WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION

Law Enforcement Digest

February 2000

HONOR ROLL

501st Session, Basic Law Enforcement Academy, Seattle – King County Regional Police Academy
June 22nd, 1999 through November 24th, 1999

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Best Overall:	Sara Cook - Seattle Police Department
Best Academic:	Sara Cook - Seattle Police Department
Best Firearms:	Sean Sweeney – King County Sheriff's Office
Tac Officer:	Grant Ballingham – Seattle Police Department

503rd Session, Basic Law Enforcement Academy – September 15th through December 10th, 1999

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Best Academic:	Jay D. Hart – Bellingham Police Department
Best Firearms:	Sean T. Dodge – Mason County Sheriff's Office
Tac Officer:	Sergeant Dave Woods – Fife Police Department

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WASHINGTON STATE COURT OF APPEALS

UNFENCED, UNPOSTED ORCHARD IN WOODS ON REMOTE ISLAND PROTECTED FROM WARRANTLESS SEARCH UNDER ARTICLE 1, SECTION 7 OF WASHINGTON CONSTITUTION

State v. Thorson, ___ Wn. App. ___ (Div. I, 1999) [1999 WL 1211442]

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

> In connection with a multi-agency drug investigation, a group of law enforcement officers executed search warrants at five properties located on Waldron Island in the San Juan Islands. Thorson's was not among these five properties. While searching one property, referred to as "the Gordon property," [an officer from a task force] traveled some distance through a heavily wooded area and came upon a clearing. He testified that he observed no boundary lines or markers during his search, and believed that he was at all times on the Gordon property until he reached the clearing. In fact, however, [the officer's] search took him off the Gordon property, across another parcel, and some way onto Thorson's property. When he reached the clearing, he realized he was no longer on Gordon's property. From the edge of the clearing, he observed a park-like area with an orchard, a pond, and several structures. He saw a single marijuana plant growing out of a large barrel next to a greenhouse. [The first officer] returned to the Gordon property and informed [a second officer] of his sighting, and the two of them returned to the edge of the wooded area and viewed the plant again. They then returned to the Gordon property

to finish executing their search warrant. At some point, [the first officer] also took [the second officer] and a team of officers to the view site, but the plant was gone.

Eventually, Thorson's property was searched [based initially on consent obtained from Thorson followed by search warrant authorization – **LED Ed. note**] and nine marijuana plants were seized from Thorson's corn patch, along with marijuana and other evidence. He was charged with manufacture and possession of marijuana. After a suppression hearing, the trial court found that when the officers observed the plant in the barrel, they were in a place they had a right to be, such that their observation of the plant was lawful under article 1, section 7 under the "open view" doctrine. From that premise, the court made other rulings regarding Thorson's consent to the subsequent search and the validity of a later warrant, and admitted the evidence. After a bench trial, Thorson was found guilty of manufacturing a controlled substance and possession of over 40 grams of marijuana.

[Officer's names deleted; bracketed material added]

ISSUE AND RULING: Did the first officer's initial observation of the marijuana plant in the barrel violate Thorson's privacy right under article 1, section 7 of the Washington constitution? (ANSWER: Yes) Result: Reversal of San Juan County Superior Court convictions of Eric Rolf Thorson for manufacturing a controlled substance and possession of over 40 grams of marijuana. Status: Time remains for the State to petition for review in the Washington Supreme Court.

ANALYSIS: (Excerpted from Court of Appeals opinion]

Washington Constitution article 1, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Because article 1, section 7 provides greater protections against warrantless searches and seizures than does the Fourth Amendment, we begin with Thorson's claim under the state constitution. As a general rule, warrantless searches are per se unreasonable. A few "jealously guarded exceptions" to the warrant requirement may justify a warrantless intrusion. Exceptions fall into "several broad categories," including, as relevant here, plain view. The burden is always on the State to prove one of these narrow exceptions.

Under the test as stated in the seminal case, State v. Myrick [102 Wn.2d 506 (1984)], the question under article 1, section 7 is whether the government unreasonably intruded into the defendant's private affairs--an inquiry which "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Myrick does not, however, elaborate on how this test is to be applied. The Myrick court explicitly declined to rely upon either of the two traditional Fourth Amendment analyses, "protected places" or the legitimacy of a defendant's subjective expectations of privacy. But the Myrick court nevertheless gave cautious deference to these factors as a starting place in the article 1, section 7 analysis, and enumerated no other specific factors to consider. Thus, many subsequent cases have continued to discuss traditional Fourth Amendment concepts.

Myrick requires us to look to the nature of the property, the expectation of privacy it reasonably supports, and the nature of the intrusion to answer the ultimate question: Whether the government's intrusion violated a privacy interest which citizens of this state have traditionally and justifiably held safe from governmental trespass absent a warrant.

I. Nature of Property and Reasonable Expectation of Privacy

We begin by noting that while the Fourth Amendment offers no protection to "open fields" [Oliver v. U.S., 466 U.S. 170 (1984)] such is not the case under the Washington Constitution: "[O]ur state constitution does not foreclose a person's

ability to protect his or her affairs in an 'open field.' " [State v, Johnson, 75 Wn. App. 692 (1994) **Jan 95 LED:15**]

The usual way a property owner attempts to preserve privacy in rural areas is by way of fences and signs; the presence of such devices is generally of consequence in most discussions as to whether a government agent unreasonably intruded into a defendant's private affairs on rural property. Significant to the court in State v. Johnson, for example, was the presence of "no trespassing" signs and a fence with a closed gate across a driveway. In State v. Hansen [42 Wn. App. 755 (1986) **May 86 LED:15**], a deputy sheriff responded to a fire call at the defendant's next door neighbor's house. As he drove by defendant's house, he saw four marijuana plants in a small garden adjacent to the road. Upholding a search and seizure under the state constitution, the court noted that the garden was neither posted nor fenced, and was clearly visible to neighbors and passers-by. Thus, the court determined that the defendant had no legitimate expectation of privacy in the garden. In State v. Crandall [39 Wn. App. 849 (1985) **June 85 LED:18**], an officer, acting without a warrant, trespassed on the defendants' fields and seized a marijuana plant. The fields were fenced by a single strand of barbed wire, but were not posted and were frequented by hunters. In fact, the warrantless search and seizure was initiated by a hunter's tip to the sheriff's office. The court, by a 2-1 majority, upheld the validity of the search and seizure under the state constitution. The court concluded that because of the characteristics of the field, any hunter could have observed the marijuana and notified the police. Thus, the court held that the property was not one in which a person could reasonably expect privacy.

In both Hansen and Crandall, the critical factor is the likelihood of observation by strangers. In the one case, trespassers were to be expected, while in the other, no trespass was required to see the contraband, which was visible from the road. The presence or absence of fences and signs is, therefore, but one factor to consider in reviewing the reasonableness of the governmental intrusion, which must depend on the facts of each case.

Thorson's property lies on Waldron Island in the San Juans. The island is rural and sparsely populated. It is not commercially developed, is not served by the state ferry system, has no public utilities, and has no amenities that would attract tourists. It is thus rarely visited by nonresidents, and strangers are neither welcome nor expected. The island is overwhelmingly agricultural and residential, and contains only those commercial establishments necessary to serve the needs of the relatively few year-round residents.

Privacy is carefully protected by the community, perhaps partly because to a great extent, residents of the island conduct their daily domestic activities outdoors. Because of the intimate nature of outdoor living on the island, the residents do not approach one another's living areas without making some sound to announce their presence. The record shows that in addition to a structure labeled a "house," there are, scattered about Thorson's property, separate structures identified as a cook shack, kitchen area, bed shacks, bathtub, laundry, and privy, wherein Thorson conducts the corresponding daily activities. Most of these structures are in the clearing in the area in which the barrel was spotted. The officers described this area as "manicured," and "really well taken care of."

The surrounding area is heavily wooded, or, as the State described it, "thick forests." It is undisputed that Thorson's incriminating barrel was not visible from any road, from his driveway, or from the boundary between Thorson's property and that of any neighbor. The nature of Thorson's property is such that he has no reason to anticipate intrusion by strangers, much less by law enforcement officers. The location and topography support the conclusion that Thorson reasonably expected privacy, and that fences and signs were not necessary to assert that expectation.

II. Nature of Intrusion

We next examine the nature of the intrusion. To reach their vantage point, the officers had to trespass through a heavily wooded area across two other parcels and some distance onto Thorson's property. On only one of those parcels, the Gordon property, did they have a right to be present. Unlike the field in Crandall, Thorson's property was not frequented or traversed by uninvited persons. Although part of the island's trail system crossed Thorson's land, the unrebutted evidence is that the footpaths were used, by permission, only by other residents of the island, and are not for use as public ways.

The State argues, and the trial court agreed, that the absence of boundary markers excused the trespass, and that, as the court described it, the officers "went through the woods on the footpath and otherwise," thereby remaining in a place where they had a right to be. With these propositions we must disagree.

The traditional plain view doctrine applies in Washington. An officer may observe what can be seen without a constitutional intrusion, that is, from a place where he has a right to be. The warrant authorizing the search of Gordon's property did not authorize the officers to search beyond Gordon's borders. Since Thorson had a legitimate expectation of privacy in his woodlands, the legitimacy of the officers' presence depends upon whether the footpath is impliedly a public access way. If so, and if it took the officers to the point from which they made their observation, the officers arguably had a right to be where they were when they observed the plant in the barrel. The record does not support either proposition. The evidence is that the island footpaths are not for public use, and are used only by island residents with permission of the property owner. Indeed, we can find no evidence that the footpath followed by the officers ever emerges on a public right of way. The State did not establish that the footpath is an impliedly open way.

In addition, we note that the record does not clearly support the [trial] court's implicit finding that the footpath followed by the officers continued to the edge of Thorson's clearing. The officer who made the initial observation did not so testify, nor did the others who followed. One officer testified, "We exited out of the woods in the brambles and were looking at a . . . botanical garden type parcel." Thorson testified there was a path to the edge of his clearing from the direction of the Gordon property, but that it entered his clearing at the edge of the orchard some 240 feet from the barrel at a different location from that described by the officers and at a point from which the barrel was not visible because of the orchard. [The officer who made the initial discovery] testified he first viewed the barrel 25 to 50 feet away from his position at the tree line. [Another officer] saw it with [the first officer], from 20 feet away. Their testimony is not consistent with the notion of a single viewpoint from a path at the edge of the tree line, looking into Thorson's clearing. Even if the officers did see the barrel from a footpath that led to the edge of the clearing, however, the officers' presence on Thorson's property was unauthorized. The evidence in the record establishes that the footpath cannot be considered analogous to a driveway, ungated road, or sidewalk that is impliedly open to the public. Nor can Thorson's woods be analogized to fields frequented by hunters or other strangers. Instead, [the officer who made the initial discovery] made his discovery as part of his search for other "grow operations" on the Gordon property. He was still searching, but he was no longer on the Gordon property. He was not in a place where he had a right to be. The absence of clear boundary markers does not change the analysis. Whether or not [the officer who made the initial discovery] knew his precise whereabouts, it is undisputed that the woods through which he came to the clearing belonged to Thorson, and as previously indicated, given the nature and location of the property, Thorson had no reason to believe strangers would be present. It is not a matter of whether the officer made a mistake in good faith, but rather whether the officer had a

> lawful basis for his presence in the specific location from which he spied something incriminating. Were the rule otherwise, the officer's good faith belief in the basis for his intrusion would overwhelm the constitutional protection.
>
> . . .
>
> We return then to the test under article 1, section 7: Is Thorson's privacy interest in avoiding the uninvited presence of law enforcement on his land an interest which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant? We hold that it is. Only where there is some implied public access to private property does a police officer without a warrant have the right to intrude. [T]he very character of Thorson's property located not only in a rural area, but on a rural island, "makes it apparent that [he] need not have anticipated unauthorized law enforcement safaris through the bush." The officers' sojourn on Thorson's property for the sole purpose of looking for marijuana constituted an unreasonable intrusion into Thorson's private affairs. The search was therefore invalid under article 1, section 7 of the Washington Constitution. Because the marijuana and other evidence seized in Thorson's garden and home would not have been found but for the officers' initial observation of the marijuana plant growing in the barrel, the evidence must be suppressed under the derivative evidence doctrine. Without such evidence, there is no evidence to support Thorson's conviction. Accordingly, we reverse with direction to dismiss his conviction. Reversed and dismissed.

[Officers' names deleted]

LED EDITOR'S COMMENT: As the Thorson opinion illustrates, the question whether property owners in remote areas have constitutionally protected privacy interests in "open fields" or forested areas on their properties is highly fact-bound. Usually, the absence of fencing and the absence of "no trespassing" signs would preclude a privacy argument under article 1, section 7. We believe Thorson was wrongly decided, and that the decision creates an elusive and unworkable test for determining privacy rights as to isolated rural fields and forests which are neither fenced nor posted with "no trespassing" signs. But for now, officers must consider the factors discussed in Thorson to determine whether consent or a search warrant is required prior to entry onto such property.

On the other hand, the Thorson ruling regarding the lawfulness of ground searches does not affect the legal standard for aerial surveillance, which was addressed most recently in State v. Wilson, 97 Wn. App. 578 (Div. III, 1999) Jan 2000 LED:07.

MAN RESTRAINED BY CIVIL ANTIHARASSMENT ORDER FROM SENDING LETTERS WAS PROPERLY PROSECUTED UNDER CITY ORDINANCE WHEN HE SENT SMALL CLAIMS COURT DEMAND LETTER TO RESPONDENT ON ANTIHARASSMENT ORDER

Seattle v. Megrey, 93 Wn. App. 391 (Div. I, 1998)

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

> When their two-year relationship ended, Sandra Lyons sought and obtained an antiharassment order against Bernard Megrey. The order prohibited Megrey from, among other things, contacting Lyons by mail. Two months later, on December 1, 1995, Megrey filed a Notice of Claim against Lyons in small claims court, seeking repayment of a loan.
>
> The courts provide an instructional brochure to small claims litigants. The brochure includes this paragraph:
>
> > Settlement. It is recommended that either the plaintiff or the defendant contact the other party prior to the trial to try to settle your differences. If your claim is settled before the trial, please notify the court in writing so the case may be dismissed.

> On February 7, 1996, Megrey sent Lyons a settlement demand letter. When Lyons did not respond, Megrey served the Notice of Claim on Lyons on March 7, 1996. On April 1, 1996, the City of Seattle filed a criminal complaint against Megrey, charging him with violation of the antiharassment order. On the basis of Megrey's having sent the demand letter, [Court's Footnote: *The city does not allege that the filing of the complaint nor service of the complaint violated the restraining order.]* the court found Megrey guilty. The [trial] court found that while Megrey acted in compliance with the suggestion contained in the small claims court brochure, Megrey also knew that the antiharassment order prohibited him from contacting Lyons; he contacted her anyway. In the meantime, the district court held a hearing on Megrey's small claims action and dismissed it with prejudice for failure to meet the burden of proof.

ISSUE AND RULING: Was there sufficient evidence to support Megrey's conviction under Seattle Municipal Code, SMC 12A.06.190? (ANSWER: Yes) Result: Affirmance of King County Superior Court conviction of Bernard Megrey under SMC 12A.06.190.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Megrey argues that willfulness, in the context of antiharassment, requires proof of specific intent and that his contacting Lyons constitutes a violation of the antiharassment order only if he intended to harass her. He cites no authority for this assertion. He argues, however, that RCW 10.14.020(1) defines "unlawful harassment" as "a knowing and willful course of conduct…" and that this same scienter element of both "knowing" and "willful" must apply to the city's ordinance defining violation of a civil antiharassment order.
>
> This construction ignores both the Seattle Municipal Code and the distinction between activity which constitutes unlawful harassment and activity which constitutes violation of a court order.
>
> The Seattle Municipal Code provides that anyone who willfully disobeys a civil antiharassment order is guilty of a crime. SMC 12A.06.190. "A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense…" SMC 12A.04.060. Megrey admits that he knew the antiharassment order prohibited him from contacting Lyons. This satisfies SMC 12A.06.190's scienter requirement.
>
> Megrey's proposed construction of the statute and ordinance requires a court to find the elements of harassment in the conduct it finds is violation of an order of antiharassment. To obtain an antiharassment order under RCW 10.14, a petitioner must prove a respondent engaged in a "knowing and willful" course of conduct. RCW 10.14 requires the court to engage in a subjective analysis and find this purposive element in a person's activities in order to proscribe otherwise legal activities. But once a court has entered an antiharassment order, both state statute and city ordinance (Megrey was prosecuted pursuant to the city ordinance) provide that an antiharassment order is violated by "willful" conduct alone. RCW 10.14.120; SMC 12A.06.190. Neither equity nor principles of statutory construction require investigation into the respondent's subjective intent when determining whether he has violated the antiharassment order.

LED EDITOR'S NOTE: In response to Megrey's argument that this prosecution violated his constitutional right of access to the courts, the Court of Appeals points out, among other things, that Megrey could have sought advance permission from the court which had issued the antiharassment order before sending a demand letter on his case in small claims court.

PROBABLE CAUSE TO ARREST FOR DRIVING UNDER THE INFLUENCE MET BY EVIDENCE OF ALCOHOL CONTAINERS PLUS "BOOZE" SMELL OF DRIVER AND PASSENGER

State v. Gillenwater, 96 Wn. App. 667 (Div. II, 1999)

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

> On the night of September 30, 1995, three cars were involved in a fatal accident on SR 307 in Kitsap County. Gillenwater was driving northbound in a Honda Accord. Stanley Zaidinski was driving a Ford Taurus northbound behind Gillenwater. Karen Brown was

driving a Geo Prizm southbound. Brown's Geo crossed the centerline and struck Gillenwater's Honda, almost head-on. Zaidinski could not avoid the other two cars and drove between them, striking both before coming to a stop. The police determined that Brown was at fault for crossing over the centerline. Brown had a 0.15 Breathalyzer reading. Brown and Gillenwater's passenger, Mr. Terrazus, died in the accident.

Although Gillenwater did not cause the accident, the police arrested him for DUI. They had the following facts at the time of arrest: Trooper Marc Barger saw a cooler full of beer behind the driver's seat of Gillenwater's car; three empty beer cans were on the floorboard, and the car exuded a strong smell of alcohol; Jeff Cowan, a paramedic, told Barger that Gillenwater had a strong smell of alcohol on his person; and the passenger in Gillenwater's car had an odor of alcohol on his person. Barger relayed this information to Trooper John McMillan, who went to the hospital to arrest Gillenwater.

At this point, Barger believed he had probable cause to arrest Gillenwater for DUI. But he took a statement from Zaidinski at the scene before communicating with McMillan, the trooper at the hospital, so Zaidinski's statement completes the facts known to the police at the time of arrest. Zaidinski simply told Barger that as he was following Gillenwater north, Gillenwater's car was traveling the speed limit, with taillights on, and driving normally rather than erratically.

[LED EDITOR'S NOTE RE FACTS: The Court of Appeals opinion omits discussion of the following, which we learned from talking to the deputy prosecutor on the appeal. The officer arrested Gillenwater at the hospital in order to conduct a blood test. The blood test was the evidence used to convict Gillenwater of DUI. In his appeal Gillenwater sought to have the blood test suppressed on grounds that it was the fruit of an unlawful arrest.]

ISSUE AND RULING: Did the open and closed alcohol containers, together with the "booze" smell of driver and passenger, provide probable cause to arrest the driver? (ANSWER: Yes) Result: Affirmance of Kitsap County District Court DUI conviction of Gary Gillenwater.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The offense of driving under the influence, or while intoxicated, consists of "driving while under the influence of intoxicating liquor or any drug." RCW 46.61.502(1). "Thus, although one can legally drink and drive, ... the two activities cannot be mixed to the extent that the drinking affects the driving...." But proof of erratic driving is not required to convict of driving under the influence.

A police officer may arrest a person without a warrant upon probable cause to believe that the person has committed the offense of driving while intoxicated. (citation omitted). Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest. "'[P]robable cause to arrest exists where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed.'" Probable cause to arrest requires more than "a bare suspicion of criminal activity," but does not require facts that would establish guilt beyond a reasonable doubt. Probable cause has also been defined as "'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.'" And "'[t]he question of probable cause should not be viewed in a hypertechnical manner.'"

Gillenwater argues that the facts are insufficient to show probable cause because there is no evidence that he caused the accident or was driving erratically at the time. He argues further that in every accident case where the trooper has not performed field sobriety tests and has not observed bloodshot eyes or slurred speech, probable cause has been found only where the accident was caused by the suspected drunk driver, citing State v. Miller, 60 Wn. App. 767 (1991); State v. Dunivin, 65 Wn. App. 501 (1992); State v. Hill, 48 Wn. App. 344 (1987). Thus, according to Gillenwater, the State cannot show probable cause because the trooper knew that the other driver caused the accident. We decline to adopt such a mechanical rule. Probable cause is determined by considering the total facts of each case, viewed in a practical, non-technical manner. And Gillenwater's

reasoning would require proof of erratic driving in any accident case where the trooper is unable to employ the customary field tests. We do not read probable cause so narrowly.

While evidence that a driver has had something to drink is insufficient to convict, and perhaps to establish probable cause, the trooper here had more. A cooler full of beer and three opened cans of beer were found in the car. The deceased passenger smelled of alcohol. And, most importantly, the paramedic reported a strong odor of alcohol on Gillenwater. Although these facts do not prove beyond a reasonable doubt that Gillenwater had consumed enough alcohol to affect his driving, they do raise "a reasonable ground of suspicion ... to warrant a cautious man in believing ...." him to be guilty.

[Citations omitted]

BB GUN FIGHT IS AGAINST PUBLIC POLICY, SO CONSENT IS NO DEFENSE TO ASSAULT CHARGE

State v. Hiott, 97 Wn. App. 825 (Div. II, 1999)

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

> The [injury at issue in this case] occurred during a game in which Hiott and his friend, Jose, were shooting at each other with BB guns. Jose was hit in the eye and lost his eye as a result. Hiott was charged with assault in the third degree; the trial court found him guilty, ruling that: "[a]t no time did either consent to be injured by the other, but both boys were engaged in a very reckless form of play . . . [and] this mutual play has lead [sic] to a crime."

ISSUE AND RULING: Is consent a valid defense to a charge of assault arising from a BB gun fight? (ANSWER: No, because such activity violates public policy)

Result: Affirmance of Thurston County Superior Court juvenile adjudication of guilt against Richard Hiott for assault in the third degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Consent can be a defense to a criminal assault charge. State v. Simmons, 59 Wn.2d 381 (1962) (the defense was applied in a sexual assault charge). Most recently, in State v. Shelley, 85 Wn. App. 24 (1997) [**June 97 LED:14**], Division One held that consent can be a defense to an assault occurring during an athletic contest. During a game of "pickup" basketball, Shelley punched another player, breaking his jaw. Division One reviewed the use of consent as a defense and extended its use beyond that of sexual assault, adopting the approach of the Model Penal Code. Under Shelley, consent can be a defense if "the conduct of defendant constituted foreseeable behavior in the play of the game" and the injury "occurred as a by-product of the game itself." In addition, consent is a defense only if the game is a lawful athletic contest, competitive sport, or other concerted activity not forbidden by law. State v. Dejarlais, 136 Wn.2d 939 (1998) (consent not a defense to charge of violating a domestic violence protection order.)
>
> Hiott argues that Jose consented to the game, Hiott's conduct was foreseeable behavior in the game, and the injury resulted from the game itself. Further, according to Hiott, the game they were playing "is within the limits of games for which society permits consent." Hiott compares the boys' shooting of BB guns at each other to dodgeball, football, rugby, hockey, boxing, wrestling, "ultimate fighting," fencing, and "paint- ball." We disagree.
>
> The games Hiott uses for comparison, although capable of producing injuries, have been generally accepted by society as lawful athletic contests, competitive sports, or concerted activities not forbidden by law. And these games carry with them generally accepted rules, at least some of which are intended to prevent or minimize injuries. In addition, such games commonly prescribe the use of protective devices or clothing to prevent injuries. Shooting BB guns at each other is not a generally accepted game or athletic contest; the activity has no generally accepted rules; and the activity is not characterized by the common use of protective devices or clothing. Compare Ritchie-Gamester v. City of Berkley, 597 N.W.2d 517 (1999) (ice skater at a city-owned ice arena sued for negligence after being injured by another skater; court addressed the standard of care in recreational

activities and games, applying the "everyday reality" of participating in a recreational activity by adhering to the rules defining the sport).

Moreover, consent is not a valid defense if the activity consented to is against public policy. Helton v. State, 624 N.E.2d 499 (Ind. Ct. App. 1993). Thus, a child cannot consent to hazing, a gang member cannot consent to an initiation beating, and an individual cannot consent to being shot with a pistol. People v. Lenti, 253 N.Y.S.2d 9 (1964); State v. Fransua, 510 P.2d 106 N.M. (1973). In Fransua, the New Mexico court held that consent was not a defense to aggravated battery, recognizing that criminal statutes are enacted to protect citizens and to prevent breaches of the public peace. Assaults in general are breaches of the public peace. And we consider shooting at another person with a BB gun a breach of the public peace and therefore, against public policy. We conclude that the trial court did not err in refusing to consider Jose's consent as a defense.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) OFFICER HAD PC TO ARREST FOR "PHYSICAL CONTROL" WHERE DRIVER SLEEPING AT THE WHEEL WITH MOTOR RUNNING IN VEHICLE LOCATED 3 FEET OFF THE HIGHWAY – In State v. Reid, ___ Wn. App. ___, 988 P.2d 1038 (Div. II, 1999), the Court of Appeals rules that an officer had probable cause to arrest a driver for physical control of a motor vehicle while under the influence of intoxicants (RCW 46.61.504) where the officer found the driver sleeping at the wheel with the motor running in a car which was located only three feet off the highway. Along the way, the Reid Court declares that the question of whether a driver has moved a vehicle "safely off the roadway" under RCW 46.61.504 (2) is irrelevant to the determination of whether the officer has probable cause to make an arrest.

After the officer roused Reid, the intoxicated lone occupant of the car, Reid was uncooperative and belligerent. The officer arrested Reid for "physical control" and searched Reid's car incident to arrest. In the search the officer found a loaded handgun in the car. Charged with "physical control," obstructing, and felony possession of a firearm, Reid sought to suppress all evidence on grounds that he qualified for the "safely off the roadway" defense of RCW 46.61.504(2).

RCW 46.61.504 currently defines the gross misdemeanor of "physical control of vehicle while under the influence" as follows:

> (1) A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if the person has actual physical control of a vehicle within this state:
>
> a) And the person has, within two hours after being in actual physical control of the vehicle, and alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
>
> b) While the person is under the influence of or affected by intoxicating liquor and any drug; or
>
> c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

The second sentence of subsection (2) of RCW 46.61.504 provides an affirmative defense to the "physical control" offense as follows:

> No person may be convicted under this section if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway.

The Reid Court notes that there is some conflict in the Washington case law as to whether an intoxicated driver qualifies for the "safely off the roadway" affirmative defense of subsection (2) where the drunk driver parks the vehicle in a safe location near the roadway and falls asleep with the engine running. But this sufficiency-of-evidence question need not be resolved in the case before it, the Reid Court explains. That is because the pertinent issue in the suppression hearing was whether the officer had probable

cause to arrest Reid, not whether Reid could be convicted. The Reid Court answers "yes" to the probable cause to arrest question on the facts of this case, explaining that the question of whether an affirmative defense applies (here, the defense of "safely off the roadway") is irrelevant on the issue of whether an officer has probable cause to make an arrest for an offense.

Result: Reversal of Jefferson County Superior Court suppression order in prosecution against Jay William Reid; case remanded: 1) for further review to determine whether seized handgun was located consistent with constitutional limits on search-incident-to-arrest; and 2) for trial.

(2) PRIOR DRUG-DEALING CONVICTION NOT ADMISSIBLE TO PROVE INTENT TO DELIVER; MERE POSSESSION OF 9 ROCKS OF COKE, PLUS FLIGHT AND DEFENDANT'S PRIOR CLAIMS OF NO DRUG USAGE INSUFFICIENT TO PROVE INTENT TO DELIVER – In State v. Wade, ___ Wn. App. ___, 989 P.2d 576 (Div. II, 1999), the Court of Appeals holds (1) that a defendant's prior convictions for drug-dealing were inadmissible in a subsequent prosecution for possession of drugs with intent to deliver; and 2) the mere fact of the defendant's possession of 9 rocks of cocaine was not sufficient to prove his intent to deliver the cocaine, even when coupled with the facts: that he ran when he saw that he was under surveillance, and that he had previously stated that he was not himself a drug user.

While patrolling a high drug-crime area in the city, a Tacoma police officer got out of his patrol car and tried to contact Charles Wade. After verbally refusing, Wade walked away, tossing down a plastic baggy, and then breaking into a run. The officer recovered the baggy, which contained 9 rocks of suspected cocaine.

Wade was subsequently arrested and charged with possession of cocaine with intent to deliver. The evidence in support of the "intent to deliver" element of the crime was: 1) Wade's two prior drug-dealing convictions; 2) the quantity of drugs (9 rocks); 3) Wade's flight from the officer; and 4) Wade previous statement that he did not use drugs. On appeal, Wade challenged admissibility of evidence of his prior drug-dealing convictions, as well as the sufficiency of the evidence of his intent to deliver the drugs.

A) Admissibility of evidence of prior drug-dealing convictions.

Under Evidence Rule 404(b), with limited exceptions, the general rule is that evidence of a person's prior bad acts is not admissible to prove a person's propensity to commit a crime. No exception to the general bar of ER 404(b) applied in this case, the Wade Court holds, so it was error for the trial court to admit Wade's prior drug-dealing convictions as evidence of his intent to deliver the drugs.

B) Sufficiency of evidence of intent to deliver.

The Wade Court summarizes as follows the relevant evidence and the Washington case law on the sufficiency of the evidence of Wade's intent to deliver the cocaine:

> Discounting the inadmissible prior acts under ER 404(b), the following competent evidence remains: (1) When the arresting officer first saw Wade, Wade was walking away from a van; (2) the nine rocks of cocaine Wade dropped was of a quantity normally held for sale, according to expert police testimony; and (3) Wade had stated 10 months earlier that he does not use cocaine.
>
> Division One has considered whether bare possession can give rise to an inference of intent to distribute and has concluded that mere possession without additional factors cannot support an inference of intent. State v. Brown, 68 Wn. App. 480 (1993) [**May 93 LED:11]**. The evidence in Brown consisted of 20 rocks of cocaine and expert testimony by a police officer familiar with cocaine sales. The court determined that relying on such evidence "would mean that any person possessing a controlled substance in an amount greater than some experienced law enforcement officer believes is 'usual' or 'customary' for personal use is subject to conviction for possession with intent to deliver." The court held that possession, coupled with an officer's expert opinion, is insufficient to justify a conviction for possession with intent to deliver; there must be an additional factor beyond mere possession. Division Three agrees with Division One and does not allow the fact-finder to infer intent to distribute from simple possession, without additional facts.

The Wade Court then discusses the somewhat mixed case law from other states. In some states, courts have allowed "intent to deliver" convictions to stand based on quantity alone where the quantity of drugs

was great. The Wade Court then concludes that the quantity of drugs in this case was not sufficient alone to support an "intent" finding:

> It appears that at some point, the quantity of drugs could be large enough to raise an inference that the drugs were possessed with intent to distribute. But here, nine rocks of cocaine, weighing a total of 1.3 grams, were not of sufficient quantity from which to infer intent to distribute.

Finally, the Wade Court reviews the other evidence in the case and concludes that it was insufficient to support Wade's conviction for intent to deliver:

> It is clear that Wade possessed the narcotics. The only additional pieces of evidence, other than possession and the officer's expert testimony, are Wade's statement that he does not use cocaine and that the officer first observed Wade walking away from a van, with which the record reflects no contact. We agree with Wade that there is insufficient evidence to support an inference of intent to deliver those narcotics.
>
> Generally, the cases finding sufficient corroborating evidence contain additional factors that are substantially related to distribution of drugs, rather than simple possession. . .
>
> Here, there are no such additional facts. Wade was neither observed having any contact with the van nor doing any act that might be considered delivery of drugs; he was observed only walking away from the van. As to Wade's presence in the Hilltop area, a high drug-activity area, he lives there; his address is listed on Trafton. According to the map presented by the State, Trafton is seven or eight blocks from where the incident occurred. Wade goes to school in the area, attending Jason Lee Middle School. His mere presence in the area does not give rise to an inference of intent to deliver drugs. The fact that he took flight when the officer asked him to stop is not persuasive evidence of intent to deliver; rather it was also consistent with evading a simple possession charge, as explained in [State v. Hagler, 74 Wn. App. 232 (Div. I, 1994) **Oct 94 LED:13**.
>
> We hold that the admissible evidence is insufficient to support a conviction for possession of a controlled substance with intent to deliver, but it is sufficient to support a conviction for simple possession.

[Footnote, citation and some text omitted]

Result: Reversal of Piece County Superior Court conviction of Charles Fidel Wade for possession of cocaine with intent to deliver – case remanded for re-sentencing for simple possession of cocaine.

LED EDITOR'S NOTE: In a footnote, the Wade Court notes some cases where evidence was held to be sufficient to establish intent to deliver drugs:

> **In State v. Miller, 91 Wn. App. 181 (1998) Dec 98 LED:18, sufficient evidence to support an intent to deliver charge consisted of drugs packaged for individual use, empty drug packaging materials, a "sales" list with names, numbers and monetary marks, and a knife. The possession of packaging materials, processing materials, and cash can be sufficient evidence. State v. Taylor, 74 Wn. App. 111 (1994) May 95 LED:18. Also, activities consistent with drug sales, such as trading small packages for currency, have been considered sufficient evidence for a conviction of intent to deliver. State v. Thomas, 68 Wn. App. 268 (1992). Possession of large sums of cash also can be sufficient evidence to allow an inference of intent to distribute. State v. Lopez, 79 Wn. App. 755 (1995) April 96 LED:16; State v. Hagler, 74 Wn. App. 232 (1994) Oct 94 LED:13. In Hagler, the court noted that the defendant, in addition to possessing a large sum of cash, also gave a false name, was nervous, and took flight. But, this evidence may indicate guilt about possession as well as intent. Therefore, the court noted that "[t]he additional factor must be suggestive of sale as opposed to mere possession in order to provide substantial corroborating evidence of intent to deliver."**

(3) "HIT-AND-RUN-ATTENDED" CONVICTION SUPPORTED BY RECORD – In City of Spokane v. Carlson, 96 Wn. App. 279 (Div. III, 1999), the Court of Appeals rules that the following facts were sufficient to support defendant's conviction for hit-and-run-attended under a City of Spokane ordinance:

> Lisa Watkins stopped for a red light in the southbound, right-hand lane on the Division Street Bridge in Spokane. The light turned green. Edward Carlson tried to change lanes but collided with the rear-end of Ms. Watkins' vehicle. Mr. Carlson then pulled along the driver's side of Ms. Watkins' car and gave, what she interpreted as, a goodbye wave. He did not indicate that he was going to stop. Ms. Watkins wrote down Mr. Carlson's license plate number. Mr. Carlson drove through the intersection in the left-hand lane. He drove ahead of Ms. Watkins but did not stop. Ms. Watkins lost sight of his car. She drove to work, called the police, and reported the incident. Mr. Carlson explained that he did not stop at the accident scene because he would have blocked both southbound lanes of traffic on the bridge. He pulled up next to Ms. Watkins and motioned for her to pull over further up the street. He sped ahead of traffic and attempted to move into the right-hand lane to pull off the road and exchange information. He could not immediately move into the right-hand lane due to traffic. Mr. Carlson eventually pulled into a parking lot several blocks away from the site of the accident. He waited for Ms. Watkins for about 30 seconds. He then retraced his path to find Ms. Watkins. Mr. Carlson did not find her. Officer Samuel Hairston estimated that the collision caused $500 in damages to Ms. Watkins' vehicle. Officer Hairston left his name and number with Mr. Carlson's employer and asked that Mr. Carlson return the call. Mr. Carlson did not respond. Officer Hairston turned the case over to Officer Marty Bowman. Officer Bowman cited Mr. Carlson for hit and run to an attended vehicle, SMC sec. 16.52.020(5).

The Court of Appeals explains what was necessary to prove a violation of the Spokane hit-and-run ordinance at issue:

> To convict Mr. Carlson of violating SMC sec. 16.52.020, the City had to prove:
>
> (1) An accident involving Mr. Carlson's taxicab and Ms. Watkins' vehicle occurred in the City of Spokane on January 9, 1996;
>
> (2) Damage to Ms. Watkins' vehicle resulted;
>
> (3) Mr. Carlson, subject to the requirement that he not obstruct traffic more than necessary, failed to (a) immediately stop his taxicab at the scene of the accident, or (b) stop his taxicab as close as possible to the accident scene and return to the accident scene, and remain at the accident scene;
>
> (4) Mr. Carlson failed to give his name, address, insurance company, insurance policy number, and vehicle license number, and exhibit his vehicle driver's license to Ms. Watkins.

The Carlson Court quickly disposes of Carlson's challenge to the sufficiency of the evidence, explaining:

> Mr. Carlson's cab collided with Ms. Watkins' vehicle in the City of Spokane. He pulled up, "gave a wave of good-bye," and then sped off in the left lane. Mr. Carlson knew that he had collided with Ms. Watkins' vehicle. He did not indicate that he was going to stop. He stayed a half block ahead of Ms. Watkins. Ms. Watkins then lost sight of his cab. The collision resulted in an estimated $500 of damage to Ms. Watkins' vehicle. He did not speak with a law enforcement officer until Officer Bowman approached him six days later. The evidence is sufficient to convict Mr. Carlson of violating SMC sec. 16.52.020.

Result: Affirmance of Spokane County Superior Court decision upholding District Court hit-and-run conviction (a gross misdemeanor under the Spokane Municipal Code) of Edward S. Carlson.

LED EDITOR'S NOTE: The Spokane city hit-and-run ordinance at issue in this case is in all pertinent respects identical to the state statute at RCW 46.52.020. The Carlson Court rejects Carlson's additional arguments that: 1) the ordinance should be declared void-for-vagueness; 2) the ordinance should apply equally to both the person who causes the accident and the person in the other vehicle; and 3) the "useless gesture" rule of State v. Teuber, 19 Wn. App. 651 (1978) should excuse his failure to stop, in light of Ms Watkins' failure to stay at the scene. On the Teuber argument, the Court of Appeals explains why that case is distinguishable on its facts:

> **The Teuber court reversed a conviction of RCW 46.52.020 for insufficiency of the evidence. But there the drivers involved in the accident were next door neighbors.**

> **Each driver knew the other's address. The driver at fault did not move his vehicle. And the driver of the attended and damaged vehicle left the scene of the accident (to call the police). The court concluded that Mr. Teuber did not commit hit-and-run because the driver of the attended and damaged vehicle voluntarily departed which "obviated the requirement that Teuber exhibit his vehicle operator's license."**
>
> **Mr. Carlson and Ms. Watkins did not have a relationship in which either could locate the other to exchange information. The court therefore properly placed the burden to exchange information on Mr. Carlson.**

(4) KIDNAP CONVICTION OVERTURNED: INSUFFICIENT EVIDENCE OF 93-YEAR-OLD'S INCOMPETENCE – In State v. Simms, 95 Wn. App. 910 (Div. II, 1999), the Court of Appeals reverses a kidnapping conviction on grounds that there was insufficient evidence that the alleged 93-year-old "victim" was unable to acquiesce in his movements with the alleged "kidnapper."

The State's theory in the case was that the 93-year-old male "victim" had become incompetent and subject to undue influence exerted by his live-in, female housekeeper and caretaker. The alleged "kidnapping" occurred when, after being warned by the sheriff's office not to leave, the housekeeper drove off with the 93-year-old man with her car apparently packed for an extended trip. Checkbooks, a quit-claim deed, and a passport were found in the car when the housekeeper was stopped by police several hours later.

The housekeeper was convicted of second degree kidnapping. However, the Court of Appeals has now held that there was not sufficient evidence to support the conviction. In extended analysis, the Court of Appeals concludes that the 93-year-old man was not shown by the evidence to be incompetent or otherwise unable to acquiesce in his movements with the housekeeper. Because the crime of kidnapping requires proof of "restraint," and "restrain" means lack of "consent" or lack of "legal authority" to interfere with a person's liberty (including lack of authority over an "incompetent" person), there was inadequate evidence to support the conviction, the Simms Court holds.

Result: Reversal of Pacific County Superior Court second degree kidnapping conviction of Mayme June Simms; charges dismissed.

(5) "PRIOR BAD ACTS" EVIDENCE ADMISSIBLE IN HARASSMENT CASE TO SHOW REASONABLENESS OF VICTIM'S FEAR – In State v. Ragin, 94 Wn. App. 407 (Div. I, 1999), a felony harassment case, the Court of Appeals applies an exception to the general rule that evidence of a defendant's "prior bad acts" is so prejudicial in comparison to its probative value that the trial court must not admit the evidence.

Evidence Rule (ER) 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In Ragin, the victim of death threats was aware of the defendant's prior armed robbery conviction, his episodic rage problems, and his domestic violence problems. That is because, during a calmer time in the life of defendant James Enoch Ragin, Ragin told victim William Dahl about his past. Later, Ragin had called Dahl from jail, asking Dahl for help in posting bail. When Dahl refused, Ragin threatened to kill Dahl and to harm other persons as well. Ragin was subsequently convicted on felony harassment charges under RCW 9A.46.020.

The Court of Appeals explains why the trial court's admission of the evidence of prior bad acts was not error under ER 404(b):

> A defendant is guilty of felony harassment if he threatens to cause bodily injury to a person, and the person is placed in "reasonable fear that the threat will be carried out." The fact-finder applies an objective standard to determine whether the victim's fear that the threat will be carried out is reasonable. This requires the jury to "consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions." The State had to prove that it was reasonable for Dahl to believe Ragin would kill him and his family. At trial, Dahl testified that although he had

> not witnessed Ragin's violent temper before September 1996, he nevertheless had reason to believe Ragin would carry out the extreme threats he made on September 18. If the jury were presented with evidence of Ragin's September ravings alone, it may have believed Dahl was overreacting to Ragin's threats. Thus, Dahl's knowledge of Ragin's prior violent acts was relevant to the reasonable fear element of felony harassment. But even though this evidence is probative of Dahl's reasonable fear, if the prejudicial effect substantially outweighed the probative value of the evidence, it still could not be admitted. Ragin asserts this is such a case. He claims that all the evidence admitted was not necessary to show the jury that Dahl's fear was reasonable because his behavior in September should have been sufficient to prove that he was capable of carrying out his threats. He further asserts that the evidence simply proved that he was a "bad or violent person who needed to be locked up." We disagree. Because evidence of Ragin's behavior in September alone did not provide a context for Dahl's fear, it is likely that these two incidents alone would not have been enough to convince the jury that Dahl reasonably believed Ragin would kill him. The jury was entitled to know what Dahl knew at the time Ragin threatened him to decide whether a reasonable person knowing what Dahl knew would believe Ragin could carry out the threats. The State was therefore allowed to use the frightening stories Ragin revealed to Dahl to prove its case. Although the prior bad acts evidence admitted in felony harassment cases generally involves the victim, the same rationale applies here. In both instances, the earlier acts are necessary to put the threats in context. Although the stories may have put Ragin in a bad light before the jury, the evidence was necessary to prove an essential element of the charged crime, so its probative value outweighed its prejudicial effect. Even if everything Ragin told Dahl about his past was not necessary to prove Dahl's state of mind, the trial court did not abuse its discretion by admitting this evidence. Contrary to Ragin's assertion that the "trial court failed even to consider ER 404(b)" in admitting the evidence, the record shows that the [trial] court considered both his and the State's arguments and concluded the evidence was admissible for the narrow purpose of showing that Dahl was reasonably afraid. Because we assume that the jurors followed the court's limiting instruction that [the jury] consider the evidence only for the purpose of determining the reasonableness of Dahl's fear, the trial court's ruling admitting the evidence was not error.

[Citations and footnotes omitted]

Result: Affirmance of King County Superior Court conviction of James Enoch Ragin for felony harassment.

(6) TWO CONVICTIONS JUSTIFIED FOR TWO MARIJUANA GROW OPERATIONS – In State v. Davis, 95 Wn. App. 917 (Div. I, 1999), in a 2-1 decision, the Court of Appeals refuses to expand on the State Supreme Court ruling in State v. Adel, 136 Wn.2d 629 (1998) **Feb 99 LED:03**.

In Adel, the State Supreme Court ruled on double jeopardy grounds that only one “unit of prosecution” was involved where the defendant was found to have possessed marijuana in small quantities (less than 40 grams total) in two locations, quite near to each other (i.e., in his convenience store and in his car parked just outside) at about the same point in time. In significant part, the Davis majority’s rationale for not applying the Adel “double jeopardy” rule to the prosecution of Davis for his two marijuana-growing operations is as follows:

> In deciding "whether the Legislature intended to punish a person multiple times for simple possession based on the drugs being stashed in multiple places," the Adel Court emphasized that the Legislature focused on the amount of drugs that the defendant possessed in drafting the simple possession statute:
>
> > One way of construing legislative intent regarding the unit of prosecution for a simple possession crime is to refer to the 40 gram cutoff between a misdemeanor and a felony. *See* RCW 69.50.401(e). The Legislature has indicated the desire to punish possession of over 40 grams of marijuana as a more serious crime. In doing so, the Legislature focused solely on the quantity of the drug, and did not reference the spatial or temporal aspects of possession. Indeed, if officers had found 21 grams in Adel's store, and 21 grams in his car, prosecutors most certainly would

> have attempted to aggregate the two stashes and charge Adel with felony possession.

In addition, the Adel Court expressed concern that if location were the determinative factor in simple possession cases, prosecutors would multiply charges where all the drugs were in the defendant's dominion and control but were held in more than one place on the defendant's person, *e.g.*, a sock, pant pocket, and a purse. Therefore, the Adel Court concluded that the Legislature intended quantity, not location, to define the unit of prosecution in simple possession cases: "We find the unit of prosecution in RCW 69.50.401(e) is possessing 40 grams of marijuana or less, regardless of where or in how many locations the drug is kept." Accordingly, the court reversed one of Adel's convictions and remanded for resentencing.

In the present case, Davis was convicted on two counts of possession of marijuana with intent to manufacture, not simple possession. The possession of marijuana with intent to manufacture statute contains no reference to quantity:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (1) Any person who violates this subsection with respect to: . . . .
>
> (iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both[.]

Therefore, based on the statute itself, the Legislature must not have intended to define the unit of prosecution in possession with intent to manufacture cases based on the quantity of drugs possessed. This conclusion is amply supported by the Adel decision itself.

Under the Adel Court's analysis of the [other] cases, the "unit of prosecution" in possession with intent to deliver cases is a *separate and distinct* intent to deliver drugs. Possession with intent to deliver and possession with intent to manufacture are both prohibited under the same statute, RCW 69.50.401(a). Therefore, the "unit of prosecution" in possession with intent to manufacture cases is a *separate and distinct* intent to manufacture drugs. Under federal case law cited in Adel, where it is alleged that a criminal defendant possessed multiple "stashes" of drugs with intent to deliver, the relative time, location, and intended purpose of the "stashes" determine whether the defendant had multiple intents to deliver drugs. Likewise, where it is alleged that a criminal defendant had multiple drug manufacturing operations, the relative time, location, and intended purpose of the defendant's manufacturing operations should determine whether the defendant had multiple intents to manufacture. Indeed, it would defy common sense to interpret Adel as permitting a drug kingpin to manufacture drugs with impunity after the police undercover one of the kingpin's multiple drug manufacturing operations. One of Davis's operations was based in a house with a Redmond address, and the other was based in a house with an Issaquah address. Because Davis's two different marijuana grow operations are sufficiently distinguishable by location, his two convictions for possessing marijuana with intent to manufacture do not violate double jeopardy.

Result: Denial of personal restraint petition of Brent Allen Davis in which he challenged his sentence and convictions on two counts of possessing marijuana with intent to manufacture. Status: The Washington Supreme Court has accepted review of this case.

(7) ASSAULT – WHERE SPOUSES ARE LIVING SEPARATELY, ONE SPOUSE HAS NO "COMMUNITY PROPERTY" RIGHT TO ENTER OR REMAIN IN OTHER'S APARTMENT – In Bellevue v. Jacke, 96 Wn. App. 209 (Div. I, 1999), a domestic violence assault case, the Court of Appeals rejects the idea that, where spouses take up separate residences, one spouse has a right to enter or remain in the residence of the other.

Accordingly, the Court of Appeals rules (apparently in relation to RCW 9A.16.020) that the trial court, in an assault prosecution involving estranged spouses, erred when it inquired into community property ownership interests. The prosecutor's allegation in the case was that a wife had gone uninvited to the separate apartment of her husband, and that, when her estranged husband had directed her to leave, she assaulted him. The Court of Appeals rules that, under these allegations, the husband was the sole tenant; and he therefore had a right to exclude his wife from the apartment. The fact that she may have had a theoretical community property interest in the apartment lease was irrelevant to the criminal case.

Result: Reversal of King County Superior Court decision which had affirmed a King County District Court ruling that Ruth Chattin had an ownership right to resist her husband's efforts to exclude her from the husband's apartment; remanded to district court for trial.

(8) NO LIABILITY FOR BANK OR POLICE IN CHECK-CASHING MIXUP AND ARREST – In Dang v. Ehredt, Seattle P.D. and Others, 95 Wn. App. 670 (Div. I, 1999), the Court of Appeals affirms dismissal of a lawsuit against a bank and the police in a multi-pronged civil action which arose from an unfortunate check-cashing mixup and arrest at a bank. As to the police officers, the Ehredt Court holds that, because the officers reasonably concluded that they had probable cause to arrest plaintiff Tham Thi Dang, they were entitled to qualified immunity from liability for: 1) a civil rights violation grounded in the Fourth Amendment, and 2) false arrest under the common law.

The Court of Appeals very briefly summarizes the facts which led to the arrest. (NOTE: The Court describes the facts in much greater detail than is provided in this **LED** entry). At the time that the arrest was made, the officers knew the following:

> The officers knew that the account on which the check was drawn had been closed because of counterfeit checks, that such checks had previously been presented for payment to Seafirst, and that First Interstate had confirmed the account remained closed and flagged as counterfeit. The bank was closing, and the officers were unable, in spite of their efforts, to verify Ms. Dang's statements.

The officers later learned Ms dang had done nothing wrong.

The Court of Appeals upholds the trial court's dismissal of the Dang's lawsuit against the bank and the police, holding that the officers acted reasonably on the totality of the circumstances, and that the bank was entitled to statutory immunity under RCW 4.24.510.

Result: Affirmance of King County Superior Court summary judgment dismissal of lawsuit against bank and police.

(9) TAVERN WITH DRUG PROBLEM LOSES APPEAL CHALLENGING DRUG NUISANCE ABATEMENT ORDER – In Bellingham v. Chin, d/b/a/ Danny's Tavern ___ Wn. App. ___, 988 P.2d 479 (Div. I, 1999), the Court of Appeals rejects an appeal by a tavern owner to a Superior Court drug nuisance abatement order entered under chapter 7.43 RCW. Along the way, the Court of Appeals rejects arguments by the tavern owner: 1) that he was not given adequate notice by the City of Bellingham that his business was being used for drug trafficking; 2) that the statute does not apply to businesses; 3) that he was entitled to a jury trial on the question of whether he knew or should have known the illegal drug activity at the tavern; and 4) that the trial court erred in closing part of the hearing to the public to protect a confidential informant's personal safety, as well as to protect an ongoing investigation of illegal drug activity in the City of Bellingham.

The abatement action was based on evidence of long-term, extensive, and obvious drug-dealing at the tavern.

Result: Affirmance of Whatcom County Superior Court nuisance abatement order against Danny's Tavern and its owner, Wayne Chin.

(10) **NO RELIEF UNDER STRIKER-GREENWOOD-SPEEDY-TRIAL-SPEEDY-ARRAIGNMENT RULE FOR DEFENDANT WHO HAD BEEN IN JAIL OUT OF STATE AND HAD RESISTED EXTRADITION**-- In State v. Roman, 94 Wn. App. 211 (Div. II, 1999), the Court of Appeals holds that the defendant was not amenable to process during the time he was incarcerated in another state. Accordingly, that time did not count as part of the time for trial on his Washington charges, under CrR 3.3 (Criminal Rule 3.3).

Roman was charged with first degree kidnapping, first degree extortion, and fourth degree assault in Cowlitz County Superior Court on April 20, 1995. A warrant was issued on April 26, 1995. The defendant was incarcerated in a California jail from May 1, 1995 through November 27, 1995. An extradition warrant was issued during this time. However, the California authorities mistakenly released him after he had served the California sentence. The issue on appeal was whether the trial court properly counted the defendant's time spent in the California jail as part of the time for trial under CrR 3.3. The Roman Court holds that the time in the California jail had not counted.

The Court begins with a review of State v. Striker, 87 Wn.2d 870 (1976), State v. Greenwood, 120 Wn.2d 585(1993), and State v. Anderson, 121 Wn.2d 852 (1993), stating:

> Relying on Striker, Greenwood held that when a defendant is present in this state, but there is "a long and unnecessary delay" between the filing of charges and the defendant's first appearance in court, first appearance will be backdated to the fourteenth day after filing, and trial must commence within 60/90 days after that. A delay may be "long" if it lasts 45 days or more. A delay is "unnecessary" if, while it was occurring, the defendant was amenable to process and the State failed to exercise due diligence to bring him or her before the court. . . .
>
> Anderson extended Greenwood to some but not all out-of-state defendants. Implicitly, Anderson held that a defendant is amenable to process when he or she is incarcerated in an out-of-state or federal jail or prison; the prosecutor is aware of that; and the defendant is actively demanding a speedy trial. Explicitly, Anderson held that the State fails to exercise due diligence if, under the circumstances just described, it ignores the defendant's demand. . . .
>
> State v. Hudson, 130 Wn.2d 48 (1996) and State v. Stewart, 130 Wn.2d 351 (1996) partially clarified Anderson by holding that a defendant is not amenable to process while at large in another state. In that situation, then, the State is not required to exercise due diligence.

[Some citations and footnotes omitted]

The Roman Court determines that the defendant was not amenable to process during the time he was jailed in California before California issued its extradition warrant, because "an out-of-state defendant is not amenable to process until extradition procedures are completed." The Court notes that:

> An exception exists when, as in Anderson, an incarcerated out-of-state defendant is affirmatively seeking to waive extradition and return to this state for speedy trial. That exception is not pertinent here, however, because [the defendant] was exercising, not waiving, his extradition rights. It follows that [he] was not amenable to process before the extradition process culminated in an extradition warrant.

The Roman Court also determines that the defendant was not amenable to process after the extradition warrant issued, but before he finished his California sentence, stating:

> A person serving time on an out-of- state sentence is not amenable to process until he or she finishes the out-of-state sentence, unless, as in Anderson, the person is actively seeking to waive his or her extradition rights and return here. Because [the defendant] was not actively seeking his return, he was not amenable to process during any part of his stay in the [California] jail.

Finally, the Roman Court concludes that, even if the defendant had been amenable to process, the State exercised due diligence in seeking his return for prosecution in Washington.

Result: Reversal of Cowlitz County Superior Court order dismissing kidnapping, extortion and assault charges against Thomas Jacob Roman; case remanded for trial.

(11) **UNDER STRIKER-SPEEDY-TRIAL-SPEEDY-ARRAIGNMENT RULE, ALL CRIMES ARISING FROM SAME CRIMINAL EPISODE HAVE THE SAME TIME LINES UNLESS STATE SATISFIES GOOD FAITH, DUE DILIGENCE EXCEPTION** -- In State v. Ross, ___ Wn. App. __, 981 P.2d 888 (Div. II, 1999), the Court of Appeals addresses that part of the Striker-speedy-trial-speedy-arraignment rule (see Criminal Rule, CrR 3.3) which sets times lines for the criminal process where multiple charges arise from the same criminal episode. Generally in this multiple-charges circumstance, the State is held to the

same speedy arraignment time lines on all charges arising out of the singular criminal episode, unless special circumstances justify a departure for one or more of the charges.

In Ross, the defendant was arrested for DUI. A search incident to arrest revealed suspected methamphetamine. The defendant was charged with DUI, and the suspected methamphetamine was sent to the lab for testing. By the time the State filed the drug charge, the defendant had already pled guilty to the DUI, and the Striker-speedy-arraignment-speedy-trial period had expired.

The Ross Court notes that, because the methamphetamine charge stemmed from the same criminal episode as the DUI charge, once the DUI charge was filed, the State was under a general obligation to proceed under the same time lines in bringing the defendant to arraignment and trial on other charges arising from his arrest. However, as an exception to the general rule, delay by the State on another charge might be excused if the delay was in good faith and reflected due diligence.

The Ross Court notes that the State's decision whether to charge a defendant with possession of illegal drugs is required under law to be based upon sufficient evidence. That means that suspected illegal drugs generally must be subjected to laboratory testing before the State files its charges. The Court further explains that this fact may, depending upon what the trial court determines on remand of the case, provide the State with a good faith, due diligence excuse for delay in bringing the drug charge against defendant Ross:

> Here, the State was not required to file the methamphetamine charge until, in the exercise of due diligence, it had or should have had the evidence to support a charge for illegal possession of that substance. If the State chooses to delay filing an information which could result in a violation of CrR 3.3, as it did here, the defendant may move, under CrR 3.3, to dismiss for an unreasonable delay in bringing the charge. The burden then shifts to the State to show that it acted in good faith and with due diligence, that is, that its reasons for delay in filing of the methamphetamine charge were understandable and justified. If the State demonstrates that it acted in good faith and with due diligence and its reasons were understandable and justified, the speedy trial period accrues from the date the State received the evidence supporting the later filed charge. In this case, that date would be when the State received the laboratory report confirming the substance found in [the defendant's] automobile was methamphetamine. But if the trial court finds that the State did not act in good faith or with due diligence, that is, failing to demonstrate that its reasons for the delayed methamphetamine charge were understandable and justified, the speedy trial period for the later filed charge accrues from the date of the underlying criminal episode from which all of the charges stemmed.

Result: Remanded for determination by Lewis County Superior Court whether the State's reason for waiting to bring the drug charge against Otto Allen Ross, Jr. was justified.

(12) **FIFTEEN-YEAR-OLD'S CLAIM OF SELF DEFENSE AGAINST FATHER'S ASSAULT SHOULD HAVE BEEN UPHELD BY TRIAL COURT** -- In State v. Graves, 97 Wn. App. 55 (Div. I, 1999), the Court of Appeals rules in favor of a 15-year-old who used reasonable force in wrestling back to resist his father's efforts to discipline the juvenile by wrestling his son down. The Court of Appeals rules in Graves that the juvenile court trial judge should have found the juvenile not guilty based on his claim of self defense.

The Graves Court explains that a juvenile defendant is not altogether precluded from raising self defense where a parent admits to using force, but the parent claims that the force was reasonable parental discipline. At the outset of its opinion, the Graves Court gives a detailed accounting of the facts [which we won't set out in detail in this LED entry]. Ultimately, the Court finds that the juvenile had offered sufficient evidence to support his claim of self defense. The Court sums up its opinion with a brief summary of the facts which, in the Court's view, show justification for the juvenile's use of reasonable force to resist his father's wrestle-down-and-hold discipline technique:

> With regard to the first incident, [the father] testified he felt [his son] "had crossed the line" with him [for defiantly refusing to do his chores], so he walked into [the son's] room calling him a "punk," and then grabbed [the son's] chin. With regard to the second incident, [the father] stated that he "put a hold on [the son]" to subdue him. On cross-examination, [the father] admitted initiating both incidents. And although [the son] stated that he was not scared when [the father] first walked into the room and that he was not in

> pain when [the father] pinned him down, [the son] also testified that he thought [the father] "was going to do something," and that he was trying to get [his father] off of him throughout the wrestling bouts. Based on this record, we cannot say that the State has proved the absence of self-defense.

Result: Reversal of King County Superior Court juvenile adjudication of guilt against Ricco Anthony Graves, Jr. for assault in the fourth degree.

(13) **ACT OF STEALING CONTAMINATED CLAMS FROM PRIVATE BED AND SELLING THEM FOR OVER $500 IS THEFT IN THE SECOND DEGREE** -- In State v. Longshore, 97 Wn. App. 144 (Div. II, 1999), the Court of Appeals holds: (1) that clams in a private bed are protected by the theft statutes; (2) that uncertified clams taken from an area not certified as clean by the Department of Health do have a market value; and (3) that there was sufficient evidence in the record in this case that the clams had a value of more than $250. Accordingly, the Longshore Court upholds a conviction for theft in the second degree.

The aptly named defendant, Longshore, was charged with second degree theft for taking 340 pounds of clams from private property and selling them for $1.50 per pound. The defendant argued at trial: that clams in a natural bed are not subject to private possession and their removal therefore could not constitute theft; and that contaminated clams have no value, and thus the clams were not worth over $250.

In addition to holding that the fact of contamination of the clams did not make them without value, the Longshore Court also holds that, unlike wildlife or wild fish, clams can be possessed as private property for purposes of the theft statutes. The Court explains that, when the "State vests title to tidelands in a private landowner, 'such investiture must carry with it the right to exercise dominion and ownership over . . . things so closely related to the soil as clams.'" Because clams are fixed to the soil, they are distinguishable from birds, other wild animals, or fish. "Under Washington law, clams 'belong with the land.'" [Footnotes and citations omitted.] Accordingly, taking the clams could constitute a theft.

Result: Affirmance of Mason County Superior Court conviction of Timothy M. Longshore for second degree theft. Status: The State Supreme Court has accepted review.

(14) **DUTY TO PAY RESTITUTION TO VICTIM MAY BECOME DUTY TO PAY RESTITUTION TO VICTIM'S ESTATE AFTER THE VICTIM'S DEATH --** In State v. Edelman, 97 Wn. App. 161 (1999), the Court of Appeals rules that a criminal defendant's obligation to pay restitution to a victim may be made an obligation to the victim's estate where the victim dies before the defendant has paid the full obligation under the restitution order.

Defendant Edelman was convicted of theft (based on embezzlement), and the Court ordered her to pay restitution as part of her sentence. When the victim died, Ms. Edelman stopped making payments. The Court of Appeals holds: (1) that "a defendant's restitution obligation does not automatically end when a victim dies, and (2) that the statutes permit the modification of a restitution order to provide for payments to the victim's estate."

The Edelman Court explains that restitution ordered under the Sentencing Reform Act has the primary purpose of punishment (as opposed to the remedial purpose of restitution ordered pursuant to the Crime Victims' Compensation Act). The Court explains that this punitive purpose of a criminal restitution order would be undercut under Ms. Edelman's theory: "[I]f restitution were not continued here, [the defendant's] obligation would not be proportionate to her criminal acts, but would instead turn upon the life span of her victim." The Court also notes that the status of the victim's heirs was irrelevant because the restitution amount continued to represent the amount the defendant had embezzled from the victim.

Result: Reversal of King County Superior Court order dismissing State's motion to show cause why Elizabeth A. Edelman should not be sanctioned for failing to make payments; State's motion to amend restitution order granted.

(15) **STATUS PRIVILEGE AGAINST SPOUSAL TESTIMONY UNDER RCW 5.60.060(1): LACK OF MARRIAGE LICENSE DOES NOT INVALIDATE A MARRIAGE –** In State v. Denton, 97 Wn. App. 267 (Div. I, 1999), the Court of Appeals holds that, for purposes of the marriage-status privilege against spousal testimony under RCW 5.60.060(1), the failure to procure a marriage license does not invalidate a ceremonial marriage.

Defendant Denton invoked the spousal privilege to prevent his wife from testifying against him in a prosecution for theft. The trial court found the marriage was invalid because, although there had been a religious marriage ceremony, the couple had not procured a marriage license. The trial court therefore allowed the wife to testify.

Reversing, the Court of Appeals notes that, while there is a statutory requirement that couples obtain a marriage license prior to being married, there is no statute making an unlicensed marriage invalid. While intentional failure to procure a marriage license is a misdemeanor (RCW 26.04.200), this does not render the marriage void or voidable.

Result: Reversal of King County Superior Court conviction of Mark W. Denton for first degree theft; case remanded for retrial.

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NEXT MONTH

The March 2000 **LED** will include an entry on the January 12, 2000 decision of the U.S. Supreme Court in Illinois v. Wardlow, 2000 WL 16215 (2000) in which the Supreme Court has ruled under the Fourth Amendment that the combination of facts that – a) a person was located in an area of "heavy narcotics trafficking," and b) the person broke into unprovoked, headlong flight upon seeing a police car – added up to "reasonable suspicion" justifying a temporary police seizure of the person under Terry v. Ohio.

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND COURT RULES

The Washington office of the Administrator for the Courts maintains web sites with Washington appellate court information, including recent Washington appellate court opinions. One address provides just decisions which have been issued within the preceding 14 days [http://www.wa.gov/courts/opinpage/recent.htm]. Two other addresses provide more appellate court information and also include decisions issued within the preceding 90 days [http://www.wa.gov/courts/home/htm] and [http:www.wa.gov/courts/opinpage/home.htm].

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.

A good source for easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC) can be found at [http://slc.leg.wa.gov/WACBYTitle.htm]. Washington Legislation and other state government information can be accessed at [http://access.wa.gov/] clicking on "L" and then "legislation" or other topical entries in the "Access Washington Home Page "Index."

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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 Ed Johnson of the Criminal Justice Training Commission (CJTC) at (206) 439-3740, ext. 272; Fax (206) 439-3752; email [EJohnson@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses 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 on the Commission's Internet Home Page at:[http://www.wa.gov/cjt].