

# LAW ENFORCEMENT DIGEST

## December 2021



### COVERING CASES PUBLISHED IN DECEMBER 2021

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Cases in the Law Enforcement Digest are briefly summarized, with emphasis placed on how the rulings may affect Washington law enforcement officers or influence future investigations and charges. Each month's Law Enforcement Digest covers court rulings issued by some or all of the following courts:

- **Washington Courts of Appeals.** The Washington Court of Appeals is the intermediate level appellate court for the state of Washington. The court is divided into three divisions. Division I is based in Seattle, Division II is based in Tacoma, and Division III is based in Spokane.
- **Washington State Supreme Court.** The Washington Supreme Court is the highest court in the judiciary of the U.S. state of Washington. The court is composed of a chief justice and eight justices. Members of the court are elected to six-year terms.
- **Federal Ninth Circuit Court of Appeals.** Headquartered in San Francisco, California, the United States Court of Appeals for the Ninth Circuit (in case citations, 9th Cir.) is a federal court of appeals that has appellate jurisdiction over the district courts in the western states, including Washington, Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon.
- **United States Supreme Court:** The Supreme Court of the United States is the highest court in the federal judiciary of the United States of America.

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## CASES

1. City of Seattle v. Buford-Johnson, 81627-6-I (December 27, 2021)
2. State v. Fletcher, 4502-1-II (December 14, 2021)
3. State v. A.L.R.H., 55172-1-II (December 7, 2021)
4. Graham v. Silbaugh, 37827-6-III (December 2, 2021)

## WASHINGTON LEGAL UPDATES

The following training publications are authored by Washington State legal experts and available for additional caselaw review:

- [Legal Update for WA Law Enforcement](#) authored by retired Assistant Attorney General, John Wasberg
- **Caselaw Update** - WA Association of Prosecuting Attorneys [[2018-2021](#)] | [[2022](#)]

## QUESTIONS?

- Please contact your training officer if you want this training assigned to you.
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The materials contained in this course are for training purposes. All officers should consult their department legal advisor for guidance and policy as it relates to their particular agency.

## Facts Summary

### TOPIC: TRUE THREAT & HARASSMENT

Late at night, Officer Zerr responded to a 911 call reporting a fight on Rainier Avenue South. Upon arrival, Officer Zerr noticed a SUV driving with its headlights off. The SUV slowly approached Officer Zerr, and while looking at him, the driver yelled “*fuck the police,*” and held out his hand with an object or finger pointed at the officer. After that, the SUV sped away, but it did, however, stop at a red light. Then, at Officer Zerr’s request, approaching police officers stopped and searched the SUV and arrested Johnson, the driver.

Later, Officer Zerr testified that he was afraid that the driver might have been pointing a firearm at him and thus, he quickly moved into the shadows.

As stated in the police report, no firearms were found in the truck nor on any of its two occupants.

Subsequently, Johnson was charged and convicted of one count of harassment on the grounds that Johnson threatened to cause bodily injury or substantial harm to Officer Zerr and that Officer Zerr was in reasonable fear of being shot.

On appeal, the court again found Johnson guilty of harassment. Johnson appealed to the superior court. On appeal, the superior court affirmed the lower courts’ rulings. Then, Johnson appealed and sought discretionary review before the Washington Court of Appeals **on the grounds that his conduct and speech were protected by the First Amendment because the evidence did not establish that he made a true threat nor that he knowingly did so.** The Court agreed and reversed the lower courts’ rulings.

# Training Takeaway

Johnson was charged under the former Seattle Municipal Code (SMC), [12A.06.040\(A\)\(2\)](#) (2012). It provided:

that a person is guilty of harassment if they knowingly threaten:

- a. To cause bodily injury immediately or in the future to the person threatened or to any other person, or . . . .
- d. Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety, and
- e. The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Under the former SMC, the Court held that Johnson’s conduct did place Officer Zerr in objectively reasonable fear of bodily harm. The Court considered the following circumstances to be relevant: he was out at night by himself; a car without headlights drove by; the driver yelled at him; and he hid because he thought he saw an object that might be a firearm pointed at him.

On its face, the Court was concerned that the former SMC could punish otherwise Constitutionally protected free speech. However, under the First Amendment, **actual true threats are not protected speech**. The Court used the following test to identify whether speech is a true threat: “[a] true threat is a statement made in a context or under such circumstances wherein a reasonable person could foresee that the statement would be interpreted... as a serious expression of intention to inflict bodily harm.” Additionally, in Washington, courts have found that **“the nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken.”** The Court found that the evidence here did not establish that Johnson made a true threat.

First, analyzing Johnson’s speech, the Court affirmed that Johnson’s speech did not itself express any intention to cause harm but, instead, was a generalized and political statement of animosity. The Court held that **“criticism, commentary... [toward] and about public servants” is political speech protected by the First Amendment, no matter how “[unpleasantly] sharp”** thus, Johnson’s speech was protected.

Next, the Court held that considering all the circumstances, Johnson’s speech and conduct together did not constitute a threat because: he did not stop or approach Officer Zerr, he kept driving; he continuously kept his arm hanging out of the car; and he immediately stopped at a red light. Therefore, the Court found that the facts were more suggestive of a casual encounter or idle talk than a serious threat.

Furthermore, the Court recognized that Johnson’s speech and conduct placed Officer Zerr in reasonable fear for his safety. However, it held that the **true threat inquiry** asks whether there was sufficient evidence that **a person in Johnson’s position would “foresee that [his] statement would be interpreted... as a serious expression of intention to inflict bodily harm.”** Although Officer Zerr was afraid because he thought he had seen a firearm, Johnson did not have one and nothing indicated that he should foresee that Officer Zerr would think that he had one. Therefore, the Court held that Officer Zerr being afraid did not indicate that Johnson’s conduct rose to the level of a true threat because Johnson neither intended to threaten Officer Zerr nor did he foresee that his speech and conduct could be interpreted as a threat.

Additionally, in finding that no true threat existed, the Court considered the randomness of the interaction to be relevant. Here, there was no suggestion that Johnson knew or was specifically targeting Officer Zerr. Thus, the Court held that as Johnson drove away, Officer Zerr had no reason to think that Johnson intended to come back to find or harm him specifically. Therefore, the Court held that the communication here lacked the specificity or pointedness that was present in other cases where there was a true threat.

Due to Johnson’s speech, conduct, and the surrounding circumstances, the Court found that Johnson’s speech did not rise to the level of a **true threat** and his conviction was reversed.

[EXTERNAL LINK: View the Court Document](#)



**NOTE:** While this case addressed a former Seattle Municipal Code, that code’s language is like harassment statutes located in the RCWs. This case is important to all Washington law enforcement in understanding how the courts differentiate words or conduct intended as a “true threat” from speech protected under the First Amendment. In this instance, the Court protected speech from an actor that uttered profanity toward the police and made a gesture of a hand pointing like aiming a gun. The Court carefully recognized that the officer had reason to be fearful and to take steps to protect himself but based upon the totality of the actor’s behavior (driving away and making no further statements or actions towards the officer) found that the actor lacked the requisite intent to threaten bodily harm. There is a delicate balance of protecting a citizen’s right to free speech and the safety and welfare of the community, including law enforcement.

## Facts Summary

### TOPIC: VEHICULAR ASSAULT AND AGGRAVATING FACTORS – Bodily Harm

Late one evening, Fletcher, Torey, and Kuykendall drank beer and drove to “Six Pack.” At Six Pack, they drank some more. Afterwards, Fletcher and Kuykendall took turns driving to Ediz Hook.

Fletcher was driving erratically and speeding, and as he drove, Kuykendall recorded Snapchat videos. On their way back, Fletcher, at a high speed, crashed the vehicle into concrete blocks and a light pole. As a result, Torey was ejected from the vehicle and paralyzed from the waist down, and Kuykendall sustained a fractured sternum and three fractured vertebrae. At the time of the collision, Fletcher’s blood alcohol content was 0.18.

Due to the accident, Torey spent a month in a medical center for rehabilitation to help him regain some bodily functions, and Kuykendall required installation of a metal rod and screws down her neck. Additionally, Kuykendall suffered mental and physical injuries from the accident, and she had to switch her career to something less physically demanding.

As a result, the State charged Fletcher with two counts of vehicular assault and each count included the special allegation aggravating factor under [RCW 9.94A.535\(3\)\(y\)](#) (discussed in the Training Takeaways).

The trial court found Fletcher guilty, and findings included: that at the time of the crash Fletcher was operating the vehicle recklessly and while under the influence; that Fletcher’s driving caused substantial bodily harm to Torey and Kuykendall; and that Torey and Kuykendall’s injuries substantially exceeded the substantial bodily harm necessary to satisfy the elements of vehicular assault.

At sentencing, the State requested an exceptional sentence of 72 months based on the severity of Torey’s injuries and 24 months based on Kuykendall’s injuries. In response, Fletcher asked for a sentence within the standard range, arguing that because Torey and Kuykendall were willing participants, the court should consider their participation a mitigating factor and balance that against the aggravating factor of their injuries.

The trial court noted that the participation of others is embodied in the law and is something for the court to consider, and that the aggravating factor was clearly applicable because of the nature of the injuries the victims suffered and will continue to suffer. However, the court could not clearly express exactly how the mitigating and aggravating factors would be synthesized into a final decision. Then, the court imposed an exceptional sentence of 48 months on each count. On appeal, the Washington Court of Appeals affirmed the lower court’s decision.

## Training Takeaway

In Washington, [RCW 9.94A.537](#) only governs **aggravating circumstances** and sentences above the standard range. It states in relevant part,

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt.

...

(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to [RCW 9.94A.535](#) to a term of confinement up to the maximum allowed under [RCW 9A.20.021](#) for the underlying conviction if it finds, [that] the facts found are substantial and compelling reasons justifying an exceptional sentence.

Furthermore, [RCW 9.94A.535](#)(3)(y), permits the court to impose a sentence above the standard range when it finds that the aggravating factor is that **“the victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.”** The substantial bodily harm element of a vehicular assault charge is met when

“bodily injury which involves a temporary but substantial disfigurement, or which causes a **temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.**” However, here, both victims suffered permanent loss or impairment in function. Thus, the victims’ injuries substantially exceed the level of bodily harm required to meet the elements of vehicular assault and the aggravating factor is applicable.

At sentencing, **the court considered the severity of the injuries and the participation of others** and found that the aggravating factor was clearly applicable because of the nature of the injuries the victims suffered and would continue to suffer. Thus, the court did consider Fletcher’s request for a sentence within the standard range but instead imposed an exceptional sentence because it found that an aggravating factor justified a higher sentence.

[EXTERNAL LINK: View the Court Document](#)





State v. A.L.R.H

No. 55172-1-II

Washington Court of Appeals, Division Two

December 7, 2021

## Facts Summary

TOPIC: *BLAKE* AND MARIJUANA POSSESSION

On February 5, 2020, the State charged A.L.R.H. with one count of violation of the Uniformed Controlled Substances Act - possession of 40 grams or less of marijuana while under the age of 21.

The trial court found A.L.R.H. guilty. A.L.R.H. argued that due to the Supreme Court's holding in *Blake*, the judgement against him was unconstitutional and void. On appeal, the Washington Court of Appeals held for A.L.R.H. and reversed and remanded the lower court's decision.

## Training Takeaway

In Washington, a conviction based on a void statute is invalid. In *Blake*, the Court found that the former strict liability drug statute, RCW 69.50.4013(1), was void because it criminalized innocent and passive possession of controlled substances and thus, violated due process.

After the decision in *Blake*, the legislature amended [RCW 69.50.4014](#) to include a knowledge element providing that "any person found guilty of **knowing** possession of forty grams or less of marijuana is guilty of a misdemeanor." However, here, A.L.R.H. was adjudicated under the former statute, which did not include a knowledge element. Thus, the former statute, like the statute held unconstitutional in *Blake*, did not contain a knowledge element, and thus it criminalized innocent and passive possession of controlled substances. Furthermore, like the statute in *Blake*, the former statute here cannot be read as silently including an intent element because shortly after *Blake*, the legislature amended the statute to add the word "knowing".

The court held that because the former statute did not include an intent element, silent or otherwise, it criminalized innocent and passive possession of controlled substances and violated due process. Therefore, the court found that the former statute was unconstitutional and A.L.R.H.'s conviction based on it was void.

[EXTERNAL LINK: View the Court Document](#)



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Graham v. Silbaugh

No. 37827-6-III

Washington Court of Appeals, Division

Three

December 2, 2021

## Facts Summary

### TOPIC: HARASSMENT ORDERS & DEFAMATION

Ms. Graham has full custody of her underaged daughter, BRK. Mr. Korth, BRK's father and Graham's ex-husband, works as a handyman for Ms. Silbaugh. Shortly after meeting Graham and BRK, Silbaugh allegedly injected herself into Graham's family law matters and was harassing them.

During Korth's visit in April, BRK told Graham that Silbaugh had a camera in her pocket and was recording the visit. Silbaugh denied the allegation, however, Graham testified that that video was sent by Silbaugh to the father of Graham's other child, who she was in a custody battle with. Also, Graham alleged that Silbaugh continuously sent unwelcome messages to herself and her boyfriend. Furthermore, Graham stated that Silbaugh appeared at her home and filmed her from the end of her driveway, and Silbaugh had also driven by screaming at Graham and BRK.

Thus, Graham petitioned for an order for protection against Silbaugh on the grounds of unlawful harassment due to a series of events that caused her and BRK to fear Silbaugh. In support for her petition, Graham also alleged communications between Silbaugh and third persons. Graham alleged that Silbaugh mailed Graham's boyfriend a packet with all Graham's criminal records. Also, Graham stated that Silbaugh anonymously sent pictures, screenshots, and memes insinuating Graham was a prostitute to third parties and accused Graham of acting like a prostitute in court documents related to custody actions between Graham and Korth.

The district court granted a temporary ex parte order and then scheduled a hearing on the petition. Before the order was served, Silbaugh appeared at Graham's home, and she was allegedly taking pictures of and recording Graham's home. While she was doing this, Graham's dogs came out and Silbaugh started screaming and threatened to call animal control, BRK begged her not to.

Then, Silbaugh came towards Graham in an aggressive manner. In response, Graham, in fear of her life, called 911 and informed them that she had a temporary anti-harassment order against Silbaugh.

Next, police responded to the incident. According to the police report, Silbaugh had not yet been served the order. Thus, the responding officer informed Silbaugh of the order and she left. Later, Silbaugh was served with Graham's petition and the temporary order.

After reviewing the order and taking testimony, the superior court granted Graham's petition and issued an order preventing Silbaugh from contacting Graham or her daughter, coming within 50 feet of their home or workplace, and preventing her from keeping them under surveillance.

Silbaugh appealed the decision, arguing that the court violated her due process and First Amendment rights in issuing the order. She also contended that the evidence was insufficient to support the finding of unlawful harassment. The Court rejected Silbaugh's appeal, finding that the evidence was sufficient and that her rights were not violated.

## **Training Takeaway**

In Washington, victims of harassment can request an ex parte temporary protection order that can become permanent at a later hearing. [See RCW 10.14.040 \(Protection order—Petition\)](#). Additionally, upon a showing that contact with a person of legal age is detrimental to a child's welfare, a child's parent or guardian can request an order of protection against that person. When seeking a protective order, the petitioner must show that they have been a victim of unlawful harassment which is defined as, **“a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legal or lawful purpose.”**

Course of conduct is defined as a pattern of a series of acts over time, evidencing a continuity of purpose, but does not include constitutionally protected free speech. The course of conduct for harassment is one that causes a reasonable person to suffer substantial emotional distress, and actually causes substantial emotional distress, or, would cause a reasonable person to fear for the well-being of their child. [See RCW 10.14.020](#).

Here, Silbaugh argued that the order for protection violated her First Amendment right to free speech.

The court reasoned that although a protection order based solely on free speech is invalid, defamatory language is not protected. Thus, the court held that Silbaugh's accusations that Graham was a prostitute constituted defamatory speech. Therefore, Silbaugh's speech was unprotected and was rightfully relied upon in the finding of harassment.

Additionally, in the harassment finding against Silbaugh, the court considered the following conduct to be relevant: her pattern of contacting third parties and Graham with allegations about Graham; her secretly recording conversations in Graham's home; her keeping Graham under surveillance; and her yelling in front of Graham's minor daughter. On these grounds, the Court ruled that the trial court did not violate Silbaugh's constitutional rights, and the evidence was sufficient to support the finding of unlawful harassment.

[EXTERNAL LINK: View the Court Document](#)