



Law Enforcement

JANUARY 2008

Digest

615th Basic Law Enforcement Academy – July 30, 2007 through December 6, 2007

President: Zachary Fairley – Pasco Police Department
Best Overall: Geary Enbody – Woodland Police Department
Best Academic: Geary Enbody – Woodland Police Department
Best Firearms: Jeremy Brown – Clark County Sherriff's Office
Tac Officer: Corporal Monica Matthews – Washington State Patrol

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WASHINGTON STATE SUPREME COURT

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State v. George (and George), 161 Wn.2d 203 (2007)

Facts and Proceedings below (Excerpted from Supreme Court opinion)

In June 2003, Tommy George approached Jerome Potter, asking if he was interested in selling his 1974 Chevrolet half-ton pickup truck. A problem with the rear wheel differential rendered the truck inoperable for the two years prior to the sale, during which time it sat uncovered, outside of Potter's home. Potter disclosed the mechanical problems and further informed Tommy George that he had replaced the old engine, a "350," with a "400." Potter said the truck had 185,000 miles on it-although the five digit odometer read 70,000. *[Court's footnote: The odometer showed only five digits and at every 100,000 miles it returned to a reading of 0. At the time of the sale, the truck had 70,000 miles on it; Potter conceded upon cross-examination that the vehicle must have had 170,000 miles, rather than 185,000.]* Potter informed George that he had purchased the truck used and that it had sat outside inoperable for two years. Tommy George's father, John, returned a few days later to negotiate, and he eventually bought the truck for \$1,800.

The Georges placed an ad in *The Seattle Times* that read: "1974 Cheyenne Super 1/2 T, 1 ownr, 350 v8, AT, tow pkg. All stock and original gar'd. 70 K mi very nice \$5,500." The Seattle Police Department reads *The Seattle Times* advertisements searching for fraudulent offers that appear "too good to be true." Detective Daniel Stokke believed he had found such an advertisement placed by the Georges. He elicited the assistance of Detectives Richard O'Donnell and Dana Duffy who impersonated interested buyers. Detective O'Donnell spoke with Tommy George who reported that his father, John George, was the original and sole owner, that the truck had always been garaged, was in "perfect condition," and had 70,000 miles on it. John George confirmed, when he met with Detective O'Donnell, that he was the sole owner, the truck had "always been in the garage," had 70,000 miles on it, and was in "great shape." The Georges asked for \$5,500, which Detective O'Donnell agreed to pay. John George required some time to retrieve the title, so the parties arranged to complete the sale the following day. The officers arrived the next day with a cashier's check and, after the sale was completed, the officers arrested the Georges.

The State charged the Georges with attempted first degree theft by deception. Because of the vehicle's age, Detective Stokke could not find standardized pricing information. At a joint trial, the only evidence the State presented that could prove the market value of the truck was the amount the Georges paid Potter. The Georges offered no evidence on the value of the truck; in fact, the Georges presented no evidence in their defense. After the State rested, the Georges moved for dismissal. The Georges argued a prima facie case had not been established because after they purchased the truck they made improvements to the truck and the State offered no evidence showing that the truck as sold was worth less than the sales price. The Georges alleged the State merely established the elements of attempted theft in the third degree, which

punishes theft of property worth less than \$250. The trial court denied their motion but did give the jury lesser included instructions on attempted second and third degree theft.

Defense counsel for John George argued to the jury, “[The police] got something of value in exchange for their \$5,500. The State has failed to prove how much a value that truck has, so by failing to prove that they can't prove to you that it's more than \$250.” Defense counsel for Tommy George drew an analogy to a jeweler who lies about a diamond and sells it for \$10,000—a dollar more than it is worth. Criticizing the claim that the jeweler stole \$10,000, instead of a dollar, he remarked, “[t]he law can't allow that, that's not logical. It's an absurd result.” The State, in response, argued that the Georges committed attempted theft by their efforts to deprive the buyer of \$5,500 through deception. The property they tried to steal was the \$5,500 cashier's check. The jury convicted both Georges of attempted theft in the first degree.

The Court of Appeals affirmed the convictions. [Sept 06 LED:12]

ISSUE AND RULING: Does substantial evidence support that the Georges attempted to deprive the undercover officers of over \$1500 (attempted first degree theft) even though the State did not prove the market value of the truck? (**ANSWER:** Yes, rules a unanimous Court, because the value for purposes of establishing the degree of theft in this theft-by-deception circumstance is the value of the money sought to be obtained.

Result: Affirmance of Court of Appeals decision affirming the King County Superior Court convictions of John S. George and Tommy B. George for attempted first degree theft.

ANALYSIS:

The Supreme Court explains as follows its interpretation of the language of chapter 9A.56 RCW in the context of this theft-by-deception case:

Theft by deception means “[b]y color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(b). Theft in the first degree is defined as theft of “[p]roperty or services which exceed(s) one thousand five hundred dollars in value.” RCW 9A.56.030(1)(a). Theft in the second degree is defined as theft of property with a value less than \$1,500, but more than \$250. RCW 9A.56.040(1)(a). Theft in the third degree is theft of property with a value less than \$250. RCW 9A.56.050(1)(a). “Property,” as used in RCW 9A.56.030(1)(a), refers to the “property or services of another” that a defendant has stolen. See RCW 9A.56.020(1)(c). “Value” is defined as “the market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(18).

The Georges argue there was no evidence of the actual loss to the potential victim because there was no evidence of the value of the truck after they repaired it. The Georges reason that the truck might be worth even more than the \$5,500 the police agreed to pay for it. However, the Georges misread the statute. A careful reading of the statute leads to the conclusion that the actual value of the truck is not relevant to the measure of value of the stolen property. We agree

with the Court of Appeals that the Georges would have an excellent argument if they were charged with stealing the truck. But they were not. Instead, they were charged with attempted theft by deception for obtaining a \$5,500 cashiers check. The cashiers check was the “property of another” they intended to obtain by aid of deception, and it cannot be disputed that its value exceeds \$1,500. We also agree with the Court of Appeals that the legislature did not intend “an inquiry into the thief’s net gain or the victim’s net loss.” In deception cases, the statute looks only to the value of the property obtained, not the net result of the exchange. See RCW 9A.56.020(1)(b). Here, the property the Georges attempted to obtain was a valid cashiers check for \$5,500. The Court of Appeals correctly observed:

theft by color or aid of deception means that “the deception operated to bring about *the obtaining of property or services; it is not necessary that deception be the sole means of obtaining the property or services.*” In drawing the line between criminal conduct and sharp business practices, the legislature clearly contemplated that something in addition to pure deception will be involved. Indeed, in many acts of theft by deception, something falsely described is given in exchange to induce the transaction.

[Some citations omitted]

The Supreme Court goes on to explain that its ruling is consistent with the Supreme Court’s own precedents, as well as precedents from other jurisdictions.

WASHINGTON STATE COURT OF APPEALS

MUTUAL CONSENT RULE OF MORSE NOT MET WHERE TWO PERSONS WITH EQUAL AUTHORITY WERE BOTH ON THE PREMISES AND ONLY ONE - - NOT DEFENDANT - - WAS ASKED FOR CONSENT; ALSO, COMMUNITY CARETAKING RATIONALE FOR SEARCH NOT MET BECAUSE PURPOSE OF SEARCH WAS CRIMINAL INVESTIGATION

State v. White, __ Wn. App. __, 168 P.3d 459 (Div. III, 2007)

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

Mr. White's mother, Janet White, owns real property and a residence in a rural area outside of Grandview, Washington. Bill Michener, a neighbor, leases orchards surrounding Janet's property. Mr. Michener owns a house and orchards adjacent to Janet's property. He has known her family since 1984.

Located on Janet's property is a multipurpose building that holds tools and houses the controls for the orchards' irrigation system and also has a furnished sunroom that opens to a garden. This building has always been unlocked. In the past, Mr. Michener had regularly come upon Janet's property and entered the building, sometimes with hired hands, to operate the irrigation controls and, at times, to use tools. Mr. Michener also had keys and the security code to Janet's residence and was given full access to the home and outbuildings.

When Janet was out of town, Mr. Michener helped out by watering her lawn and shrubs in the backyard and picking up her mail and newspaper. Janet had never expressly limited Mr. Michener's access to any part of her property. She assumed that Mr. Michener would deal with a break-in of her property if one occurred, and she had no problem with him taking the police into her premises under such circumstances. In fact, several years prior to the events in this case, Janet's security alarm went off when she was away, and Mr. Michener had police check inside the home.

Mr. White had not lived at his mother's residence for a few years, but he had permission to come and go and he, too, had keys and the access codes. Mr. White kept clothing at the residence and stored furniture and various other items in the outbuildings.

Janet left on a trip a couple of days before the events of May 7, 2003. She made the usual arrangements with Mr. Michener to look after her place. Mr. White did not tell either Janet or Mr. Michener that he would be at the residence during Janet's absence.

In the early morning hours of May 6, Mr. Michener came to Janet's property to irrigate the fields. At 3 or 4 a.m. he recognized Mr. White's pickup parked near the irrigation room, and he saw lights coming from under the door of the room. By 8 a.m., it appeared that Mr. White (or whoever was there earlier) had gone. Mr. Michener noticed an odd odor in the irrigation room.

When Mr. Michener returned the next morning, the door to the irrigation room was locked and a "very strong odor" was coming from inside. Unlike the prior morning, Mr. Michener saw no vehicles parked nearby. He called the sheriff's office and requested that a deputy come out to investigate.

[A deputy] responded. Mr. Michener reported his observations to the deputy and stated that he had the authority to enter and use the building. Mr. Michener led the deputy to the irrigation room, which was still locked. As Mr. Michener began to walk around to try the sunroom door, Mr. White opened the irrigation room door. In a brief conversation, Mr. White identified himself and stated that he had a right to be there.

[The deputy] smelled a strong ammonia-type odor coming from the open door. He sensed something was wrong because of Mr. White's body language so he directed Mr. White to step outside. Mr. White initially refused. He complied when the deputy unholstered, but did not aim, his firearm. [The deputy] secured Mr. White in a patrol car "so he could further investigate the situation."

The deputy returned to the building and looked inside the doorway. On the ground, he saw a bucket filled with liquid that was emitting a vapor. He also saw a box containing black and clear tubing, plastic bottles of HEET, and a 10-gallon container of paint thinner. Mr. Michener said that he had not seen the items in the shed before. [The deputy] believed that the items were indicators of a possible methamphetamine lab.

[The deputy] stepped inside and followed an extension cord from the irrigation

room to a hotplate in the backyard. On top of the hotplate was a bubbling container of liquid that was emanating a strong ammonia odor. [The deputy] returned to the patrol car and arrested Mr. White for manufacturing methamphetamine.

In denying Mr. White's motion to suppress the evidence, the trial court concluded that:

Although [the deputy's] entry onto the property and into the [irrigation room] was made without a warrant, his entry was lawful because of Mr. Michener's invitation and request for the deputy to enter the property and building to investigate. Mr. Michener was standing in the shoes of the property owner, as he had been given authority by Mrs. White to enter, use, and bring other people onto the property. Mr. Michener had actual authority to invite the deputy to go inside the [irrigation room] and he had actual authority to give consent to search.

....

Mr. White was convicted of one count of manufacturing methamphetamine after a stipulated facts trial on the evidence seized by the warrantless search of his mother's home.

ISSUES AND RULINGS: 1) Under article 1, section 7 of the Washington constitution, as interpreted in State v. Morse, did the neighbor and the adult son (defendant) have equal authority over the premises such that, where both were present on the premises, police could obtain consent to search only by obtaining consent from both the neighbor and the adult son? (ANSWER: Yes, and therefore the neighbor's consent was invalid in relation to the suppression motion of the son); 2) Do the facts alternatively support the search of the premises on the "community caretaking" rationale? (ANSWER: No, because the purpose of the search was criminal investigation).

Result: Reversal of Yakima County Superior Court conviction of Paul David White for manufacturing methamphetamine.

ANALYSIS:

1) Third party consent to search

Under the federal constitution's Fourth Amendment, as well as under article 1, section 7 of the Washington constitution, a third party may consent to a police search if the third party possesses common authority over the premises or effects that the police seek to search. But under the restrictions of article 1, section 7 of the Washington constitution (which are tighter in many contexts than Fourth Amendment restrictions), a third party has only equal control over premises or effects does not have authority to consent on behalf of another third party who is present and has equal control over the premises or effects. See generally State v. Morse, 156 Wn.2d 1 (2005) **Feb 06 LED: 02.**

The White Court holds that White and the neighbor had equal control over the premises searched. Therefore, because White was present at the time of the officer's search, the neighbor's consent to a police search was not valid in a prosecution of White.

2) Community caretaking exception to search warrant requirement

On the community caretaking issue, the White Court's analysis is as follows:

The community caretaking exception to the search warrant requirement allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. This invasion is allowed only if: (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place being searched. "Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.' "

Police involvement under this exception must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." A warrantless search is justified, for instance, "when premises contain persons in imminent danger of death or harm; objects likely to burn, explode, or otherwise cause harm; or information that will disclose the location of a threatened victim or the existence of such a threat."

There was no evidence that [the deputy in this case] had any concern for the safety of persons or property. In contrast to the lack of testimony to support the exception, there is ample evidence to support his intent to investigate his belief that Mr. White was engaged in ongoing criminal activity.

[The deputy] testified that upon seeing Mr. White, "[I]n my 24 years as a law enforcement officer I have seen that look in a person[']s eyes that have been caught in the act." When Mr. White told [the deputy] he had a right to be there and refused to exit, the officer unholstered his weapon and told Mr. White that "it would be in his best interest to step out now." He then placed Mr. White in his patrol car and told him he intended to find out what Mr. White was doing. And that is what he did; he returned to the irrigation room and looked inside and saw what he believed was a methamphetamine lab. But based on his limited experience and training with methamphetamine manufacturing-consisting mainly of a two-hour class-he was still uncertain at that point.

He did not apply for a warrant nor did he call the drug task force as he was trained. Rather, he entered, stating that he wanted to make sure that there was nobody else there that he needed to detain. He said that he was not sure if there was a burglary, trespass, or exactly what was going on, given the smell. [The deputy] was clearly investigating. He did not, however, testify to any community caretaking justification for the entry, nor does the record support one.

“When the State invokes [the community caretaking] exception, the reviewing court “must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search.” ” There is no assurance that the deputy’s motives were not a pretext here.

[Some citations omitted]

CORPUS DELICTI FOR “DRIVING” ELEMENT OF DUI ESTABLISHED BY PROOF THAT WRECKED CAR WAS REGISTERED TO DEFENDANT AND HE WAS THE ONLY PERSON FOUND IN THE AREA OF THE ONE-CAR ACCIDENT

State v. Hendrickson, __ Wn. App. __, 168 P.3d 421 (Div. II, 2007)

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

At about 1:30 a.m., on January 13, 2005, Deputy Steven Weigley was driving along State Route 302 when Hendrickson darted across the roadway, forcing Weigley to swerve to miss him. Weigley approached Hendrickson, who was on his knees crying. Hendrickson told Weigley that he had “crashed” and that he was by himself. Weigley called paramedics and the state patrol.

Hendrickson told Deputy Weigley and Trooper Jonathan Ames that he had been following a friend home and had lost control of his car and had driven off the road attempting to avoid an oncoming car that was passing improperly. Hendrickson also admitted to Ames that he had been drinking, that he was intoxicated, and that he should not have been driving.

The officers found the car Hendrickson had been driving at the bottom of a ravine; the keys were still in the ignition. At the scene, using the Department of Licensing database, Trooper Ames verified that Hendrickson was the owner of the car.

The State charged Hendrickson with one count of DUI. RCW 46.61.502(1)(b).

At trial, over Hendrickson’s objection that the State had failed to establish *corpus delicti*, the State elicited testimony from Deputy Weigley and Trooper Ames regarding Hendrickson’s admissions to them that he had been drinking and that he had been driving the vehicle.

At the close of the State’s case, Hendrickson moved to dismiss, arguing that the State failed to prove the *corpus delicti* of the crime. The district court found that the State had proved *corpus delicti* and denied Hendrickson’s motion to dismiss. The jury convicted Hendrickson of DUI in violation of RCW 46.61.502(1)(b) and (c).

Hendrickson appealed the conviction to the superior court [which reversed the conviction based on the corpus delicti rule].

ISSUES AND RULINGS: 1) Do the facts that the wrecked vehicle belonged to Hendrickson and that he was the only person in the area of the one-car accident provide sufficient evidence to meet the driving element for the corpus delicti of DUI? (ANSWER: Yes); 2) Does the corpus

delicti rule limit the State's proof of the corpus delicti (i.e., proving that the elements of a crime were present) to evidence that officers obtained prior to the arrest of the defendant? (ANSWER: No)

Result: Reversal of Pierce County Superior Court ruling, reinstatement of District Court conviction of Andrew Christian Hendrickson for DUI; case remanded for sentencing.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Corpus delicti means the “ ‘body of the crime’ ” and must be proved by evidence sufficient to support the inference that there has been a criminal act. A defendant's incriminating statement alone is not sufficient to establish that a crime took place. The State must present other independent evidence to corroborate a defendant's incriminating statement. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred.

In determining whether there is sufficient independent evidence under the corpus delicti rule, we review the evidence in the light most favorable to the State. The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a “ ‘logical and reasonable inference’ of the facts sought to be proved.”

Notably, [Washington is] among a minority of courts that has declined to adopt a more relaxed rule used by federal courts. Under the federal rule, the State need only present independent evidence sufficient to establish that the incriminating statement is trustworthy. Under the Washington rule, however, the evidence must independently *corroborate*, or confirm, a defendant's incriminating statement.

In addition to corroborating a defendant's incriminating statement, the independent evidence “ ‘must be consistent with guilt and inconsistent with a [] hypothesis of innocence.’ ” If the independent evidence supports “reasonable and logical inferences of both criminal agency and noncriminal cause,” it is insufficient to corroborate a defendant's admission of guilt.

The independent evidence here clearly provided prima facie proof of *corpus delicti* in respect to whether Hendrickson was driving the car; the car the officers found was registered to Hendrickson and Hendrickson was the only person in the area. Similarly, the evidence prima facie establishes that Hendrickson was intoxicated; the officers noted that Hendrickson smelled strongly of alcohol, that his eyes were bloodshot and watery, and that his face was flushed. Accordingly, the district court and superior court were both correct when they found that the State ultimately established *corpus delicti*.

Citing State v. Hamrick, 19 Wn. App. 417 (1978), Hendrickson appears to argue, however, that the State was required to prove *corpus delicti* based on evidence acquired *before* his arrest. Specifically, he argues that (1) “[a]llowing confession prior to adducing independent evidence would defeat the purpose of the corpus delicti rule,” and (2) “[t]he State failed to present sufficient independent evidence

that defendant was driving when he was arrested for driving under the influence of intoxicants.” He contends that using evidence found after the statement frustrates the purpose of the *corpus delicti* rule.

But “[t]he purpose of the *corpus delicti* rule is to protect a defendant from an unjust *conviction* based on a false confession alone; it prevents the possibility that a false confession was obtained through police coercion or abuse and the possibility that a confession, though voluntary, is false.” Thus, the *corpus delicti* rule is an evidentiary rule that addresses whether the evidence provided by a defendant's confessions or admissions is sound enough for a jury to consider in assessing whether a defendant has committed the crime charged. It is not intended to establish whether additional evidence obtained prior to and independent of the defendant's confession exists to establish probable cause for the defendant's arrest. Accordingly, the district and superior courts did not err when they concluded that the State had established the *corpus delicti* of the crime.

[Some citations omitted]

ATTEMPTED BURGLARY EVIDENCE SUFFICIENT: PROOF OF INTENT TO COMMIT CRIME WITHIN BUILDING BY FORCIBLY TAKING SON FROM ESTRANGED WIFE ESTABLISHED NECESSARY ELEMENT OF THE CRIME; CONVICTION REVERSED ON OTHER GROUNDS

State v. Powell, 139 Wn. App. 808 (Div. II, 2007)

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

Powell and Amber Williams had a relationship for three and one-half years. During that time, they had a son together. On October 12, 2005, Williams was living with her parents and Powell was living in an apartment in Portland, Oregon. He called her that night, but the call ended when she hung up the telephone and shut it off. Apparently, she told him that she did not think it would be a good time for him to be around their son.

About 7:30 the next morning, Williams was preparing herself and her children and for the day when she heard someone try to open the front door “really quietly.” Her son looked out the window, got a panicked look on his face, and said to her, “It’s Jason.” He also said that Powell was going down the front stairs and around the back of the house.

Williams then went to the back sliding glass door, pulled the curtains shut, and stood there. When she then heard Powell trying to open the back door, she took her children to a back bedroom, locked the door, and called the police. She said that Powell never knocked, rang the doorbell, or called out. She did not understand why he was sneaking around but it concerned and scared her.

A short time later, she looked out the window and saw Powell being arrested. He was wearing a camouflage shirt, a black knit hat, black cut-offs, black socks, and black shoes. She had never seen Powell wear the shirt or shorts before and found them unusual. She later described him as an uninvited guest.

Williams testified that Powell often carried a gun; that he would play with it, which made her uncomfortable; and that he carried it to defend himself, but that he never had pointed it at her or anyone else in her presence. She said that her entire family was mad at Powell and that he was not welcome at their home, though she admitted that no one had told him this. She stated that the last time he had been there was on July 4, 2005, and he was on the front porch waiting when she arrived home. During that visit, while sitting with friends, Jason told her that if she ever tried to keep their son from him, he would kill her. She said he then cocked his gun and said that someone was going to die. When she responded that everyone dies eventually, he replied, “[s]ome sooner than others.”

Vancouver Police Officer James Watson responded to Williams's 911 call. As he drove past the front of the house, he saw Powell on the front porch. He later described what he saw: “Well, it appeared to me that he was actually trying to get in the door. He was facing the door, slightly bent over, and his right arm was-looked like he was working the mechanism.” When Officer Watson approached the house on foot, he called out to Powell. Powell's posture became very rigid and he turned and walked away without looking at the officer. Officer Watson asked Powell to stop three times but each time Powell kept walking. Officer Watson referred to this as “conspicuous ignoring.”

Officer Watson caught up to Powell and took his elbow. Powell jerked his arm away violently and exclaimed, “What the fuck are you doing?” In the process of trying to control Powell, Powell's camouflage jacket came off and he tried to break free. While forcing Powell into handcuffs, dispatch informed Officer Watson that Powell had an outstanding warrant and a gun then fell from Powell's shorts. The gun was loaded and fully functional.

After Powell's arrest, Officer Watson approached a light blue Honda Accord with a young man at the wheel who appeared to have observed what had happened. The driver identified himself as William Andrew Pearson and told Officer Watson that he had given Powell a ride “to come and get his child.”

Earlier that morning, Gregory Kincaid went to Powell's residence. There he found Powell with Pearson. Powell was anxious and upset with Williams. Kincaid saw him take methamphetamine. When leaving, Powell told Kincaid that he was going over to Williams's house.

Powell was charged with attempted first degree burglary (domestic violence) while armed with a firearm.

The jury found Powell guilty and by special verdict that he committed the offense while armed with a firearm. The court imposed a standard range sentence along with a 36-month firearm enhancement.

ISSUE AND RULING: An element of burglary is intent to commit a crime against a person or property inside a building when a person enters or remains unlawfully. Here, among other things, there was evidence that the armed defendant intended to forcibly take custody of his

child from his wife. Does the record contain sufficient evidence of the defendant's intent to commit a crime against a person or property inside the residence? (ANSWER: Yes)

Result: Reversal (on grounds not addressed in LED entry) of Clark County Superior Court conviction of Jason Vincent Powell for attempted first degree burglary with a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The trial court defined first-degree burglary:

A person commits the crime of Burglary in the First Degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in the immediate flight therefrom, he or she is armed with a deadly weapon.

A person commits attempted first degree burglary when he takes a substantial step toward commission of first degree burglary.

Taking the evidence in a light most favorable to the State, a jury could find that Powell intended to commit an offense against Williams inside the residence. Given the surrounding circumstances, the jury was entitled to infer from the attempted unlawful entry that Powell intended to commit a crime. Williams testified that she was afraid of Powell, that he carried a gun, that he had threatened to kill her if she prevented him from seeing his son, and that she had hung up on him the previous night. She also testified that he was dressed in camouflage clothing, was trying to sneak undetected into her home, and that he was not welcome there. Further, Kincaid testified that Powell had just consumed methamphetamine, and Officer Watson testified that Pearson told him that Powell was there to get his son. The reasoning that Powell potentially had a lawful purpose to be at Williams's residence (visiting his son or retrieving his bicycle) did not prevent the State from arguing, and the jury from finding, that he intended harm. It is irrelevant that he had equal rights to his child when the evidence supports an inference that had he gained entry into the residence, he would have harmed Williams to get his son.

EVIDENCE (1) THAT DEFENDANT KNEW - - AND THAT OTHER PARTICIPANT DID NOT KNOW - - TARGET HOME'S SECURITY CODE, AND (2) THAT DEFENDANT WAS ONE OF THREE PERSONS SEEN RUNNING FROM BURGLERED PREMISES, HELD SUFFICIENT TO SUPPORT HIS CONVICTIONS FOR BURGLARY AND THEFT BASED ON ACCOMPLICE THEORY; HENCE, COURT REJECTS DEFENDANT'S CLAIM THAT HE WAS A NON-PARTICIPANT WHO JUST HAPPENED TO BE AT THE SCENE

State v. B.J.S., 137 Wn. App. 622 (Div. II, 2007)

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

On November 17, 2005, Jason Norris and a friend discussed the idea of "[t]aking stuff" from Robert Brekke's house while Brekke was away at the beach. Norris stayed with Brekke for a couple of days before Brekke left for the beach, but Brekke had never given Norris his house's security code.

B.J.S., who was 16 at the time, had spent "a lot" of time at Brekke's house and occasionally spent the night there. Brekke had given B.J.S. his house's security code and let him know where the house key was.

Norris picked up B.J.S. before going to Brekke's house. He discussed his idea with B.J.S. so that B.J.S. would allow him to "do it" and not "say anything" or "give [him] up." He brought B.J.S. along to enter the security code correctly and to deal with any visitors he did not know who might arrive at the house.

Sometime after midnight, Norris and B.J.S. arrived at Brekke's house. Norris took electronic devices, credit cards, and cash from the house. B.J.S. did not assist Norris, but saw him taking things. Sometime after 6 A.M. that morning, Norris and B.J.S. left the house with the items Norris had taken. Norris dropped off B.J.S., took the items "somewhere," and "unloaded" them in exchange for a later payment. Later, Norris gave B.J.S. some of the cash, but did not tell him where it came from.

After dropping off the items, Norris picked up someone named James, bought some "dope," and then picked up B.J.S. The three then went to Brekke's house. While at the house, Norris took some more credit cards and some pills. Norris did not see either James or B.J.S. take anything from the house. Norris and James attempted to use some lock cutters on an outbuilding on the property, but they did not work. B.J.S. did not use the lock cutters.

Timothy Entler and Dustin Albright went to Brekke's house on the morning of November 18 to see if Brekke had returned from the beach. Brekke was not home when they got there, and they noticed that two of his vehicles were missing. Entler and Albright left Brekke's house, and Albright called the police from his house. Entler and Albright returned to Brekke's house and noticed one of his vehicles was back on the property. Entler saw some people running from the house, but he could not identify who they were.

The State charged B.J.S. with two counts of residential burglary, two counts of second degree theft, and one count of second degree taking a motor vehicle without permission. B.J.S. had an adjudicatory hearing for the charges on February 14, 2006. Among others, Norris, B.J.S., Entler, and Albright testified.

Norris testified he and B.J.S. went to Brekke's the first time to "party" and returned the second time to get his car. He said the idea to burglarize Brekke's house was a spur of the moment decision and he had Brekke's security code. He also testified he thought of burglarizing Brekke's house on November 17 and talked B.J.S. into "allowing [him] to do it and not to say anything or not to give [him] up or nothing. You know, making it okay." He said he needed B.J.S. to come with him "[t]o make sure that [he] had the [security] code right" and because he wanted B.J.S. there in case someone he did not know arrived to the residence.

Norris also read portions of a written statement he prepared on November 18 after the incident. In his statement, he said he had to talk to B.J.S. before "going

through with anything” at Brekke's house and discussed a conversation he had with B.J.S., stating,

I brought it up to [B.J.S.] who acted completely out of character by not just saying yes, but like he might enjoy it too.

That was truly out of character for [B.J.S.] so I asked him a few times on the way over to [James's] house if he was sure about wanting to do this.

And he constantly repeated his answer was yes.

When asked what “[w]anted to do this” referred to, Norris said, “I think we were on our way to go get dope” and that it did not have to do with burglarizing Brekke's house. Another portion of his statement read, “I heard glass breaking and [B.J.S.] say you should have used bolt cutters, not punch it.” Norris said this statement had to do with James cutting padlocks on outbuildings on Brekke's property, which “[n]othing was taken out of.”

B.J.S. testified that he had permission from Brekke to be at his house when he was not there. He said he did not take anything from Brekke's house and did not see Norris take anything. He verified Norris's statements that he was at Brekke's house on the early morning of November 18, left the house sometime around 6 A.M., and then returned later that day.

After the State rested, the juvenile court judge dismissed the second degree taking a motor vehicle without permission count. The juvenile court judge found that Norris's claim that he had Brekke's security code was not credible and found that Norris was attempting to “take the fall” for B.J.S. because his testimony was inconsistent and not credible. The juvenile court judge concluded that B.J.S. had aided and abetted Norris and found him guilty of one count of residential burglary and one count of second degree theft.

ISSUE AND RULING: Where there is evidence that 1) B.J.S. knew, and the other participant in an alleged burglary did not know, the security code for the target home; and (2) B.J.S. was one of three persons seen running from the home, is the evidence sufficient to support B.J.S.'s convictions of residential burglary and second degree theft under an accomplice liability theory? (**ANSWER:** Yes)

Result: Affirmance of Cowlitz County Superior Court convictions of B.J.S. for residential burglary and second degree theft.

ANALYSIS: (Excerpted from Court of Appeals opinion)

To adjudicate B.J.S. of residential burglary, the State had to show that he remained “unlawfully in a dwelling other than a vehicle” with the intent “to commit a crime against a person or property therein.” RCW 9A.52.025(1). To adjudicate him of second degree theft as the juvenile court did, the State had to show he committed theft of an access device (such as a credit card). RCW 9A.56.040(c), .010(1). Because the juvenile court judge adjudicated him as an accomplice for both crimes, the State had to show that he encouraged or aided Norris in the

planning or commission of the crimes with the knowledge that his actions would promote or facilitate the crimes. RCW 9A.08.020(3)(a)(ii). "Aiding" in a crime includes " 'all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his ... presence is aiding in the commission of the crime.' "

B.J.S. does not dispute that he was at Brekke's house while Norris burglarized it and stole credit cards. Rather, he argues that insufficient evidence showed that he aided or abetted Norris in committing the crimes, claiming that substantial evidence does not support the juvenile court judge's findings of fact 2-5 and, therefore, the juvenile court's findings fail to support its conclusions of law.

Finding of fact 2 deals directly with Norris's credibility, an issue that we do not review on appeal. Accordingly, we defer to the juvenile court judge's finding. B.J.S. challenges finding of fact 3 on the basis that the juvenile court found there was "no evidence" that Norris knew Brekke's security code even though Norris testified that he did. The juvenile court judge specifically discussed this finding in his oral ruling. Although this oral ruling is not a finding of fact, we may look to the juvenile court judge's oral ruling to interpret written findings.

In his oral ruling, the juvenile court judge recognized that Norris did testify he had the security code, but the juvenile court judge stated that he did not find this testimony credible. The juvenile court judge's credibility determination was the basis for the wording of this finding of fact, and it is one that we will not disturb on appeal. Although it may have been more precise if finding of fact 3 said there was no "credible" evidence, there is substantial evidence to support this finding.

B.J.S. also challenges finding of fact 4, which states that B.J.S. "was brought along to enter the security access code and to deal with any visitors that may show up at the home while the burglary was in progress." The juvenile court judge did not find Norris's testimony that B.J.S. went to Brekke's house on November 18 for purposes other than the burglary credible. Instead, he found it more persuasive that Norris told B.J.S. his plan to burglarize the house and brought him along to aid in the burglary. Deferring to the juvenile court judge's credibility ruling, there was substantial evidence to support this finding of fact.

B.J.S. challenges finding of fact 5, which provides he "fled the scene of the crime." Entler testified he saw some people running from the house, but he could not identify either one as B.J.S. The record shows that B.J.S., Norris, and James were at the house on the morning Entler saw people running from the house, and police did not find anyone at the house when they responded. Viewing this evidence in the light most favorable to the State, it is reasonable to infer that B.J.S. was one of the people who fled from the home. Substantial evidence supports this finding.

Considering the evidence in the light most favorable to the State and all reasonable inferences from it, the juvenile court judge had sufficient evidence to find, beyond a reasonable doubt, that B.J.S. was an accomplice to the residential burglary and second degree theft. Norris testified that he burglarized Brekke's house after telling B.J.S. the plan and bringing him along to enter the security code and deal with anyone he did not know who came by. Although Norris

testified that B.J.S. went to the house for other purposes, the juvenile court judge found this testimony not credible. It is reasonable to infer that B.J.S. was present at the house to facilitate in the commission of the crime. His sufficiency argument fails.

[Some citations omitted]

WHERE THERE WAS EVIDENCE THAT DEFENDANT USED A MACHETE TO BREAK INTO A HOME, AND THAT HE TOOK THE MACHETE INTO THE PREMISES, THE EVIDENCE WAS SUFFICIENT TO SUPPORT HIS FIRST DEGREE BURGLARY CONVICTION; FROM THIS EVIDENCE, THE JURY COULD CONCLUDE THAT HE WAS “ARMED” WITH A MACHETE WHEN HE BURGLARIZED THE HOUSE

State v. Gamboa, 137 Wn. App. 650 (Div. III, 2007)

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

Verna and Peter Mullinex, Sr., live on Marion Drain Road in Yakima County. Joaquin Gamboa burglarized their home. Mr. Gamboa had blood on his left hand, shirt, and around his mouth when other Mullinex family members caught him.

A Yakima County sheriff's deputy investigated and found drops of blood inside and outside the home. Deputy Jose Aguilar found a front window had been broken and a large television set was missing from the entertainment center. Investigators also found blood on the entertainment center and television set. Ms. Mullinex found a machete under blankets in the living room. The machete did not belong to them. The machete had blood on both sides of the blade and on its handle.

A jury found Mr. Gamboa guilty of first degree burglary. The court refused to instruct the jury on a lesser included offense of residential burglary.

ISSUE AND RULING: Where the evidence established (1) that Gamboa used a machete to help in breaking into a residence, and (2) that Gamboa took the machete inside the burgled residence, was the “deadly weapon” evidence sufficient to support Gamboa’s conviction of first degree burglary? (ANSWER: Yes)

Result: Affirmance of Yakima County Superior Court conviction of Joaquin Gamboa for first degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

First degree burglary requires a showing that the defendant was armed with a deadly weapon when he entered or remained unlawfully in a building with the intent to commit a crime against a person or property. RCW 9A.52.020. A deadly weapon is “any explosive or loaded or unloaded firearm, and [it includes] any other weapon, device, instrument, article, or substance, ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6).

Mr. Gamboa argues that the State failed to show that the machete, as used here, satisfied the requirements of a deadly weapon. That is, “under the circumstances in which it is used, attempted to be used, or threatened to be used, [it was] readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6). He says, if anything, the machete was used as a tool to break in, not as a deadly weapon.

The State responds that the question is whether the machete was readily capable of causing death or substantial bodily harm and whether Mr. Gamboa was armed with it.

First, the State made a sufficient circumstantial showing that Mr. Gamboa was armed with the machete. The gate on the homeowners' property was hacked with a sharp object to break in. The homeowners found the machete inside the house. It had blood on it. Mr. Gamboa had blood on his shirt, hands, and mouth. Circumstantial evidence and direct evidence are equally reliable when determining the sufficiency of the evidence. The evidence here is certainly sufficient to show Mr. Gamboa used the machete.

Mr. Gamboa used the machete as a tool for entering the Mullinex home. But that does not exclude the availability of a machete as a deadly weapon, i.e., weapon or device capable of causing death or substantial bodily harm. It is the potential as a weapon and not how the machete was actually used that is important. RCW 9A.04.110(6). Here, if Mr. Gamboa had used a knife or a hammer or a club to break into the house, it would not be the use of the instrument that was important. It is rather the potential for inflicting bodily injury or death that counts. RCW 9A.04.110(6). It was not necessary for the homeowners to appear and for Mr. Gamboa to brandish the machete for it to qualify as a deadly weapon. A machete is readily capable of causing great harm by its very nature and size.

Again, the fact that Mr. Gamboa only used it to enter does not preclude the jury's finding that he was armed with a deadly weapon. The question is whether the machete was “ ‘easily accessible and readily available for use by the defendant for either offensive or defensive purposes.’ ”

[Case citations omitted]

**WHERE EVIDENCE ESTABLISHED DEFENDANT WITH BACK PAIN HAD REASONABLE
LAWFUL ALTERNATIVES TO JUMPING BAIL, TRIAL COURT WAS NOT REQUIRED TO
GIVE “NECESSITY” DEFENSE INSTRUCTION IN BAIL JUMPING PROSECUTION**

State v. White, 137 Wn. App. 227 (Div. III, 2007)

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

On June 18, 2004, the court convicted and sentenced Mr. White for two felony convictions and ordered him to report to jail the next day, but Mr. White failed to appear as ordered. A warrant was issued for his arrest. On June 28, 2004, Portland police officers Andrew Caspar and Scott Foster arrested Mr. White on the warrant and the State filed a bail jumping charge. Mr. White remained in custody for a month awaiting transfer to Walla Walla. Mr. White spent another 67 days in the Walla Walla County jail before his release.

In his July 2005 bail jumping trial, Mr. White requested a common law “necessity” affirmative defense instruction based on evidence that he failed to report to jail because he had a back injury and suffered increased back pain while sleeping on a standard jail bed during a February 2003 incarceration. Instead, the court gave a statutory “uncontrollable circumstances” affirmative defense instruction. The court ruled the legislature superseded the common law “necessity” defense by enacting the statutory defense. A jury found Mr. White guilty . . .

ISSUE AND RULING: Where the evidence shows that defendant had reasonable alternative to jumping bail, does the evidence in this bail jumping case support the giving of defendant’s proposed “necessity” affirmative defense instruction such that it was error for the trial court to not give the instruction? (**ANSWER:** No)

Result: Affirmance of Walla Walla County Superior Court conviction of Elliott A. White for bail jumping.

ANALYSIS: (Excerpted from Court of Appeals decision)

It is a statutory affirmative defense to the crime of bail jumping that “uncontrollable circumstances prevented the [defendant] from appearing or surrendering.” RCW 9A.76.170(2). The defendant must not have contributed to the circumstances in “reckless disregard of the requirement to appear or surrender” and the defendant must have “appeared or surrendered as soon as such circumstances ceased to exist.” “Uncontrollable circumstances” include medical conditions. RCW 9A.76.010(4).

“Necessity” is a common law defense with limited application. See State v. Jeffrey, 77 Wn. App. 222 (Div. III, 1995) **Oct 95 LED:06**; 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 63 (2d ed. pocket part 1998) (WPIC). It is available “when circumstances cause the [defendant] to take unlawful action in order to avoid a greater injury.” Jeffrey; WPIC 18.02. The defendant must not have caused the threatened harm, and there must be no reasonable legal alternative to breaking the law. Jeffrey; WPIC 18.02. The defendant must prove the defense by a preponderance of the evidence. Jeffrey; WPIC 18.02.

Comparing the two defenses, the statutory defense is a specific iteration of the principles underlying the necessity defense. In this sense, the statutory defense appears to displace the need to give a general necessity defense instruction. Thus, giving an additional necessity defense instruction would necessarily be redundant, if not confusing. Overall, the statutory defense was sufficient for Mr. White to argue his case theory. But we need not dwell upon legislative intent or the differences between the two defenses because, in any event, the trial evidence does not support giving a general necessity defense instruction in Mr. White’s case over the statutory defense.

According to Captain James R. Romine of the Walla Walla sheriff's office, special mattresses are available to inmates for medical conditions upon the advice of his medical staff. He testified the inmates are informed during the booking process of the procedure for submitting personal or medical requests, called “kite[s].”

On February 10, Mr. White was initially admitted to the Walla Walla county jail, and at a medical screening, he indicated he had been taking Tylenol for hip pain. He did not report back problems. At some point during his three-day stay, he did complain of back pain, and on February 12, shortly before being released on bail, he saw a physician's assistant.

On June 19, Mr. White failed to report to jail after being sentenced. He testified he failed to appear because he was "afraid of what could have happened if [he] had to go to jail," even though he did not have back pain on the night of June 18, or for the next 10 days leading up to his arrest on June 28. While in custody, waiting to be transferred back to Walla Walla, he was given special sleeping accommodations based on a jail doctor's recommendation. According to Mr. White, his back pain was "bearable" because he was given a hospital bed.

On July 30, Mr. White returned to the Walla Walla county jail. Mr. White sent kites to the jail staff requesting a urologist and requesting medication refills. According to Captain Romine, Mr. White had complained about back pain, but did not request to see a doctor for the pain. Captain Romine testified his medical staff never reported Mr. White needed special accommodations.

No evidence shows Mr. White's actions were necessary to avoid a greater harm or that no reasonable legal alternatives were available. WPIC 18.02. First, he did not suffer from back pain at the time of sentencing; he was simply afraid of what could happen upon returning to jail. Second, he had alternatives to breaking the law. Mr. White could have asked to see a doctor after reporting to jail to receive special accommodations, or he could have taken his medical record to the jail to show the need for special accommodations. Third, Mr. White's circumstances are unlike those typically seen in a necessity defense scenario where the defendant is confronted with an "unforeseen and sudden situation." Jeffrey.

[Some citations omitted]

"RECKLESS MANNER" MEANS THE SAME UNDER FELONY ELUDING STATUTE AS IT DOES UNDER VEHICULAR HOMICIDE AND VEHICULAR ASSAULT STATUTES

State v. Ratliff, 139 Wn. App. 1015 (Div. III, 2007)

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

On June 18, 2005, Reardan Police Chief Leland Varain and officer Michael Walters, both in uniform, saw a brown car skid to a stop and take off. Officer Walters got into his marked police car and followed. The brown car eventually went northbound on State Route (SR) 231. The officer had to drive 100 miles per hour (mph) to catch it. The speed limit on SR 231 is 60 mph.

Officer Walters got within 50 feet of the brown car. At this point, he believed it was traveling 70-75 mph. The officer then activated his lights and siren. As he got to 20-30 feet of the car, it fishtailed, turned around, and passed him. As it did, Officer Walters believed the distance between the car and his vehicle was six to seven inches. After about two miles, the brown car stopped.

The State charged Ms. Ratliff with attempting to elude a pursuing police vehicle. At trial, defense counsel took exception to the instructions defining the elements of the offense. She was convicted as charged.

ISSUE AND RULING: For purposes of the felony eluding statute, RCW 46.61.024, does driving in a “reckless manner” mean driving in a rash or heedless manner, indifferent to the consequences? (**ANSWER:** Yes)

Result: Affirmance of Lincoln County Superior Court conviction of Mandi S. Ratliff for felony eluding.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Ms. Ratliff was convicted of violating RCW 46.61.024, attempting to elude a police vehicle:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1). In 2003, the words “reckless manner” were substituted by the legislature for the phrase “manner indicating a wanton or willful disregard for the lives or property of others.”

Ms. Ratliff claims the court erroneously defined “reckless manner” in its jury instructions.

The court's instructions defined “reckless manner” as “a rash or heedless manner, indifferent to the consequences.” Ms. Ratliff proposed an instruction defining “reckless manner” as “a wanton or willful disregard for the lives or property of others.” She defined “willful” as “acting intentionally and purposefully,” and “wanton” as “acting intentionally in heedless disregard of the consequences.” The court rejected these instructions.

Here, the trial court's definition of “reckless manner” is a correct statement of the law, at least for vehicular homicide and vehicular assault. State v. Roggenkamp, 153 Wn.2d 614 (2005) **April 05 LED:07**. Whether this definition of “reckless manner” applies to the felony eluding statute has yet to be determined. We decide it does.

RCW 46.61.024 does not define “reckless manner.” In fact, those words are not defined anywhere in the motor vehicle code. The definition is well settled, however, for vehicular homicide and vehicular assault cases. Prior to 2003, the statute required a showing of willful or wanton disregard for the lives or property of others. But the legislature replaced that language with “reckless manner” in

2003. By doing so, it clearly intended to remove the willful and wanton standard from this statute.

Ms. Ratliff argues that, for purposes of the eluding statute, we should define “reckless manner” in the same way the courts define “reckless driving.” As the Roggenkamp court noted, this requires “us to dismember both the term ‘in a reckless manner’ and the term ‘reckless driving.’ ” Doing so would sever “reckless” from its surrounding context and read the word as if it stood alone. This proposed reading violates the rules of statutory construction.

“Reckless manner” has been defined as “a rash or heedless manner, with indifference to the consequences.” “Reckless driving” involves a person who drives in willful or wanton disregard for the safety of persons or property. RCW 46.61.500(1). The legislature changed the eluding statute to require proof of driving in a “reckless manner” in order to be found guilty of attempting to elude a police vehicle. By deleting the language “willful and wanton disregard,” the legislature also evidenced the intent to delete it as a required element of the crime. Moreover, if the legislature had intended to adopt the standard for reckless driving, it would have said so.

[Some citations omitted]

DESPITE FAILURE OF HOSPITAL TO FOLLOW STRICT PROCEDURES OF RCW 46.61.506 FOR TESTING AND PRESERVING BLOOD, IF SAMPLE WAS TAKEN AT HOSPITAL FOR MEDICAL PURPOSES, IT CAN BE ADMITTED AS “OTHER EVIDENCE” OF DUI; BUT RESULTS OF LAW ENFORCEMENT TESTING OF SECOND SUCH HOSPITAL SAMPLE SUBSEQUENTLY OBTAINED BY LAW ENFORCEMENT FOR INVESTIGATIVE PURPOSES CANNOT BE ADMITTED IN DUI PROSECUTION

State v. Charley, 136 Wn. App. 58 (Div. III, 2006)

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

Early in the morning on December 22, 2002, Ms. Charley's vehicle was involved in a rollover accident with another vehicle in Omak. She and two passengers were ejected from the vehicle. One of the passengers died, the other was seriously wounded, and an occupant of the other vehicle died.

Ms. Charley was first treated at Mid Valley Hospital, which took blood samples within one hour of the accident and placed them in two vials provided by the hospital. These vials, referred to as sample A, contained an anticoagulant, but were not preserved with an enzyme poison. They were kept refrigerated. Later that day, Ms. Charley was moved to Sacred Heart Medical Center's Intensive Care Unit in Spokane. Sacred Heart took blood sample B and tested it for medical purposes. The hospital's toxicology analysis showed a blood ethanol level of 0.108 grams per deciliter.

After the investigation indicated that Ms. Charley was the driver of one of the vehicles and had been drinking alcohol, the Okanogan County Sheriff's Department obtained a search warrant for seizure of Mid Valley Hospital's sample A. These vials of blood were seized on December 26 by a deputy who

called the Washington State Patrol Toxicology Laboratory for instructions on transporting the evidence. The deputy was warned that unpreserved blood may produce its own ethanol if allowed to get warm, so he packed the samples in ice and sent them by overnight air mail to the state lab. Sample A was then tested, showing a blood ethanol level of 0.19 grams per 100 milliliters. The State also obtained the results of sample B.

In Washington, a person is driving under the influence if, within two hours after driving, he or she has an alcohol concentration of at least 0.08 grams of alcohol per 100 milliliters of whole blood. RCW 46.61.502(1)(a); WAC 448-14-020(2). Based on the results of the blood tests on samples A and B, the State charged Ms. Charley with two counts of vehicular homicide (RCW 46.61.520) and one count of vehicular assault (RCW 46.61.522). She moved to suppress the evidence on the ground that the blood tests did not comply with the requirements of RCW 46.61.506 and WAC 448-14-020.

In a memorandum opinion, the trial court concluded that sample A was inadmissible because the testing was done for forensic law enforcement purposes, not for medical purposes. The trial court found, however, that sample B was tested for medical purposes and was therefore admissible as scientific or expert evidence under the relevant rules of evidence.

ISSUES AND RULINGS: 1) Sample B of Ms. Charley's blood was taken and tested by hospital staff for medical purposes. May evidence of the results of the hospital staff's medical testing of the blood be admitted into evidence as "other evidence" of DUI despite the fact that staff did not preserve sample B with an enzyme poison? (ANSWER: Yes); 2) Sample A of Ms. Charley's blood was also taken by hospital staff. It was not tested by staff. It was not preserved with an enzyme poison. It was later tested by law enforcement only for forensic law enforcement purposes. May sample A be admitted as evidence of DUI in Ms. Charley's prosecution for vehicular homicide and vehicular assault? (ANSWER: No, not under the per se standard and not as "other evidence" of DUI).

Result: Affirmance of Okanogan County Superior Court ruling that sample A is inadmissible and sample B is admissible; Bernardene Charley case remanded for trial.

ANALYSIS:

The Charley Court explains that under the variations of vehicular homicide and vehicular assault with which Ms. Charley was being prosecuted, the State was required to prove she was driving under the influence (DUI) when she caused the death and injuries through her driving. DUI may be proved in one of two ways: 1) by showing that the driver's blood alcohol level was at least 0.08 within two hours after the accident, the so-called "per se" method; or 2) by the use of other evidence that, at the time of the accident, the driver was under the influence of alcohol, any drug, or a combination of alcohol and any drug, the so-called "other evidence" method.

Under the per se method of proving DUI, because the per se nature of the proof is based on approved procedures for sampling, preserving, and testing the blood, per RCW 46.61.506 and WAC 448-14-020, the defendant is limited under the per se method to attacking the accuracy of the reading.

On the other hand, in a non-per se case, where proof is under the "other evidence" method, in which the test of admissibility is whether the evidence actually proves the driver was under the

influence of alcohol and/or any drug, the defendant may attack the accuracy and reliability of the test technique or method used, and whether that method meets the general standards for admission of expert witness testimony.

In this case, the result of medical staff testing of sample B of Ms. Charley's blood, taken from her well after the accident and tested by hospital staff for medical purposes (which the hospital concluded showed blood alcohol level of 0.108), was admissible as "other evidence" of intoxication. The result was not admissible as per se evidence of intoxication, however, because the sample was not preserved as required by statute and regulation for proper blood sample analysis.

As for sample A of Ms. Charley's blood, although the sample was originally drawn for medical purposes at a hospital, the hospital never tested the sample. Instead, the sample was seized by law enforcement under a search warrant and was tested by the State for forensic, not medical, purposes. Because the only testing of sample A was for non-medical purposes, and because the enzyme protocols of the statute and regulation were not followed, the results of testing of sample A cannot be admitted either for purposes of per se proof of intoxication or as "other evidence" of DUI.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WHERE MOTOR VEHICLE PASSENGER WAS INJURED IN A DUI CRASH, SHE WAS A "VICTIM" UNDER RCW 9A.08.020(5), AND THEREFORE SHE COULD NOT LAWFULLY BE CONVICTED OF DUI AS AN ACCOMPLICE – In State v. Hedlund, 137 Wn. App. 494 (Div. I, 2007), the Court of Appeals rules that where a passenger is injured in an accident involving DUI, the passenger is a "victim" of the crime of DUI within the meaning of RCW 9A.08.020(5) and therefore cannot be convicted of DUI under an accomplice theory.

The Hedlund Court's analysis in selected part is as follows:

Hedlund was charged as an accomplice under RCW 9A.08.020. The statute provides, in relevant part that:

A person is an accomplice of another person in the commission of a crime if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he
 - (i) solicits, commands, encourages, or requests such other person to commit it; or
 - (ii) aids or agrees to aid such other person in planning or committing it.

The City argues that, in addition to furnishing alcohol to the party-goers, Hedlund aided, promoted, and encouraged Stewart's reckless and intoxicated driving by video taping the activities at the party and in the car, and was thus complicit in Stewart's criminal acts.

Hedlund, in turn, points to section 5 of the statute which states that a person is not an accomplice in a crime committed by another person if he or she is a victim of that crime. [*Court's footnote: RCW 9A.08.020(5). The section reads in full: "Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if: (a) He is a victim of that crime; or (b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime."*]

RCW 46.61.5055 lays out the penalty schedule for alcohol violators. It states that in exercising its discretion in setting penalties for those convicted of DUI or reckless driving, a court shall particularly consider whether the person's driving at the time of the offense was responsible for injury or damage to another or another's property.

The statute plainly recognizes that DUI and reckless driving may potentially involve flesh and blood victims beyond the State in the abstract and the public at large. Section 5 draws no distinction between victims of DUI, reckless driving, and vehicular assault. Indeed, by requiring the court to consider whether the accused's driving caused injury to another, the statute makes it plain that vehicular assault and vehicular homicide are not the only crimes which could give rise to injuries under the statute.

Hedlund's injuries were the direct result of Stewart's reckless and intoxicated driving. Under RCW 46.61.5055, the sentencing court would have been required to consider Hedlund's injuries in imposing sentence on Stewart had he lived and charges been brought against him. Having sustained serious injuries as a result of Stewart's criminal acts, Hedlund is Stewart's victim. RCW 9A.08.020(5) thus bars her prosecution as an accomplice.

Result: Reversal of municipal court conviction of Teresa A. Hedlund for DUI.

(2) SCHOOL TEACHERS' USE OF E-MAIL AND SCHOOL MAILBOXES TO PROMOTE BALLOT MEASURE PUNISHABLE BY PUBLIC DISCLOSURE COMMISSION CIVIL PENALTY UNDER RCW 42.17.130 – "DE MINIMIS" USE DEFENSE AND CONSTITUTIONAL CHALLENGES REJECTED — In Herbert v. Washington PDC, 136 Wn. App. 249 (Div. I, 2006) the Court of Appeals upholds civil penalties levied under RCW 42.17.130 against two Seattle school teachers who used the school e-mail system and school mailboxes (the old-fashioned kind) in support of a ballot measure. The Herbert Court holds: 1) that this use of public resources for political advocacy violates RCW 42.17.130, 2) that there is no implicit de minimis defense under the statute, and 3) that the statute does not violate free speech or other constitutional protections.

RCW 42.17.310 provides:

No elective official nor any employee of his [or her] office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of a public office or agency include, but are not limited to, use of stationery, postage,

machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency. However, this does not apply to the following activities:

(1) Action taken at an open public meeting by members of an elected legislative body or by an elected board, council, or commission of a special purpose district including, but not limited to, fire districts, public hospital districts, library districts, park districts, port districts, public utility districts, school districts, sewer districts, and water districts, to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body, members of the board, council, or commission of the special purpose district, or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;

(3) Activities which are part of the normal and regular conduct of the office or agency.

The Herbert Court describes the factual and procedural background of the case as follows:

Herbert and Nusbaum are Seattle School District teachers at Ballard High School. Herbert volunteers as a building representative for the Seattle Education Association (SEA), which is an affiliate of the Washington Education Association, a voluntary statewide labor organization. As an SEA building representative, Herbert regularly distributes SEA information to members employed at Ballard via school mailboxes or school e-mail. The Seattle School District provides e-mail accounts to its employees, subject to a use agreement that prohibits the use of school computers to support or oppose ballot measures.

In 2004, SEA members supported Referendum 55 and Initiative 884. Herbert placed blank petitions for the ballot measures in teachers' school mailboxes so that they could collect signatures to place those measures on the ballot. He directed them to place completed petition in his school mailbox. One morning before school started, Herbert received an e-mail message from an SEA staff member notifying him that petitions would be collected that afternoon. Herbert forwarded this e-mail to all Ballard staff, instructing them to place any completed petitions in his school mailbox that day.

The Washington State PDC received a complaint that Herbert had violated RCW 42.17.130 by using public resources to support the ballot measure campaigns. Following an investigation, the PDC held an administrative hearing. Herbert stipulated to the underlying facts, and based on those stipulations and the evidence and testimony offered at the hearing, the PDC determined that Herbert had violated the statute. The PDC assessed a \$500 penalty against Herbert, with \$450 suspended if he did not violate the statute again for two years.

Herbert filed a petition for judicial review under the Administrative Procedure Act (APA) in King County Superior Court. He argued that the PDC had misapplied the law and that its order was unconstitutional. The superior court affirmed the PDC's order. . . .

[Footnote omitted]

Result: Affirmance of King County Superior Court decision that affirmed the decision of the Public Disclosure Commission.

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

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions 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/court_rules].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/opinions.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." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. 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 2006, is at [<http://www1.leg.wa.gov/legislature>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The internet address for the Criminal Justice Training Commission's 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.atg.wa>].

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. **LEDs** from January 1992 forward are available via a link on the Criminal Justice Training Commission's Internet Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]