

# LAW ENFORCEMENT DIGEST

## November 2021



### COVERING CASES PUBLISHED IN NOVEMBER 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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## 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](#) authored by WA Association of Prosecuting Attorneys' Senior Staff Attorney, Pam Loginsky

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*State v. Moreno*

No. 99147-2

SUPREME COURT OF THE STATE OF

WASHINGTON

November 24, 2021

## Facts Summary

### **TOPIC: First Degree Burglary & Knowledge**

On April 8, 2018, Moreno assaulted Vollmar after breaking into Vollmer's townhome. Vollmar and Moreno began a relationship and started living together in the townhome in August 2017. Vollmar testified that she told Moreno he could no longer live in the townhome in October 2017 and that she changed the locks. Vollmer ended their relationship in January 2018.

Moreno testified that he lived with Vollmar in the townhome up to the time of the incident on April 8, 2018. He also said that Vollmar had never changed the locks. He testified that he split home expenses with Vollmar, that he kept his personal belongings and cars at the townhome, and that he picked up his tribal checks there.

Vollmar testified that on the day of the incident, she retrieved a car Moreno had taken from her earlier that week after he had picked up a tribal check, which was being sent to the townhome. She and Moreno spoke on the phone, and Moreno insisted on coming over, despite warnings from Vollmar that he was not welcome. Moreno threatened Vollmar over the phone.

As Vollmar called 911, she heard her door being kicked in. She explained that Moreno came into her bedroom where she was with her son, held her down by her neck, and took her phone. Moreno grabbed Vollmar's hair as she tried to get up, but Vollmar was eventually able to break loose. Vollmar testified that as she ran downstairs, Moreno grabbed her again, causing her to fall on her knees and stomach. Vollmar was pregnant at the time of the assault.

Moreno was charged with first degree burglary aggravated by domestic violence against a pregnant victim, fourth degree assault with domestic violence, and interfering with reporting domestic violence. The jury convicted Moreno on all counts.

Moreno appealed his conviction, arguing for the first time, in part, that his conviction for first degree burglary should be reversed because the charging document and jury instructions omitted an implied essential element that a defendant have knowledge of the unlawfulness of the entering or remaining. The Court of Appeals rejected Moreno's argument. Moreno then sought review by the Supreme Court of the State of Washington (the "Court"). It granted review limited to the issue of whether knowledge of the unlawfulness of entering or remaining is an implied essential element of burglary. The Supreme Court agreed with the Court of Appeals' rejection of Moreno's argument.

## **Training Takeaway**

The only issue presented by this case was whether knowledge of the unlawfulness of entering or remaining is an implied essential element of first-degree burglary. The Court held that such knowledge is not an implied element of first-degree burglary based on the plain language of the first-degree burglary statute.

The statute defining first degree burglary provides: **A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.** [RCW 9A.52.020](#)(1).

The charging documents and jury instructions for burglary in the first degree against Moreno provided in part that **"A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."** [RCW 9A.52.010](#)(2). **"Enters or remains unlawfully"** is an **"essential element"** of the crime of **burglary**. Because it is written in the RCW, it is considered an **"express"** essential element. Sometimes, courts will rule that **certain elements of a crime that are not expressly written in a statute can be "implied" from the legislative intent and the common law.**

While burglary in the first degree requires “intent to commit a crime against a person or property therein,” the statute is silent as to whether the person must have knowledge that he or she has entered or remained unlawfully. In this instance, Moreno argued that he believed he had a right to be in the townhome, so he lacked the knowledge that he entered and remained unlawfully and that such a requirement should be implied under the law to support the charge and conviction of burglary in the first degree.

Moreno used the statutory language for and defenses to criminal trespass to support his argument. **A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building.** Unlike burglary, criminal trespass has the express element that an accused have knowledge. Criminal trespass is the only crime in chapter [9A.52](#) of the RCW that the legislature provided defenses, including that an accused “reasonably believed that the owner of the premises, . . . , would have licensed him or her to enter or remain.” [RCW 9A.52.090](#)(3). This defense is related to the element of criminal trespass that a defendant “know” that their entering or remaining was unlawful. See [RCW 9A.52.070](#)(1).

Therefore, the defense that an accused has a reasonable belief that their entering or remaining was lawful excuses a criminal trespass because it shows an accused lacked knowledge of the unlawfulness of their entering or remaining. But this was not a case of criminal trespass. Instead, it rose to the level of first-degree burglary when the element of “intent to commit a crime therein” was proven. Were that defense to apply to burglary, it could support the conclusion that knowledge of unlawfully entering or remaining is also an essential element of burglary. But this reading does not comport with the intent to commit a crime element for first degree burglary. Also, the fact that the legislature chose to include the defense of lack of knowledge within the criminal trespass statute, but not within the burglary statute further supported the Court’s ruling.

Prior to this case, the Court had not directly addressed whether knowledge of the unlawfulness of the entering or remaining is an essential element of first-degree burglary. The Court noted that the “[t]he intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises.” In this case, the lower concluded that the plain language in the statute defining first degree burglary showed that no additional mens rea (“mental state” or “knowledge”) requirement impliedly exists.

The Court reasoned that the surrounding provisions in the RCW confirmed the conclusion that burglary has no additional implied mens rea element. It noted that for any burglary charge, if an accused entered or remained unlawfully, a permissible inference arises that the accused acted with the requisite criminal intent to commit a crime unless other evidence is presented. The Court said that this statutory inference is permitted **without requiring that the defendant know that their entering or remaining was unlawful.**

Therefore, the Court rejected Moreno's argument and upheld his conviction. This ruling may impact domestic violence cases where a primary aggressor may not be the homeowner but had been living on the premises and sharing expenses. Once the homeowner (or renter) tells, in this instance, a former domestic partner that he or she is no longer welcome on the premises, entering or remaining in the event a crime is committed (in this instance, DV assault and interference with reporting DV) tacks on burglary. On potential DV calls, understanding the relationship and ownership or property rights of the parties, including the likely primary aggressor may inform as to additional crimes or charges. Even when, as here, the primary aggressor claims to have believed he had a lawful right to enter and remain.

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



## Facts Summary

### TOPIC: Insanity and Involuntary Intoxication

Michael Thompson suffered from severe mental illness and began using drugs regularly as a young teenager. In 2012, Thompson began living in an apartment at Kenyon House. Kenyon is a housing program for people who have been chronically homeless and suffer from chronic mental illness or substance abuse issues.

In January 2014, Thompson was sentenced on a conviction of taking a motor vehicle and was ordered to serve eight months on electronic home monitoring. Thompson was required to begin serving this sentence by May 19, 2014. On that day, Thompson became depressed, believing that he would have to go to jail. He began drinking alcohol and using drugs and continued to do so around different areas of downtown Seattle for several days.

Eventually, Thompson encountered an acquaintance, Daryl Ford. Ford and Thompson drank beer together and then went to Thompson's apartment and used drugs supplied by Ford. At trial, Thompson testified that, in the apartment, Ford made sexual advances toward him over his verbal objections. According to Thompson's testimony, Ford then repeatedly attempted to sexually assault Thompson and prevented Thompson from leaving the apartment at knifepoint, causing Thompson to retreat to a bathroom in which he hit his head against a towel rack, losing consciousness.

Upon awakening, Thompson found himself on the floor stabbing Ford's hand with the knife. Ford was dead. An autopsy later revealed that Ford had 87 injuries produced by a knife. Thompson cleaned the apartment and removed the body. He did so by wrapping Ford's body in blankets, placing it in a shopping cart, and pushing it down the street. A neighbor saw him moving the cart, became suspicious, and called the police.

Police officers discovered the body. Thompson was arrested and charged with murder in the second degree.

Thompson requested that the jury be instructed on insanity and he sought to present evidence, through expert testimony, that he suffered from mental illnesses—specifically posttraumatic stress disorder, depression, and a developmental disability—which “rendered him unable to perceive the nature and quality of his act” at the time of the offense.

The trial court excluded any reference to insanity because the expert witnesses believed Thompson’s mental state at the time of the offense was also impacted by his voluntary use of drugs and alcohol.

He was convicted of felony murder while armed with a deadly weapon. Thompson appealed on the grounds that the trial court erred by denying him the right to advance the defense of insanity. According to Thompson, the trial court’s ruling violated his “right to present a defense.” The Court of Appeals agreed with Thompson.

## **Training Takeaway**

For many decades, Washington courts have ruled that a condition that results from voluntary drug and alcohol is not evidence of insanity, even when the condition is a severe or unusual response to drug or alcohol use. But no Washington court has held that a defendant may not present evidence of insanity—caused by an involuntary mental illness—simply because there is also evidence that voluntary drug or alcohol use impacted the defendant’s mental state.

The Court of Appeals reasoned that if evidence is presented that a defendant was impacted by an involuntary mental condition that caused insanity and was also impacted by voluntary drug or alcohol use at the time of the offense, the evidence of insanity should be presented to the jury. Then, the jury should be instructed to consider whether the impact of the involuntary condition alone would have rendered the defendant insane. Thompson did not claim that the voluntary intoxication rendered him insane at the time, rather, he claimed a preexisting mental illness.



Indeed, evidence of insanity has long been admitted and insanity defense instructions given in such cases. For example, in prior Washington cases, unrefuted evidence that defendants had voluntarily used drugs or alcohol did not result in the exclusion of evidence advancing the insanity defense. Rather, in each case, the defendant presented evidence of insanity, the jury was instructed on insanity, and the jury decided as to the defendant's sanity.

In this case, the trial court ruled based on its misunderstanding of the law by determining that the evidence of voluntary intoxication prevented the insanity defense. Accordingly, the Court of Appeals ruled that the trial court abused its discretion by excluding Thompson's evidence pertaining to the insanity defense. Therefore, the Court of Appeals reversed the trial court's ruling and conviction.

Note that the Court of Appeals did not rule that insanity would have resulted in a not guilty verdict. Instead, it reversed the conviction because the defendant was denied the constitutional right to present the defense of insanity regardless of whether the jury ultimately would have found the defendant not guilty by reason of insanity.

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



*Daybreak Youth Services v. Clark  
County Sheriff's Office*

No. 54137-8-II

Division II

November 9, 2021

## **Facts Summary**

**TOPIC: Good Cause Orders**

Daybreak provides drug and alcohol treatment to teens, including psychiatric; therapy; and medication evaluation. On June 12, 2018, Clark County Sheriff's Office (CCSO) Enforcement Sergeant Luque began investigating whether Daybreak was failing to report serious incidents at its treatment facility, including assaults and rapes. Initially, Daybreak cooperated with the investigation and voluntarily provided records such as incident reports and surveillance videos. In August 2018, Daybreak stopped voluntarily providing records and told CCSO that they required a search warrant.

Sergeant Luque obtained eight search warrants and seized patient records, computers, hard drives, and flash drives. Sergeant Luque's investigation revealed approximately seventeen serious incidents that occurred at Daybreak, many of which were not reported to the proper authorities.

Subsequently, Daybreak filed a complaint in state court asserting that its patient records were subject to confidentiality under federal law [42 U.S.C.](#) Section 290dd-2 and [42 C.F.R.](#) Part 2 (referred to as the "Federal Law" for convenience and discussed in the Training Takeaways below) because it is a federally assisted treatment facility for substance use disorders. Thus, Daybreak argued, it was entitled to have all its illegally seized property returned. During this same time, Daybreak filed a motion in the federal district court seeking a temporary restraining order (TRO) because of the Federal Law.

CCSO filed a motion for an order of good cause under the Federal Law in the Clark County Superior Court. The motion was filed in response to Daybreak's motion for a TRO. In its motion, CCSO asserted that Daybreak was the party obligated to maintain confidentiality of the records and Daybreak did not raise the issue until the federal court proceeding.

Specifically, CCSO claimed Daybreak should have advised CCSO before or at the time the search warrants were served, or during the pendency of this state superior court action regarding the requirements of the Federal Law.

CCSO filed the motion for an order of good cause “to confirm this court’s prior determination that CCSO’s search warrants were not overbroad and to find that good cause exists to retain and disclose, with appropriate redactions, these records for law enforcement and criminal justice purposes.”

The state superior court granted the Motion for Good Cause and in its order made the following findings:

1. The records obtained by CCSO through search warrants to Daybreak Youth Services could not have been obtained through other mechanisms;
2. The public interest and need for the disclosure of records obtained by these search warrants outweighs any potential injury to the patient, the physician-patient relationship, and the treatment services; and
3. All records obtained from the search warrants have been retained with sufficient controls and limitations to protect confidential information pursuant to [the Federal Law].

Daybreak filed a motion for return of the seized documents. Daybreak argued that CCSO had illegally seized its records by failing to comply with the Federal Law. The trial court denied Daybreak’s motion for return of property. Subsequently, CCSO filed notice that it would voluntarily return the seized evidence, including Daybreak’s computers, hard drives, and patient records. CCSO did return the records. Despite receiving the records, Daybreak appealed the trial court’s orders granting the motion for good cause and denying its motion for return of property.

Although CCSO returned the records voluntarily rendering the issue “moot,” the Court of Appeals agreed to consider the appeal on the grounds that it was:

**exercising our discretion to review matters of substantial public interest. Here, the issue**

**involves seizure of records governed by federal law and regulations regarding substance use disorder treatment.** As Daybreak correctly points out, federal law has identified an interest in encouraging people with substance use disorders to seek treatment and providing protection of those records to further that interest. Therefore, **this issue could impact patients seeking substance use disorder treatment, providers of substance use disorder treatment, and law enforcement agencies seeking records from facilities providing substance use disorder treatment.**

After review, the Court Appeals granted Daybreak’s motion, as CCSO failed to comply with the Federal Law and the Motion for Good Cause was untimely (filed after the warrant and seizure, not before) and failed to meet other requirements of the Federal Law.

## Training Takeaway



**NOTE:** A full discussion of the federal law is beyond the scope of this LED. The important takeaway is that when seeking records from any drug treatment facility in the state that receives federal funding or other federal government or agency support, law enforcement must consider specific federal laws related to certain facility records and file a motion for good cause prior to seeking a warrant. A valid search warrant or subpoena alone issued from a state or federal court will not suffice.

Briefly, the Federal Law and Regulations 42 U.S.C. Section 290dd-2(a) provide:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

The Federal Law [42 U.S.C. § 290dd-2\(b\)\(2\)\(C\)](#) allows disclosure of confidential records if authorized by a court order granted based on good cause.

The good cause order’s “only purpose is to authorize a disclosure or use of patient

information which would otherwise be prohibited.” Applicable Code of Federal Regulations (CFR) [42 C.F.R. Section 2.61](#)(a). A subpoena or similar legal mandate is necessary to compel disclosure after a good cause order is entered.

To determine if good cause exists, the court must find that:

(1) Other ways of obtaining **the information** are not available or would not be effective;  
**and**

(2) The **public interest and need for the disclosure outweigh the potential injury** to the patient, the physician-patient relationship, and the treatment services.

Based upon this guidance, the Court determined that CCSO’s motion for good cause was deficient on two grounds. First, it was filed **after** the issuance and execution of the search warrant in violation of Federal Law (**the order for good cause must be obtained before the warrant is issued**). Second, the Federal Law requires a finding by the court that “**the information** is not available through other means.” But the trial court found that **the records could not have been obtained through other mechanisms**. “Information” and “records” are not the same. Therefore, the trial court erred by entering the good cause order without making appropriate findings (not using the exact language from the Federal Law).

Based upon these findings, the Court of Appeals determined that the superior court’s denial of Daybreak’s motion for return of records was in error. Again, the records had already been returned, but the Court of Appeals determined this issue and related law were a matter of substantial public interest (including for law enforcement), so it considered the appeal and rendered this opinion.

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

## **Facts Summary**

### **TOPIC: Forcible Compulsion & Rape**

Darren Gene and K.M were described as having a brother-and-sister-like friendship. During the summer of 2018, they hung out almost all the time every weekend together with a group of their friends. On the evening of August 29, 2018, Gene and two of his friends went to K.M.'s apartment. K.M.'s friend and roommate, Rachel, was also present. The group consumed alcohol and listened to music. K.M. began to feel unstable and sick. She went to the bathroom and began vomiting. Still feeling nauseous and dizzy, K.M. went to her bedroom to sleep. She took a comforter and slept in a fetal position on the floor.

At trial, K.M. testified that Gene sexually assaulted her while she slept on the floor. Her description of the events, detailed by her trial testimony included in the court opinion, is summarized as follows. After entering K.M.'s bedroom, Gene placed K.M. from a fetal position onto her back, removed her blanket and lower garments, and penetrated her vagina three times using his finger, then his penis, and his finger again. K.M. testified she was too intoxicated to move or communicate but felt Gene's body on top of her and felt pain upon penetration. Eventually, K.M. was able to wrap her blanket more tightly around her body and curl up back into a fetal position to resist further assault. She remembered Gene making sounds that she described as groans of frustration as he attempted to move her body again. At that point, K.M. stated she became alert enough to jump up onto her bed and begin screaming. Rachel awoke in another bedroom and came to K.M.'s aid. Gene ran from the apartment.

Gene was charged with rape in the second degree. A jury found Gene guilty. Gene appealed his conviction of rape in the second degree by forcible compulsion on the grounds that there was insufficient evidence to support this alternative means upon which the jury could have based its verdict. The Court of Appeals (the "Court") agreed, reversed the judgment, and remanded to the trial court for further proceedings.

## Training Takeaway

Rape in the second degree is an “alternative means crime.” Basically, the statute describes different means in which a person may commit rape in the second degree. These alternative means include, but are not limited to, where the person engages in sexual intercourse with another person: **(a) By forcible compulsion; or (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.** The State charged Gene with both these two alternative means.

**Under both the United States and Washington Constitutions, a criminal defendant is entitled to a unanimous jury verdict. When a defendant is charged with an alternative means crime, the jury need not be unanimous as to the means by which the crime was committed, so long as there is sufficient evidence to support each of the alternative means. But when one alternative means of committing a crime has evidentiary support and another does not, courts may not assume the jury relied unanimously on the supported means.** If it is impossible to rule out the possibility the jury relied on a charge unsupported by sufficient evidence, reversal is required.

Simply, it would suffice if the jury unanimously agreed that Gene committed the crime of rape in the second degree even if 7 jurors thought it was through the means of forcible compulsion and 5 jurors thought it was through the means of K.M.’s incapacitation but only if the evidence presented supports a finding for both.

**“Forcible compulsion” is defined by statute as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.”** [RCW 9A.44.010](#)(6). In other words, for there to be forcible compulsion in the context of rape in the second degree, there must have been force that was “directed at overcoming the victim’s resistance and was more than that which is normally required to achieve sexual penetration.”

**Forcible compulsion is not the force inherent in any act of sexual touching, but rather is that used or threatened to overcome or prevent resistance by the victim. The resistance that forcible compulsion overcomes need not be physical resistance, but it must be**

**reasonable resistance under the circumstances.** Here, viewing the evidence in the light most favorable to the prosecution, the Court determined that K.M. did not resist the penetration of her vagina by Gene's penis. K.M. testified that she was unconscious or unable to respond when Gene engaged in sexual contact with her. Because K.M. was unable to respond, she could not resist the assault and there was no resistance for Gene to overcome.

Under these circumstances, the Court ruled that no reasonable juror could find beyond a reasonable doubt that Gene resorted to forcible compulsion to engage in penile penetration of K.M.'s vagina. Thus, there was constitutionally insufficient evidence to support Gene's conviction for rape in the second degree by means of forcible compulsion. Because there was not sufficient evidence to support rape through the means of forcible compulsion, the Court had no way of knowing if the jurors were unanimous as to the means of rape by reason of incapacity.

Gene conceded that he may be retried on the alternative means that the Court did not determine to be unsupported by sufficient evidence—specifically, that Gene engaged in sexual intercourse with K.M. while she was incapable of consent by reason of being physically helpless or mentally incapacitated. Consequently, Gene would be entitled only to a new trial, not an outright acquittal. However, the State could not retry Gene on the alternative means of forcible compulsion.

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