necessarily, then, its purpose is the purpose of the person or persons who initiate, contribute to, or otherwise influence its occurrence. The initiator or contributor need not be the accused or the minor whose conduct is at issue. Whoever the initiator or

> contributor is, however, his or her purpose must be to sexually stimulate a viewer. If his or her purpose is different, the conduct will not be sexually explicit by virtue of RCW 9.68A.011(3)(e). State v. Grannis, 84 Wn. App. 546 (Div. II, 1997) **July 97 LED:18** (noting it would not necessarily be criminal to possess a child playing on the playground or a child taking a bath) (citations omitted); see also State v. Chester, 82 Wn. App. 422 (1996) **Oct 96 LED:15** (declining to find sexually explicit conduct where minor was unaware she was being photographed as she exited the shower because her behavior was not influenced by the initiator).
>
> Mr. Mobley argues insufficient evidence shows the three images depicted children. However, Detective Sprowl and Dr. Zirkle both testified based on their training and experience that each image depicted children or adolescents. S.E. related some of the pictures she was shown by Mr. Mobley were "bad pictures" of naked children. Thus, the evidence was sufficient for the jury to infer the three images depicted children as required by RCW 9.68A.070.
>
> Mr. Mobley argues the three images are merely described in the record as naked children or adolescents, which is insufficient to establish the images contained sexually explicit conduct. However, the images were exhibits at trial. Thus, the jury could view the exhibits to determine if their purpose was to sexually stimulate the viewer. For example, the jury could see how the children were posed and if the children knew they were being photographed. The jury was fully instructed on the sexually explicit conduct definition. Mr. Mobley failed to provide the three exhibits for our record, leaving us to speculate. It is Mr. Mobley's responsibility to provide us with the necessary record relevant to his argument. We decline to speculate.
>
> In sum, we conclude sufficient evidence exists to support Mr. Mobley's convictions for possessing depictions of minors' engaged in explicit conduct.

[Some citations omitted]

IDENTITY THEFT: CASE 1 – CHARGE MUST BE LINKED TO SPECIFIC REAL PERSON; CASE 2 – ACTUAL USE OF VICTIM'S ID NOT A REQUIRED ELEMENT OF PROOF

State v. Berry, 129 Wn. App. 59 (Div. I, 2005)

Case No. 1: Facts and Proceedings below:

Defendant Keith Duane Berry, pled guilty to identity theft under circumstances that the trial court summarized as follows:

> On 2-9-03 at about 1913 hours, Keith Berry approached a clerk inside the Home Depot home improvement store located at 1715 S. 352nd., Federal Way, King County, WA., and attempted to purchase $139.57 in merchandise with a business check.
>
> Berry presented identification in the name of Timothy J. Davis, and filled out a business check in the business account of Computech dba. Tim J. Davis.

> The clerk, Michelle Jones, felt that the business check was suspicious, and a check verification revealed that the check was forged. The Federal Way police department was notified, and Officer S. Swanson responded and arrested Berry. Berry subsequently admitted to committing the fraud, stating that he knew that the check and ID he presented were forgeries.
>
> Detective S. Parker contacted the bank listed on the check Berry presented, Bank of America, and determined that the account holder information and routing number were fictitious, however the checking account number was a valid Bank of America checking account.
>
> Detective Parker then contacted the account holder for the checking account number on the bottom of Berry's check, Herb Paulson. Paulson subsequently provided a telephonic statement advising that he does not know Keith Berry, did not give Berry permission to use his checking account number, or permission to access or sign on his checking account.
>
> The trial evidence in the other case was that Berry was a passenger in a car that was pulled over for a traffic violation. During the stop, Berry was arrested for possession of methamphetamine. A search incident to his arrest produced credit cards, checks, and a temporary driver's license in the name of "Robert Cronk." Berry admitted he had purchased the credit cards, checks, and identification, and stated that although he intended to use them, he had not yet done so.
>
> Joan Cronk, Robert Cronk's widow, testified that she served as executor of Cronk's estate and that she did not give Berry permission to possess or use any of Robert's credit cards or accounts. She also testified that a number of charges were made on Robert's credit cards after he died, but she suspected that a woman with whom Robert had been living at the time of his death had made the charges. Berry was found guilty [by a jury] of possession of methamphetamine and second degree identity theft. . .

Berry subsequently moved the trial court for permission to withdraw the guilty plea, asserting that the above-quoted description of facts does not support a charge of identity theft, because no specific real person's identity is linked to defendant's forgery activity. The trial court denied this motion.

<u>Case No. 2: Facts and Proceedings below:</u>

The Court of Appeals describes the facts and procedural background relating to a second identity theft conviction of defendant Berry:

> Berry . . . moved for a new trial on the ground that the to-convict instruction allowed the jury to find him guilty of identity theft without finding that he had used the victim's means of identification, an element Berry argued was required. He also argued that there was insufficient evidence of use to support a conviction.
>
> The trial court denied both [the] motions [.]

<u>ISSUES AND RULINGS</u>: 1) Can a defendant lawfully be convicted of committing identity theft where the evidence does not link the defendant's forged identification with a specific real

person? (ANSWER: No, and the fact that numerous persons named still live in the area does not cure the problem); 2) May a defendant be lawfully convicted of committed identity theft where the person has possessed, obtained or transferred the ID but has not actually used the ID? (ANSWER: Yes)

Result: Reversal in part and affirmance in part of King County Superior Court convictions of Keith Duane Berry for identity theft (two counts) and for forgery (one count); case remanded for retrial on one of the identity theft counts.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Case No. 1 (Specific real victim required)

Former RCW 9.35.020 provided:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
>
> (2)(a) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony.
>
> (b) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony.

Berry argues that the certification for determination of probable cause was insufficient to support the crime of identity theft because it did not purport to name a real person. . .

The only real person named in the certification was Herb Paulson. But Berry was not charged with identity theft of Herb Paulson. Instead, he was charged in relevant part with using "a means of identification or financial information, to wit: a driver's license with the name and address of Tim Davis...."

The State argues that Berry's claim fails for two reasons: 1) the telephone book provides proof that as many as 21 persons named Tim or Timothy Davis live in the Seattle Metro area; and 2) the certification provides ample evidence that Berry committed identity theft of Herb Paulson by using his account number to obtain credit.

The State's argument that Berry committed identity theft even though the evidence did not link Berry's forged means of identification with a specific, real person fails to recognize whom the Legislature intended to protect by this statute. When the Legislature created the identity theft statute, it noted that "financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests." [Moreover, the Legislature defined a "means of identification" as "information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person ...." The fact that numerous real persons named Tim Davis may live in the Seattle area does nothing to cure the failure to charge Berry with stealing the identity of a specific, real person.

Nor does identifying Herb Paulson as the owner of the account on which Berry issued a forged check cure the omission. Berry simply used an account number that matched Paulson's account number. He did not use Paulson's name or other examples of identity.

Because Berry was not charged with stealing the identity of a specific, real person, the certification did not (and could not) provide a factual basis for the plea. Without that factual basis, the plea was not truly voluntary. Therefore, the trial court erred in denying Berry's motion to withdraw his guilty plea to identity theft. We reverse and remand.

Case No. 2 (Use of the ID not necessary element)

Berry argues that the trial court erred by denying his motion for new trial, because the evidence was insufficient to convict him of identity theft of Robert Cronk. . .

Berry argues that the evidence was not sufficient because RCW 9.35.020 requires that the State prove he "used" the victim's means of identification.

Berry argues that because he did not use Cronk's means of identification, he was not guilty of identity theft. His argument relies on a misinterpretation of the statute. He argues that because subsection (1) of former RCW 9.35.020 did not identify a crime, it was not the operative subsection in defining the crime of identity theft. Instead, Berry argues that the court must look to subsections (2)(a) and (2)(b). Based on the language of those two subsections, which defined identity theft in the first degree and identity theft in the second degree respectively, identity theft was committed when the accused or an accomplice used the victim's means of identification. Subsections (2)(a) and (2)(b) did not repeat the language used in subsection (1), which provided that "[n]o person may knowingly obtain, possess, use, or transfer a means of identification ... of another person ... with the intent to commit any crime." Berry's argument ignores the straightforward prohibition against obtaining and possessing another's means of identification with intent to commit a crime.

Where there is no ambiguity, we will not construe the statute. Subsection (1) of the identity theft statute prohibited obtaining, possessing, using or transferring a means of identification of another person with the intent to commit a crime. Subsections (2)(a) and (2)(b) merely defined the difference between first degree and second degree identity theft. Both subsections (2)(a) and (2)(b) began with

the language "violation of this section," relying on subsection (1) to define what was prohibited by the statute. By including the language "violation of this section," the Legislature indicated clearly that the three subsections must be read together, with subsection (1) defining the prohibited acts, and subsections (2)(a) and (2)(b) explaining the difference between first degree and second degree. There was no ambiguity in the language of former RCW 9.35.020; obtaining and possessing another person's means of identification with intent to commit a crime was illegal.

SHOWUP IDENTIFICATION PROCEDURE HELD NOT UNDULY SUGGESTIVE; ALSO, EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTION FOR SECOND DEGREE ROBBERY

State v. Brown, 128 Wn. App. 1 (Div. III, 2005)

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

On April 19, 2003, Geneva Campbell was waiting for a bus in front of a Denny's restaurant in north Spokane, when a young man approached her from behind and demanded her purse. The man took Ms. Campbell's purse and knocked her down. Following the incident, she described the man as a white male, with short blonde hair, wearing dark clothing.

Karen Howell and her husband witnessed the incident from the Denny's parking lot. Ms. Howell described the assailant as a young, Caucasian male, approximately five-feet-seven to five-feet-eight inches tall, with a shaved head, and wearing dark clothing.

Geoffrey Smith was driving a car at a nearby auto dealership where he worked when he saw a young man carrying a purse running at full speed behind Denny's and then "dive" into a waiting car being driven by a female. He saw the man from the front and back side for a total of about 30 seconds from 30 to 40 feet away. Mr. Smith wrote down the license plate number on his hand. He described the suspect as a Caucasian male, in his 20s, with short blonde hair; approximately five-feet-six inches to five-feet-eight inches tall, wearing a gray sweater and denim jeans. Mr. Smith identified Mr. Brown in a show up and in court as the person he had seen running.

Spokane Police Officer Alan Edwards soon found a car with a matching license plate parked behind an apartment building, about one mile southwest of the crime scene. An individual closely matching the suspect's description then emerged from an area near the car. The suspect was apprehended by Officer Edwards after first running and appearing to hide. The suspect wore a light blue jersey and brown pants when he was arrested.

Officer Paul Watson brought Ms. Campbell and Mr. Smith to that location for identification. From 30 feet away, Ms. Campbell was unable to identify Mr. Brown. She did not want to come any closer. She described Mr. Brown's hair as "too dark." Mr. Smith then positively identified Mr. Brown, but he was unable to pick Mr. Brown out of a defense photomontage seven months later.

Mr. Brown was charged with second degree robbery. At a bench trial, Mr. Brown denied any involvement in the robbery. He testified he was in the area where the car was found because he was visiting a friend named "Hollywood," who lived in a nearby apartment. He related he ran from the police because he feared he would be arrested on an outstanding warrant.

Mr. Brown was convicted as charged.

ISSUES AND RULINGS: 1) Was the showup procedure unduly suggestive? (ANSWER: No); 2) Was the evidence sufficient to support the conviction for second degree robbery? (ANSWER: Yes)

Result: Affirmance of Spokane County Superior Court conviction of Bud Ray Brown for second degree robbery.

ANALYSIS: (Excerpted from Court of Appeals opinion)

To convict Mr. Brown of second degree robbery, the State was required to prove he unlawfully took Ms. Campbell's purse by the use of force. *See* RCW 9A.56.190; RCW 9A.56.210. Although Mr. Brown contends Mr. Smith's show up identification was impermissibly suggestive and, thus, insufficient to support his conviction, he failed to object at trial. Failure to object to evidence at trial precludes appellate review, unless the appellant makes a showing of manifest constitutional error not present here.

Even so, an impermissibly suggestive [identification procedure] violates due process solely when it creates an "irreparable probability of misidentification." "First, the defendant must show the [identification procedure] was impermissibly suggestive. If the defendant fails to meet this initial burden, the inquiry ends. If the defendant meets this burden, then the court determines whether the ... identification contained sufficient indicia of reliability despite the suggestiveness."

Generally, "courts have found lineups or montages to be impermissibly suggestive solely when the defendant is the only possible choice given the witness's earlier description." Only the show up identification merits mention because the montage was prepared by Mr. Brown and was, nevertheless, inconclusive.

Even an impermissibly suggestive identification may be overcome if it is otherwise sufficiently reliable.

> In considering the reliability of the identification, the court may consider: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

Here, Mr. Smith initially saw the suspect from about 30 or 40 feet away and observed him for 30 seconds. Mr. Smith's description was accurate as to height, weight, hair color and length. At the time of identification, Mr. Smith was

> confident Mr. Brown was the suspect he had seen earlier. Finally, the identification took place less than an hour after Mr. Smith first witnessed the suspect. Considering all, Mr. Smith's identification was sufficiently reliable.
>
> Other evidence, some circumstantial, like Mr. Brown's flight and his proximity to the identified get-a-way car, supports conviction. Although Mr. Brown denied involvement and argued weaknesses in the State's case, the credibility and weight decisions are left for the fact finder. In sum, the evidence was sufficient.

[Citations omitted]

EVIDENCE HELD SUFFICIENT TO SUPPORT CONVICTIONS FOR POSSESSING PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE METHAMPHETAMINE

State v. Moles, Conn and Cambra, __ Wn. App.__, 123 P.3d 132 (Div. II, 2005)

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

> On August 9, 2003, Officer Byerley was on routine patrol when he received a dispatch informing him that three males in an unconfirmed stolen red Geo Prism had purchased the maximum allowed quantity of pseudoephedrine from two local grocery stores.
>
> Byerley observed a red Geo Prism matching the dispatch description and license plate number parked in a drug store parking lot. Two males exited the store and got into the car. Byerley stopped the car as it left the parking lot and requested back-up assistance. Once Officer Scott Lane arrived on the scene, the officers asked the three individuals to exit the vehicle one at a time. The officers then handcuffed and searched the defendants before placing them in a police car.
>
> Byerley found store receipts from two grocery stores in Conn's right pocket, reflecting the purchase of three Allerfed packets and three Triphed packets. Byerley found a plastic bag containing brown powder residue, a second bag containing white powder residue, and several coffee filters in Cambra's pockets. Byerley advised Cambra of his Miranda rights. Cambra acknowledged that he understood his rights and agreed to talk to the officer. He stated that Moles had possessed the stolen car for several days and that the three defendants had been purchasing pseudoephedrine from various stores.
>
> After taking the defendants into custody, Byerley noticed that the Prism's ignition had been "punched," and contacted dispatch to confirm that the Prism was stolen. A subsequent search of the Prism revealed (1) four empty blister packs; (2) one box of Suphedrine; (3) a grocery bag containing two empty blister packs and one full package of pseudoephedrine and several loose white pills; (4) a second grocery bag containing two empty boxes of Suphedrine, two blister packs, and numerous loose white pills; and (5) a black bag with two sealed packages of Contac(R) Cold Medicine. According to Byerley's trial testimony, he found close to 440 loose white pills in the vehicle.
>
> The State charged all three defendants with unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. The State charged Cambra with unlawful possession of a controlled substance. The State

also charged Moles with first degree possession of stolen property and with making a false or misleading statement to a public servant.

At the pretrial suppression hearing, Byerley testified that he stopped the Prism "because it was a reported stolen vehicle." The court denied the defendants' motion to suppress.

At trial, Byerley testified that he was a member of the Pierce County Sheriff's clandestine lab team and that he had training in identifying controlled substances. He further testified that the first stage of the manufacturing process is the acquisition of pseudoephedrine tablets that are then crushed and mixed with a solvent. The mixture is strained through a coffee filter, separating the drug from the liquid mixture. Frank Boshears, a forensic scientist, testified that he tested the white tablets, the tan powder, and the white powder residue on the coffee filters. The pills contained pseudoephedrine. He further testified that the brown powder and the white powder residue on the coffee filters tested positive for methamphetamine.

Chung Hoon Lee testified that he shared the Prism with his parents and that it had been stolen. He testified that he called 911 to inform the police about the theft but that it was "probably" his brother who filled out the written report.

The jury found all three defendants guilty as charged.

ISSUE AND RULING: Was the evidence sufficient to support the conviction for possessing pseudoephedrine with intent to manufacture methamphetamine? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court convictions of William C. Moles, II, Alan Conn and Louis G. Cambra for possessing pseudoephedrine with intent to manufacture methamphetamine; also (under analysis in the unpublished part of the opinion not addressed in this **LED** entry), affirmance of Moles' separate convictions for possession of stolen property and making a false or misleading statement to a public servant, as well as Cambra's separate conviction for unlawful possession of a controlled substance.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Defendants argue that their convictions must be reversed because the jury did not have sufficient evidence to find that they possessed pseudoephedrine with intent to manufacture methamphetamine. The State responds that the evidence was sufficient because the jury could infer intent to manufacture from the quick succession of cold pill purchases, the drugs in Cambra's pocket, and the large number of loose pseudoephedrine tablets in the car.

To establish that defendants possessed pseudoephedrine with intent to manufacture methamphetamine, the State had to prove that they: (1) possessed pseudoephedrine; and (2) intended to use the pseudoephedrine to manufacture methamphetamine. RCW 69.50.440. Manufacture is "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly." RCW 69.50.101(p).

Bare possession of a controlled substance is not enough to support an intent to manufacture conviction; at least one additional factor, suggestive of intent, must

> be present. State v. McPherson, 111 Wn. App. 747 (2002). A person acts with intent when he acts with the objective or purpose to accomplish a result that constitutes a crime.
>
> RCW 9A.08.010(1)(a). A person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process.
>
> Here, the State presented sufficient evidence for a rational trier of fact to find the defendants guilty of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. RCW 69.50.440. Byerley counted close to 440 loose white pseudoephedrine pills in the defendants' stolen vehicle. The pills had been removed from the blister packs. Byerley testified that the first stage in the manufacturing process is to acquire pseudoephedrine tablets and then process them. The fact that so many pills had been removed from the blister packs leads to the only plausible inference: that the defendants were in the process of preparing the pseudoephedrine for the first stage of the manufacturing process. We hold that this alone is sufficient to support the jury's finding of intent to manufacture. Further, Byerley found a coffee filter with methamphetamine residue in defendant Cambra's pocket. And the defendants were acting in concert to purchase the maximum allowable amount of cold pills containing pseudoephedrine from various stores over a short period of time. Thus, additional factors suggesting manufacture exist, and the evidence was sufficient to support a manufacturing conviction for each of the three defendants.

[Citations and footnotes omitted]

LED EDITORIAL NOTE: Other Washington decisions addressed in the LED on this issue of sufficiency of evidence of meth manufacturing include: State v. Keena, 121 Wn. App. 143 (Div. II, 2004) June 05 LED:14; State v. Todd, 101 Wn. App. 945 (Div. III, 2000) Jan 01 LED:11; State v. Zunker, 112 Wn. App. 130 (Div. III, 2002) Aug 02 LED:23.

UNDER FOUR-PART TEST FOR "NECESSITY" DEFENSE, FACTS OF CASE ARE HELD NOT TO JUSTIFY THE DEFENSE TO AN UNLAWFUL-POSSESSION-OF-FIREARM CHARGE

State v. Parker, 127 Wn. App. 352 (Div. III, 2005)

Facts and Proceedings below:

> At approximately 2:36 a.m. on April 9, 2003, Tacoma Police Officer Stephen Shepard observed a vehicle without headlights fail to obey a stop sign. When Shepard initiated a traffic stop, Parker fled from the vehicle, disobeying Shepard's command to stop. Shepard radioed for help and chased Parker to a nearby residence.
>
> After two other officers found Parker inside feigning sleep, Shepard arrested him and found a gun magazine containing bullets in his pants pocket. The magazine fit a gun found in the area, and Parker admitted that the gun belonged to him.
>
> Because Parker had a prior conviction for second degree assault, the State charged him with first degree unlawful possession of a firearm. At trial, Parker

testified that he carried the gun because he had been shot the previous July and his assailants were still at large. He added that he was leaving a friend's house after borrowing a car battery charger when Officer Shepard stopped him.

After the trial court rejected his proposed necessity instruction, the jury found Parker guilty as charged.

ISSUE AND RULING: Washington courts have held that a defendant can establish a common law "necessity" defense to a charge of unlawful possession of a firearm under RCW 9.41.040 if: (1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. Did the trial court err in refusing the defendant's "necessity" instruction under the facts of this prosecution for violation of RCW 9.41.040? (ANSWER: No, the first, third and fourth elements of the four-part test in "unlawful possession of a firearm" cases are not met by the facts of this case)

Result: Affirmance of Pierce County Superior Court conviction of Shamarr D. Parker for unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The necessity defense is available to a defendant "'when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.'" Unlawful possession of a firearm is necessary when (1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. State v. Jeffrey, 77 Wn. App. 222 (Div. III, 1995) **Oct 95 LED:06**.
>
> The trial court refused Parker's proposed necessity instruction after finding that he had not proved the first element set forth above. Parker testified that he had been shot almost nine months before Officer Shepard stopped him on April 9, 2003, and that he had been carrying a gun for protection since the shooting. He also testified that he was not under any specific or imminent threat of harm at any time on April 9.
>
> The Fifth Circuit Court of Appeals refused a necessity instruction where the evidence showed that the defendant bought a gun to protect himself at his business, which had been the object of several robbery attempts over an 18-month period. United States v. Harper, 802 F.2d 115, 117-18 (5th Cir. 1986). Because there was no evidence that the defendant was in danger of imminent bodily harm at the moment he purchased and possessed the gun, he was not entitled to the necessity defense. By contrast, Division One held that a defendant was entitled to a necessity instruction where the evidence showed that he grabbed an assailant's gun while being beaten, pointed it at his attackers, and ran away. State v. Stockton, 91 Wn. App. 35 (Div. I,1998) **Nov 98 LED:09**.

> The facts here are closer to those in Harper than those in Stockton, and we agree that Parker did not show that he reasonably believed he was under an unlawful and present threat of death or serious bodily injury when he was in possession of the gun on April 9.
>
> Furthermore, we also find that Parker failed to prove that he had no reasonable legal alternative to carrying a gun. To show that he had no such alternative, Parker had to show " 'that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative.' " Harper. Here, Parker testified that he never contacted the police about his shooting, even thought the police made several attempts to contact him. Instead, he said he got advice from a lawyer. Although he added that he thought his family would be harmed if he did contact the police, he did not demonstrate that previous contacts had been futile.
>
> Finally, we note that Parker failed to establish a direct causal relationship between his possession of a firearm and the avoidance of the threatened harm. His own testimony established that his gun possession did not eliminate the possibility of attacks by his assailants. See Harper (though possession of firearm made robbery attempt less attractive, it did not eliminate the defendant's danger).
>
> The trial court did not err in refusing Parker's proposed necessity instruction.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COURT ADDRESSES MEANING OF "ENTERS UNLAWFULLY" AND "REMAINS UNLAWFULLY" IN BURGLARY STATUTES – In State v. Allen, 127 Wn. App. 125 (Div. I, 2005), the Court of Appeals addresses several issues in an appeal by a burglary-theft defendant from offices in downtown Seattle office buildings.

Among other things, the Allen Court holds that, during closing argument to the jury, the deputy prosecutor mischaracterized long-established Washington law governing burglary. It was improper for the prosecutor to invite the jury to find the defendant guilty without considering whether, after entering buildings lawfully, the defendant strayed into private areas of the buildings such as to render his presence unlawful.

The second degree burglary statute at issue in this case provides that it is burglary in the second degree when "with intent to commit a crime against a person or property therein, [a] person enters or remains unlawfully in a building other than a vehicle or dwelling." RCW 9A.52.030. The Allen Court explains that one who enters areas of a building that are open to the public does not "enter unlawfully" and therefore commit burglary by committing a crime in those areas even if he intends to commit a crime as he enters. See State v. Miller, 90 Wn. App.

720 (Div. III, 1998) **Aug 98 LED:18** (rejecting what was referred to in that case as the broader "California rule" for burglary of business establishments).

The Allen Court also explains as follows that the alleged thief defendant could be lawfully convicted of burglary in the second degree under the alternative theory that he "remaine[d] unlawfully" in the buildings in question by going from areas in the building that were open to the public into areas not open to the public:

> Contrary to Allen's arguments, there was sufficient evidence to support the burglary convictions on the basis of the unlawful remaining alternative. All three buildings were open to the public, and Allen was therefore privileged to enter. In each, however, the evidence suggested Allen exceeded that privilege and unlawfully remained. In the Airborne Express and Washington Mutual buildings, the privilege was limited by the requirement that visitors check in with a receptionist to obtain authorization for areas that were not open to the public. At Airborne Express, this limitation was signaled by signs next to the elevators, just inside the public entrance. At the Washington Mutual Tower, visitors to Karr Tuttle and Sorenson & Edwards were physically restricted by the elevator to entering on the 29th floor, next to the receptionist's station. In both cases, the evidence indicated that Allen circumvented these requirements and intruded into areas not open to the public.
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> Similarly, the evidence indicated that Cummings' office in the U.S. Bank branch was physically separated from the lobby and teller areas by a partial wall and a portion of the escalator. In addition, Cummings testified he placed some chairs to leave only a narrow opening into the office, supporting a reasonable inference that the space was not part of the public area of the bank and that Allen exceeded the scope of any privilege by entering the office.

Result: Reversal of King County Superior Court convictions of Joel Dan Allen for three counts of burglary in the second degree; remand for re-trial on the burglary charges (the Court decision did not affect Allen's convictions arising from the same incidents for second degree theft and second degree possessing stolen property.)

(2) ORCHARDIST'S CONVICTION FOR UNLAWFULLY HUNTING BIG GAME IN SHOOTING OF FORAGING ELK UPHELD, NECESSITY DEFENSE FAILS – In State v. Vander Houwen, 128 Wn. App. 806 (Div. III, 2005), the Court of Appeals rules that an orchardist who shot elk damaging his fruit trees was lawfully convicted for unlawful hunting of big game under RCW 77.15.410.

The primary issue on appeal was whether the jury was properly instructed on the defense of "necessity." The Court of Appeals rejects defendant Vander Houwen's argument that a property owner has an absolute constitutional right to defend his property against marauding wild animals, such as in the case here where an orchardist was trying to stop elk from raiding his orchard. The Vander Houwen Court declares that the following instruction on necessity was a lawful instruction in this case:

> Necessity is a defense to a charge of unlawful big game hunting in the second degree and/or waste of wildlife in the first degree if

(1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize a harm; and

(2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;

(3) the threatened harm was not brought about by the defendant; and

(4) no reasonable legal alternative existed.

This defense must be established by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

Result: Affirmance of Yakima County Superior Court convictions of Jerrie L. Vander Houwen for second degree unlawful hunting of big game (two counts).

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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://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2005, is at [http://slc.leg.wa.gov/]. Information about bills filed since 1997 in the 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 [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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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: [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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