

Law Enforcement Digest – January 2023

COVERING CASES PUBLISHED IN JANUARY 2023

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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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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?

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United States v. Baker

No. 20-50314

United States Court of Appeals for the Ninth

District

January 30, 2023

TOPICS:

1. Search and Seizure
2. The Fourth Amendment
3. Terry Stop
4. Fruit of the Poisonous Tree
5. Abandonment of an Object/Property

Factual Background

One week after the robbery of a Sprint store in Los Angeles, CA, LAPD officers Byun and Salas observed a group of individuals congregating at a local housing complex. The officers were aware that one of the individuals, Baker, was a gang member and did not reside at the housing complex. The officers suspected that Baker was trespassing.

As the officers approached Baker, Baker lifted his shirt to show that he was unarmed. Officer Byun conducted a patdown search which revealed no weapons or contraband. Officer Byun observed a car key attached to Baker's belt loop. The officer detached the key and instructed Baker to hand over his driver's license. The officer then began walking the parking lot pressing the key fob near various vehicles to identify which car matched the key. Officer Salas asked Baker if he had driven a car to the housing complex, and Baker responded, "I don't have a car."

When Officer Byun pressed the lock button on the key fob, he observed the headlights of a red Buick flash. Officer Byun said, "You don't have a car? That's your car right there, it's blinking, man." Officer Byun asked Officer Salas to handcuff Baker, and Baker took off running. After a brief chase, during which Officer Byun lost the car key, Baker was apprehended. Baker told officers that he ran because he was scared, and that the car belonged to his mother.

While Baker was in custody, additional officers arrived on scene and investigated the Buick identified by Officer Byun. An Officer Caballos testified that when he peered inside the car, he "was able to see underneath the front seat what appeared to be the butt of a handgun." Another officer used a baton to open the car door and recovered a handgun with a black frame and silver slide.

At trial, the gun was admitted along with surveillance video of the robbery. A government expert witness testified that the gun recovered from the Buick was a real gun and that its distinctive color scheme matched the gun used by the robber in the surveillance video.

Additionally, the prosecution admitted testimony evidence of Baker's co-defendant, Beatty,

who described how he and Baker planned and committed the robbery of the Sprint store where Beatty worked. Another store employee testified that the gun was pointed at his head and he was forced on the ground and held in a back room while Beatty took iPhones from the Sprint safe. The jury was shown photos of Baker in clothing appearing to match the clothing worn by the robber in the surveillance video. And, cell phone evidence introduced against Baker included records showing seven calls between Baker and Beatty on the evening of the robbery, as well as cell site location information admitted to show Baker's movement toward the Sprint store before the robbery and away from the store afterward.

Baker filed a motion to suppress the evidence of the handgun and to exclude the evidence of the cell site location data. The district court denied the motions.

The jury found Baker guilty of the three counts arising from the Sprint store robbery. The district court applied an obstruction of justice sentencing enhancement based on Beatty's testimony that Baker had threatened him prior to Beatty's testimony. Baker was sentenced to 125 months on each of the two Hobbs Act [robbery] counts, to be served concurrently, and a consecutive 84 month term for the 18 U.S.C. [§924\(c\)](#) count [brandishing a firearm in relation to a crime of violence].

Baker appealed. —

Analysis of the Court

On appeal, Baker argued that the evidence of the handgun resulted from an illegal search and seizure and should have been suppressed at trial.

The United States District Court for the Ninth Circuit (the Court) observed that the Fourth Amendment guarantees **the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures**. A search involves **government infringement on an expectation of privacy that society is prepared to consider reasonable**, and a seizure of property involves **some meaningful interference [by the government] with an individual's possessory interests in that property**. To establish standing to challenge governmental intrusions under the Fourth Amendment, an individual must demonstrate their reasonable expectation of privacy in a place searched, or meaningful interference with their possessory interest in the property seized. **Because warrantless searches or seizures of abandoned property do not violate the Fourth Amendment, persons who voluntarily abandon property lack standing to complain of its search or seizure.**

The Court noted that it is a bedrock principle that **warrantless searches are per se [by themselves] unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions**. One of these exceptions is the **Terry stop, which allows officers with reasonable suspicion that an individual is engaged in a crime to briefly detain the individual and make reasonable inquiries aimed at confirming or dispelling the officer's suspicions**. **If the officer has reasonable suspicion to believe that the detained individual is armed and presently dangerous, the officer may conduct a frisk, or a protective patdown search of the individual for weapons.**

In Baker's case, the Government was unable to explain how the officers' post-patdown search of the car was intended to confirm or dispel their suspicions about a crime being committed or to secure the safety of anyone on the scene. The Court agreed with Baker that the handgun was discovered as a result of police conduct that violated his Fourth Amendment rights. If the officers had limited their Terry stop to a brief detention and protective patdown, they would have had no occasion to search for a car that matched the key fob hanging from Baker's belt loop.

In a previous case, [*United States v. Brown*](#), the Court held that **even if an officer was authorized to conduct a protective frisk, his search of [the defendant's] right pocket exceeded what**

Terry and subsequent cases allow. In Baker's case, the Government failed to identify any caselaw showing that the removal of a key from a defendant's belt loop qualifies as part of a lawful Terry frisk. **Where a protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.**

The Government argued that, even though the officers should not have seized the key from Baker during the Terry stop, when Baker stated that he did not have a car he abandoned the car key and eliminated his possessory interest in it. This abandonment left Baker without standing to challenge the key's seizure or the resulting car search.

The Court reasoned that this argument fails to persuade because Baker's statements concerning the car did not constitute abandonment of a possessory interest in the key hanging from his belt. **Abandonment is a question of intent, and a court must consider the totality of the circumstances to determine whether an individual, by their words, actions, or other objective circumstances, so relinquished their interest in the property that they no longer retain a reasonable expectation of privacy in it at the time of its search.** The Court noted that prior caselaw recognized two important factors in this inquiry: **(1) The denial of ownership and (2) the physical relinquishment of the property. None of the Ninth Circuit's abandonment cases have held that mere disavowal of ownership, without more, constituted abandonment of a person's reasonable expectation of privacy in that property.**

The Court concluded that, based on a totality of the circumstances, Baker did not objectively demonstrate his intent to abandon the car key. Baker never denied ownership or possessory interest in the key itself, and he did not voluntarily relinquish it. Instead, Officer Byun removed the key from Baker's belt loop without his consent. The fact that the key was hanging from Baker's belt reveals an objective intent to maintain possession of it. The Government could point to no caselaw showing that a person abandons an item in his possession by stating he does not own a different, related item. And even if the Government could do so, a person does not relinquish a possessory interest in an item merely by stating he does not own the item. The Court noted no evidence in the record suggesting that Baker disassociated himself from the car key, even if the key belonged to someone else.

Therefore, the discovery of the handgun was the product of illegal police conduct, whether that conduct was framed as exceeding the permissible scope of a Terry stop or as the warrantless seizure of the car. The Court observed that, **where evidence is obtained from an unlawful search or seizure,**

the exclusionary rule renders both the primary evidence obtained as a direct result of an illegal search or seizure and the evidence later discovered and found to be derivative of an illegality inadmissible. This doctrine is known as the fruit of the poisonous tree. The exclusionary rule required suppression of handgun evidence at Baker's trial unless an exception to the rule applied.

The Government argued that the handgun **evidence was admissible under the attenuation doctrine based on Baker's flight from the officers. Under the attenuation doctrine, evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence.** In determining whether attenuation applies, courts consider three factors. **First, the temporal proximity between the conduct and the discovery of the evidence. Second, the presence of intervening circumstances. And third, the purpose and flagrancy of the official misconduct.** The Government bears the burden of demonstrating admissibility.

The Court concluded that the first and third factors favor suppression of the evidence. Both parties agreed that very little time elapsed between the seizure of the key and discovery of the gun in the car. Additionally, while the Court was hesitant to say that the officers flagrantly disregarded the law, it could also not be said that they acted on a reasonable but mistaken belief that Baker had consented to their actions. The record clearly demonstrated that Officer Byun removed the car key from Baker's belt loop during a patdown without asking for permission or consent. **The Court has consistently held that suppression of evidence is favored where an officer violates the law with the purpose of extracting evidence against the defendant.** In Baker's case, the officers' conduct after the patdown was clearly investigatory and an expedition for evidence in the hope that something might turn up.

The Government argued that Baker's flight as officers attempted to handcuff him was an intervening circumstance that attenuated the taint of any illegal misconduct. The Government argued that in prior cases flight on its own triggered attenuation. But the Court didn't buy that in Baker's case. It reasoned that Baker's flight from police did not qualify as an intervening circumstance because the Buick was discovered as a consequence of the officers' misconduct before Baker fled. The Court stated that **the relevant inquiry for attenuation was not whether illegal police conduct was part of a series of facts culminating in the discovery of challenged evidence, but whether the evidence was obtained by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.**

In Baker's case, the way the officer discovered the handgun could not be distinguished from their illegal conduct. They discovered the handgun by seizing the car key from Baker and using the key to identify the Buick. They then searched that Buick in clear causal succession. In prior cases, other illegal actions of defendants had warranted the application of attenuation.

For example, in another case, after a defendant fled an illegal check point, the defendant engaged police in a high-speed pursuit. After officers stopped the driver, police found contraband in their car in a search incident to arrest. That defendant's motion to suppress was denied, and the Court affirmed that denial because the high-speed chase supplied officers with

the requisite probable cause to arrest the driver and search their car. In that case, the flight, along with other untainted evidence about the defendant's suspicious behavior, gave the officers a basis independent of the illegal checkpoint to stop to effectuate an arrest and search the defendant's car.

In Baker's case, however, the officers' illegal seizure of the key was the sole reason for discovery of the car. Baker's flight played no role in the identification and eventual search of the Buick.

Therefore, Baker's flight could not purge the taint of the prior illegal conduct. The Court held that the district court's finding that Baker's flight gave officers grounds to identify the Buick or to search it was unsupported by the record.

The Court held that the Government failed to meet its burden showing attenuation between the illegal search and seizure and the discovery of the handgun evidence.

While the Court held that the evidence of the handgun should have been suppressed, the Government argued that the error of the district court failing to do so was harmless. The Court noted that before it can hold a constitutional error harmless as to a particular conviction, it must determine whether the Government met its burden showing beyond a reasonable doubt that the error did not contribute to the conviction. **Where a trial court errs in admitting evidence obtained in violation of the Fourth Amendment, the Court reviews the remainder of the evidence against the defendant to determine whether there is any reasonable doubt that the jury would have convicted the defendant absent the erroneously admitted evidence.**

The Court concluded that the Government had met this burden and demonstrated beyond a reasonable doubt that the jury would have convicted Baker of robbery and conspiracy to commit robbery. The Court noted that the evidence that Baker committed the robbery and conspiracy was substantial. A Sprint employee testified at trial that the robber took phones with a total value of approximately \$30,000 and that the robbed store was closed for the remainder of the day (and thus affecting interstate commerce). Surveillance video and testimony of the non-involved Sprint employee established that a gunman entered the store and directed Baker's co-defendant, Beatty, to fill a duffle bag with phones while holding the other employee at gunpoint. This established the unlawful taking of personal property by force.

Moreover, Beatty testified that Baker was the gunman who committed the robbery and described the conspiracy in detail. However, the Court noted, the brandishing conviction was a different matter. To convict someone under § 924(c), the Government was required to prove the firearm Baker used was real. **A real firearm under § 924(c) is a weapon that expels a projectile by the action of an explosive, and toys, replicas, antiques, and blank firing prop guns do not qualify.**

The jury returned a guilty verdict on the § 924(c) count, finding that Baker knowingly possessed a firearm in furtherance of the robbery and knowingly used, carried and brandished a firearm during and in relation to the crime.

The Court believed that there was reason to doubt that the jury would have convicted Baker under § 924(c) had the district court excluded the gun recovered from the car. Evidence admitted at trial suggested that the gun Baker used in the robbery was not real. Beatty testified that Baker told him he was going to use a fake gun. Beatty could not testify that the gun was real because he never touched it, and surveillance video of the robbery could not independently establish whether the gun was real or a replica.

The fact that the gun used in the robbery was real was established using testimony based on the recovery of the gun from the Buick after the illegal search and seizure by officers. On this record, the Court held, it could not be said that the admission of the gun was harmless beyond a reasonable doubt as to Baker's § 924(c) conviction.

Baker raised other objections to various rulings made by the district court, but the Court of Appeals found no error in these determinations and they are not relevant for law enforcement purposes.

Accordingly, the Court affirmed Baker's robbery and conspiracy convictions, and vacated his brandishing conviction under § 924(c). Baker's case was remanded to the trial court for a reduction in sentence or a retrial on the § 924(c) count.

Training Takeaway

A search involves governmental infringement on the expectation of privacy that society is prepared to consider reasonable, while a seizure of property involves some meaningful interference by the government with an individual's possessory interest in that property. To establish standing to challenge governmental intrusions under the Fourth Amendment, an individual must demonstrate that they had a reasonable expectation of privacy in the place searched or a meaningful interference with their possessory interest in the property seized.

Because warrantless searches or seizures of abandoned property do not violate the Fourth Amendment, persons who voluntarily abandon property lack standing to complain of its search or seizure. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions.

One of the exceptions to the warrant requirement is the Terry stop, which permits an officer with reasonable suspicion that an individual is engaged in a crime to briefly detain the individual and make reasonable inquiries aimed at confirming or dispelling the officer's suspicions. If an officer has reasonable suspicion that a detained individual is armed and presently dangerous, the officer may conduct a frisk – or a protective patdown of an individual for weapons.

In this case, the police officers exceeded the permissible scope of a Terry stop and frisk by removing a car key visibly hanging from the defendant's belt loop and searching for a car that corresponded to it. The officers continued to detain the defendant, not for the purpose of inquiring about a trespass, but to ask him questions about whether he owned a car, and the officer made no claim that he suspected the car key was a weapon or contraband.

A Terry stop must be confined in scope to a carefully limited search of outer clothing in an attempt to discover weapons. If weapons are discovered, they may properly be introduced into evidence against the person from whom they were taken. Police officers may seize nonthreatening contraband during a protective patdown search so long as the officer's search stays within the bounds marked by Terry.

A Terry stop is the seizure of the individual and the frisk is a search of the individual's person within the meaning of the Fourth Amendment.

Here, the defendant did not abandon the car key by stating that he did not have a possessory or any other interest in the car and had standing to challenge the seizure of the key and resulting search of the car. The defendant did not objectively demonstrate his intent to abandon the car key, the defendant never disclaimed any ownership or possessory interest in the key itself, nor did he voluntarily relinquish possession or control over the key. Instead, the officer removed the key from the defendant's belt loop without consent. The fact that the key was hanging from the defendant's belt manifested the objective intent to maintain possession of it.

Because the abandonment of property is a question of intent, courts must consider the totality of the circumstances to determine whether an individual, by their words, actions, or other objective circumstances, so relinquished their interest in property that they no longer retain a reasonable expectation of privacy in it at the time of its search or seizure.

There are two important factors in an abandonment inquiry: the denial of ownership and the physical relinquishment of the property. An individual does not relinquish a possessory interest in an item merely by stating that he does not own the item.

Where evidence is obtained from an unlawful search or seizure, the exclusionary rule renders inadmissible both primary evidence obtained as a direct result of an illegal search or seizure and evidence later discovered and found to be derivative of an illegality, known as the "fruit of the poisonous tree."

Under the **"attenuation doctrine,"** **evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by the suppression of the evidence obtained.** Courts determine whether the attenuation doctrine applies by considering three factors. First, the temporal proximity between the conduct and the discovery of the evidence. Second, the presence of intervening circumstances. And third, the purpose and flagrancy of the official misconduct. The government bears the burden of demonstrating the admissibility of evidence under the attenuation doctrine.

Here, the evidence of the handgun that resulted from the illegal search and seizure was not admissible under the attenuation doctrine, even though the defendant fled from the police. The defendant's flight from police did not qualify as an intervening circumstance because the car was discovered as a consequence of the officers' misconduct before the defendant fled. Very little time elapsed between the warrantless seizure of the car key from the defendant's belt

loop and the discovery of the gun in the car. The officers did not act on a reasonable but mistaken belief that the defendant had consented to their actions, and the officers' conduct following the patdown of the defendant was plainly investigatory.

The relevant inquiry for the attenuation doctrine is not whether illegal police conduct was part of a series of facts culminating in the discovery of the challenged evidence, but whether the evidence was obtained by exploitation of that illegality or instead by means that are sufficiently distinguishable to be purged of the primary taint.



NOTE: The Washington Constitution is more protective than the Fourth Amendment. Recent cases like *State v. Sum* have established that race and ethnicity matter when it comes to considering the totality of the circumstances when determining whether a person was searched or seized.

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



State v. Bell

No. 83387-1-I

Washington State Court of Appeals Division

One

January 30, 2023

TOPICS:

1. Assault
2. Drive-by Shooting
3. Double Jeopardy

Factual Background

On December 14, 2017, Defendant Justin Bell got into an argument with his co-worker, Freddie Brooks, over an unpaid carpooling payment owed to Bell. The argument escalated and the two men got into a fistfight in the employer's parking lot. After the fight, the two men went their separate ways. Brooks met his girlfriend at a bus stop while Bell went to his car.

As Brooks and his girlfriend crossed the street, shots rang out. Brooks' girlfriend ran towards a nearby parking lot and hid behind a car. When she looked back, she saw Brooks crawling on the ground, hit by several bullets. A passing car transported Brooks to a hospital, where he was treated for his injuries. Brooks would recover.

Multiple witnesses testified that they saw the shooting and the events surrounding it. One witness reported looking in the direction of the gunshots and saw a black sedan driving erratically. One witness called police while following the car and was able to write down the first three letters of the license plate of the black sedan, and another witness was able to record the last four numbers. The license plate reported to police matched the license plate on Justin Bell's 2017 Hyundai Elantra.

Other eyewitnesses were able to get a look at the shooter, and their descriptions roughly matched Bell's appearance. Witnesses also observed shots being fired from the vehicle. Bell owned a Kahr 9mm and casings and bullet holes found at the scene of the shooting matched this caliber.

Bell reported the firearm stolen in February of 2018. According to the officer that took the report, Bell was concerned that, "if a crime occurred or the pistol was used inappropriately that it could be associated with him."

The State charged Bell with first degree assault and later added the charge of drive-by shooting. After trial, a jury convicted Bell of first-degree assault with a firearm enhancement and drive-by shooting. The trial court sentenced Bell to 171 months in prison, which is at the low end of the standard range.

Bell timely appealed.

Analysis of the Court

Bell made several claims on appeal. The relevant claim here is his contention that his conviction for both assault in the first degree with a firearm enhancement and drive-by shooting is barred by his constitutional protections against double jeopardy.

The Washington and federal constitutions prohibit entry of multiple convictions for the same offense. **To determine whether a defendant's double jeopardy protections have been violated, Washington applies the "same evidence rule," which asks if the offenses are the same in fact and in law. If each offense includes an element not included in the other and requires proof of a fact that the other does not, double jeopardy is not offended.**

The Washington Court of Appeals for Division I (the Court), noted that the two crimes Bell was convicted of contain distinct elements. Under [RCW 9A.36.011](#)(1)(a), a person commits assault in the first degree when they, **with intent to inflict great bodily harm... assault another with a firearm or any deadly weapon.** [RCW 9A.36.045](#) creates the crime of drive-by shooting. A drive-by shooting occurs **when a person recklessly discharges a firearm... in a manner which creates substantial risk of death or serious physical injury to another person and the discharge is ... from a motor vehicle.** A conviction for assault in the first degree requires the intent to inflict great bodily harm, while a conviction for drive-by shooting requires the discharge of a firearm from a motor vehicle. Each element is present in only one of Bell's charged crimes, and as a result are not the same in law.

The Court noted that the offenses are not the same in fact for the same reasons. Proof that Bell committed a drive-by shooting required a showing that he discharged his firearm from within a car. This proof would not have been required to prove assault in the first degree, which does not have any specific requirements for the manner of attack. Similarly, proof that Bell committed first degree assault required a showing that he intended to inflict great bodily harm on Brooks. This proof would not have been required to prove he committed a drive-by shooting, which only requires a reckless discharge.

The Court concluded that double jeopardy did not bar Bell's conviction for both drive-by shooting and assault in the first degree.

Training Takeaway

The double jeopardy provisions of the Washington and federal constitutions both prohibit the entry of multiple convictions for the same offense. To determine whether a defendant's double jeopardy protections have been violated, Washington applies the "same evidence rule," which asks if the offenses are the same in fact and in law. If each offense includes an element not included in the other and requires proof of a fact the other does not, double jeopardy is not offended.

The offenses of first-degree assault and drive-by shooting were not the same in law, supporting the finding that Bell's convictions for both offenses did not violate double jeopardy. The offenses contain distinct elements. First degree assault requires intent to inflict great bodily harm, and drive-

by shooting requires discharge of a firearm from a motor vehicle. Each of those elements were present in only one of the defendant's charged crimes.

The offenses of first-degree assault and drive-by shooting were not the same in fact, supporting the defendant's convictions for both offenses as not violating double jeopardy. Proving that the defendant committed the drive-by shooting required proof that he discharged his firearm from within a car, and such proof would not have been required to show first degree assault, which does not have a specific requirement for the manner of attack. On the other hand, first degree assault required proof that the defendant intended to inflict great bodily harm on the victim, and such proof would not have been required to show a drive-by shooting (which only requires reckless discharge of a firearm).

Assault in the first degree and drive-by shooting, although they occurred at the same time, did not merge for double jeopardy purposes as the two crimes contain distinct elements.

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

In the Matter of the Personal Restraint of Arntsen

No. 83075-9-1

State of Washington Court of Appeals

Division One

January 3, 2023

TOPICS:

1. Assault in the Second Degree
2. Brandishing
3. Road Rage

Factual Background

In December of 2014, Kim Koenig was commuting to work on a road with two lanes going in either direction, divided by a turning lane. As Koenig approached an intersection on Auburn Way, she came upon a car driven by appellant Ricky Arntsen. Koenig “made a maneuver” and merged in front of Arntsen. After pulling ahead of Arntsen, Koenig noticed that Arntsen began driving aggressively as though she had made him mad. She described his driving as attacking her vehicle by “driving up to her and stopping just short of hitting her car” and moving into the other lane driving like he wanted to hit her from the side. “Arntsen had his window rolled down and was yelling and gesturing” to the side of the road like he wanted Koenig to get off the road, though Koenig could not hear what he was saying.

Arntsen then sped ahead and threw his car into a turn, slamming on his brakes and stopping diagonally so as to block all the lanes of traffic. Koenig stopped her vehicle, leaving as much space between her car and Arntsen’s as possible. Arntsen then exited his car with his face covered by a kerchief and holding a rifle. Arntsen approached the driver’s side of Koenig’s vehicle, holding the rifle straight up in one hand. While next to Koenig’s vehicle, Arntsen moved the rifle from its upward position down to his waist where he held it with two hands. Arntsen never pointed the rifle at Koenig. Koenig immediately called 911 and avoided looking at Arntsen.

At trial, Koenig testified that she thought she was going to get shot and thought Arntsen meant to do her harm, but then explained, “... he was not looking to shoot me, he did the [sic] not raise the gun like, you know, he wanted to shoot me. He had something else in mind. I have no idea what it was. I still don’t know what it was.” A witness described Arntsen run up to Koenig’s driver side door, turn around, and then return to his vehicle before jumping in and taking off. The witness described Arntsen’s demeanor as “Aggressive. Scary aggressive.”

Arntsen was charged with several crimes, including some related to other behavior surrounding the incident. With respect to the road rage incident, the jury was instructed on both assault in the second degree with a deadly weapon and the lesser offense of unlawful display of a weapon. The jury found Arntsen guilty on both counts.

In a separate appeal, Arntsen’s conviction for malicious mischief was dismissed, and all other convictions were affirmed. Following that decision, Arntsen submitted a motion to vacate or amend the sentence, claiming that the evidence was insufficient to support his conviction for assault in the second degree because Arntsen only displayed the rifle and never pointed it at another person. (Arntsen made some other claims that are not relevant for law enforcement purposes).

Analysis of the Court

Arntsen argued that the State did not prove the requisite intent to support a conviction for assault in the second degree. **A person is guilty of assault in the second degree if they... under circumstances not amounting to assault in the first degree, assault another with a deadly weapon.** To convict a defendant of assault in the second degree, **the jury must find specific intent to create reasonable fear and apprehension of bodily injury. Such intent may be inferred from pointing a gun, but not from mere display of a gun.** [State v. Eastmond](#). In Arntsen’s case, the parties agreed that Arntsen never pointed the rifle at Koenig.

Arntsen contended that while the evidence may support a conviction for unlawful display of a weapon, it was insufficient to prove that he had a specific intent to cause Koenig apprehension and fear of bodily injury.

The State responded by arguing that the holding in Eastmond did not preclude “inferring intent from surrounding facts and circumstances beyond pointing the muzzle at the victim.” The State asserted that because assault requires specific intent to target an individual and the unlawful display does not, conduct targeting an individual can be sufficient to infer the requisite intent. The State also argued that a jury could have found such intent when Arntsen attacked Koenig with his car forcing her to stop before advancing on her in a “scary aggressive” manner while brandishing his rifle.

The Court did not agree. It noted **that directing intimidating conduct at someone does not necessarily establish evidence sufficient to prove the requisite intent to support a conviction for assault in the second degree.** The court noted that in the cases where a conviction for second degree assault had been affirmed, the defendants wielded their weapons in a threatening manner directed at their victims. For example, in [State v. Star](#) (2018), the defendant had pointed a knife directly at his victim and aggressively approached the victim with the knife held out in front of him.

But that’s not what happened in Arntsen’s case. The undisputed facts established that Arntsen got out of his car with his face partially covered while holding a rifle. He approached Koenig’s car without pointing the rifle at her, walked (or ran) to the driver’s side door and then returned to his vehicle. The Court opined that without knowing what Arntsen said, the jury only had what he did and what he looked like to go off of. **When the evidence of someone’s conduct leaves unanswered questions about what the defendant intended, the jury could only speculate intent based off what the defendant looked like.**

The Court noted that **the law recognizes that display of a weapon could be done in a manner to cause reasonable apprehension, fear, or alarm – but there is no necessary nexus between reasonable apprehension and the defendant’s actual intent.** The State was required to prove beyond a reasonable doubt **that Arntsen assaulted Koenig, meaning that in the circumstances surrounding the road rage incident he specifically intended to create in Koenig apprehension and fear of bodily injury.** The Court concluded that the evidence did not sufficiently allow the jury to find that Arntsen had such an intent without speculating.

Furthermore, the Court noted that in addition to an intent to create in another apprehension and fear of bodily injury, **the State needed to prove that Arntsen did in fact create in Koenig a reasonable apprehension and imminent fear of bodily injury.** However, Koenig testified that when Arntsen stepped out of his car with his rifle, she initially believed he meant to do her “harm” but had “no idea” what type of harm. She went on to testify that Arntsen “was not looking to shoot her, and that ‘he had something else in mind,’ though she had ‘no idea what that was.’” Thus, the evidence was insufficient to support the conclusion that Arntsen did in fact create in Koenig an imminent fear of bodily injury.

The Court reversed Arntsen’s conviction for assault in the second degree and remanded the case to the trial court to vacate the charge.

Training Takeaway

Words, words, words. To convict a defendant of assault in the second degree, the jury must find specific intent to create reasonable fear and apprehension of bodily injury. The requisite intent to convict a defendant of assault in the second degree may be inferred from pointing a gun, but not from the mere display of a gun.

The unlawful display of a weapon statute recognizes that display of a weapon, without any required intent, could be done in a manner to cause reasonable apprehension, fear, or alarm, and there is no necessary nexus between reasonable apprehension and the defendant’s actual intent. Under some circumstances, apprehension could be reasonable at the mere sight of a firearm, while the defendant’s intent could be completely innocent.

Directing intimidating conduct at someone does not necessarily establish the requisite intent to support a conviction for assault in the second degree. Even when a gun is not directly pointed at another, other evidence may still suffice to allow a jury to find that the defendant had sufficient intent to support assault in the second degree.

In determining whether a defendant has the sufficient intent to support a conviction for assault in the second degree, whether or not the victim’s apprehension is reasonable involves considerations not directly related to a defendant’s specific intent to cause apprehension. For example, the required intent involves mental processes of the defendant, whereas the reasonableness of the victim’s reaction involves the victim’s mental processes.

In this case, the evidence was insufficient to allow the jury, without speculating, to find that the defendant had the requisite intent to create apprehension and fear of bodily injury in the victim

when the defendant merely displayed a rifle when approaching the victim's car, as is required to support a conviction for assault in the second degree. During the incident, the defendant got out of his vehicle with his face partially covered and holding a rifle. The defendant then approached the victim's vehicle without ever pointing the rifle at the victim and then went back to his own vehicle and left. There was no evidence of what the defendant said, but an eyewitness did report that the defendant appeared "scary aggressive."

This evidence was insufficient to support a finding that the defendant did, in fact, create in the victim a reasonable apprehension and imminent fear of bodily injury when he approached the victim's vehicle while displaying a rifle. This element is required to support a conviction for assault in the second degree. When the victim first saw the defendant step out of his car with a rifle, she testified that she initially believed he meant to do her harm but had no idea what type of harm. The victim explained that when the defendant approached her vehicle, she said the defendant was not looking to shoot her and that he had something else in mind, though she had no idea what it was.

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

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TOPICS

1. Assault in the First Degree
2. Double Jeopardy
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4. Assault in the Second Degree
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9. *Terry* Stops
10. The Exclusionary Rule (Fruit of the Poisonous Tree)
11. Abandonment of Property
12. The Attenuation Doctrine

CASES & REFERENCES

1. [United States v. Baker](#) No: 20-50314 (January 30, 2023)
 - a. [United States v. Brown](#)
 - b. [§ 924](#)
2. [State v. Bell](#) No: 83387-1-I (January 30, 2023)
 - a. [RCW 9A.36.011](#)
 - b. [RCW 9A.36.045](#)
3. [In the Matter of the Personal Restraint of Arntsen](#)
 - a. [State v. Eastmond](#)
 - b. [State v. Star](#) (2018)

WA Legal Updates

For further reading, 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** by WA Association of Prosecuting Attorneys [[2018-2021](#)] | [[2022-present](#)]