LAW ENFORCEMENT DIGEST
September 2022

COVERING CASES PUBLISHED IN SEPTEMBER 2022

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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.

TOPIC INDEX

CASES

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]

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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.

Johnson v. City of Grants Pass

No. 20-35752

United States Court of Appeals for the Ninth Circuit

September 28, 2022

TOPICs: Cruel and Unusual Punishment Clause & Anti-Camping/Anti-Sleeping ordinances

Factual Background

The City of Grants Pass (the City), located in southern Oregon, has a population of around 38,000. Somewhere between 50 and 600 homeless people live in the City. The number of homeless people outnumber the availability of shelter beds. Homeless people have nowhere to sleep in the City other than streets or in parks. City ordinances precluded homeless people from using a blanket, pillow, or carboard box for protection from the elements while sleeping in the City. The ordinances result in civil fines up to several hundred dollars per violation and people found to have violated the ordinances multiple times can be barred from all City property. If a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for criminal trespass.

Since 2013, City leaders have viewed homeless people as a cause for substantial concern. That year, the City convened a Community Roundtable to identify solutions to current vagrancy problems. Participants discussed driving repeat offenders out of town and leaving them there. The City Public Safety Director noted that police had purchased bus tickets out of town for homeless people, but that they had often returned. A city counselor made it clear that the City's goal should be, *"to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road."* One result of the Community Roundtable was an increase in enforcement of City Ordinances, including the anti-camping ordinances.

The next year saw a significant increase in enforcement of the City's anti-sleeping and anti-camping ordinances, and from 2013 through 2018, the City issued a steady stream of tickets under the ordinance. In 2019, a three-judge panel of the Ninth Circuit issued its opinion in *Martin v. City of Boise*. The *Martin* court held that the Cruel and Unusual Punishment Clause of the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." The *Martin* court, however, held that a city is not required to "provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets… at any time and at any place."

Following that ruling, three homeless individuals filed a class action complaint against the City arguing that a number of City ordinances were unconstitutional. The district court certified a class of "involuntarily homeless" persons and granted partial summary judgment in favor of the class.

The plaintiffs voluntarily dismissed some of the claims left unresolved at summary judgment and the district court issued a permanent injunction prohibiting enforcement against the class members of some of the City ordinances, at certain times, in certain places.

The City appealed. The City argued that the case was moot (a case brought over an issue that has been resolved leaves no live dispute for a court to resolve), that the class should not have been certified, that the claims failed on the merits, and that Plaintiffs did not adequately plead one of their theories.

We will focus solely on the merits of the claims.

Analysis of the Court

This case centered on challenges to five City provisions, an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance. The anti-sleeping ordinance stated that:

A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.

B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.

C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

A violation of this ordinance resulted in a $75 fine. If unpaid, the fine escalated to $160. If a person pled guilty, the fines could be reduced to $35 for a first offense and $50 for a second offense.

The first anti-camping ordinance prohibited people from occupying a "campsite" on all public property, such as parks, benches, or rights of way. The term "campsite" was defined as, "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof." The second anti-camping ordinance prohibited camping in public parks, including overnight parking of any vehicle. A homeless person would violate the parking prohibition if they parked or left "a vehicle parked for two consecutive hours [in a City park]… between the hours of midnight and 6:00 a.m. Violations of either ordinance resulted in a $295 fine. If unpaid, the fine escalated to $537.60. If a violator pled guilty, the fine could be reduced to $180 for a first offense and $225 for a second offense.

The "park exclusion" ordinance allowed police officers to bar individuals from all city parks for 30 days if, within one year, the individual was issued two or more citations for violating park regulations. If a person received a park exclusion order, but was subsequently found in a city park, that person would be prosecuted for criminal trespass.

The *Martin* court established a formula barring the government from prosecuting homeless people for sleeping in public if there "is a greater number of homeless individuals [in a jurisdiction] than the number of available" shelter spaces. When assessing the number of shelter spaces, *Martin* held that shelters with a "mandatory religious focus" could not be counted as available due to potential violations of the First Amendment's Establishment Clause. There was no dispute that the City did not have enough shelter spaces to accommodate its homeless population.

On appeal, the City made two arguments. First, it argued that its system of imposing civil fines cannot be challenged as violating the Cruel and Unusual Punishment Clause because that clause only provides protection in criminal proceedings, after a person has been convicted. Second, the City argued that *Martin* did not protect homeless persons from being cited under the City's amended anti-camping ordinance which prohibits use of any bedding or similar protection from the elements. The Court observed that the City appeared to have conceded that it cannot cite homeless people merely for sleeping in public but the City maintained that it is entitled to cite individuals for the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag "for bedding purposes."

In making its first argument, the City contended that citing individuals under the anti-camping ordinances could not violate the Cruel and Unusual Punishment Clause because citations under the ordinances are civil and civil citations are "categorically not 'punishment' under the Eighth Amendment. The Court noted that usually claims under the Cruel and Unusual Punishment Clause involve straightforward criminal charges. The City's focus on civil citations simply involved an extra step from the normal Cruel and Unusual Clause analysis and the analysis under *Martin*. The City basically adopted a slightly more circuitous approach than just establishing violating of its ordinances as criminal offenses. Instead, the City issued civil citations under the ordinance, and if an individual violates the ordinance twice, they can be issued a park exclusion order. Then, if the individual is found in a park after issuance of a park exclusion order, they are cited for criminal trespass. Many City police officers explained in their depositions that this sequence was standard protocol.

Martin held that the Cruel and Unusual Punishment Clause "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." **A local government cannot avoid this ruling by issuing civil citations that later become criminal offenses. The Cruel and Unusual Punishment Clause looks to the eventual criminal penalty, even if there are preliminary civil steps.**

The Court observed that the anti-camping ordinances prohibited Plaintiff's from engaging in activity that they could not avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecution for criminal trespass. **Imposing extra steps before criminalizing the very acts *Martin* explicitly said cannot be criminalized does not cure the fact that the anti-camping ordinances violated the Eighth Amendment.**

In support of their second argument, the City argued that the City's revision of its anti-camping ordinances to allow homeless people to sleep in City parks avoided the holding in *Martin*. However, the Court viewed the City's argument as an illusion. It noted that the amended ordinance continued to prohibit homeless people from using "bedding, sleeping bag[s], or other material used for bedding purposes," or from using stoves, lighting fires, or erecting structures of any kind. The City claimed that homeless people are free to sleep in City parks, but only without the items necessary to facilitate sleeping outdoors.

The Court noted that prior case law made clear that a person may not be prosecuted for conduct that is involuntary or a product of a "status" such as homelessness or alcoholism. The City argued that sleeping is involuntary conduct for a homeless person, but that a homeless person can choose to sleep without bedding materials and therefore can be prosecuted for sleeping with bedding. The Court didn't buy this argument, observing that **prohibiting homeless people from "taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available," violated the Cruel and Unusual Punishment Clause. The Court opined that the only plausible reading of *Martin* was that it**

applies to the act of sleeping in public, including articles necessary to facilitate sleep. *Martin* deemed the enforcement of anti-camping ordinances against people who take even the most rudimentary precautions to protect themselves from the elements unconstitutional. It follows, the Court reasoned, that the City cannot enforce its anti-camping ordinances to the extent they prohibit "the most rudimentary precautions" a homeless person might take against the elements. The City's position that it was entitled to enforce a complete prohibition on bedding, sleeping bags, or other materials used for bedding purposes was incorrect.

While the Court held that the anti-camping ordinances were unconstitutional, it noted that the record had not established that the fire, stove, and structure prohibitions deprived homeless people of sleep or "the most rudimentary precautions" against the elements. These prohibitions may or may not have been permissible, and it ordered the issue sent back down to the lower court for it to craft a narrower injunction recognizing the Plaintiff's limited rights to protect themselves against the elements, as well as limitations when a shelter bed is available.

The holding of the lower court was affirmed in part, vacated in part, and remanded.

Training Takeaway

An "anti-camping" ordinance allowing for the citation of individuals using bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public could violate the Cruel and Unusual Punishment Clause even though the citation at issue is a civil infraction, where, under the totality of city ordinances, an individual who violated the anti-camping ordinance twice could be issued a park-exclusion order and cited for criminal trespass if they are subsequently found in the park.

Anti-camping ordinances precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishment Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep. The ordinance prohibited individuals from engaging in activity they could not avoid, given the lack of other shelter options and the fact that, due to the city being cold in the winter, use of protection from the elements was a life-preserving imperative.

Under the Cruel and Unusual Punishment Clause, it is unconstitutional to punish simply sleeping somewhere in public if one has nowhere else to do so. "Sleeping" includes sleeping with rudimentary forms of protection from the elements.

EXTERNAL LINK: View the Court Document

TOPIC: Actual vs. Constructive possession of a controlled substance

Facts Summary

In June of 2018, the Snohomish Regional Drug Task Force executed a search warrant on an apartment rented to a man named Javier Romo Meza. The task force was attempting to recover drugs and related evidence from the apartment. Using a "soft ruse-type knock," an officer claimed they were management and persuaded Ibarra-Erives to open the door. The officers pulled Ibarra-Erives onto the front landing and arrested him.

In the apartment, officers found a locked bedroom, an unlocked bedroom, and a kitchen. The officers believed that the locked bedroom belonged to Romo Meza. The locked bedroom contained no contraband. However, police found white powder that proved to be methamphetamine on the kitchen counter.

On a closet shelf in the unlocked bedroom, officers discovered a backpack. The backpack contained seven one-ounce bindles of methamphetamine and five bindles of heroin. The street value of the bindles was close to $8,000.00. The backpack did not contain any identifying information. On the shelf next to the backpack, officers found a digital scale and a box of plastic sandwich bags.

Ibarra-Erives admitted that he "temporarily" lived at the apartment. He told officers that sometimes he slept on the couch and other times he would sleep on the pile of blankets that the officers observed in the bedroom where they found the backpack. Ibarra-Erives told officers that prescription medication and clothes found in the bedroom were his. However, he denied owning the backpack. Upon searching Ibarra-Erives, officers found a broken glass pipe with a white residue and burn marks in his pocket. They also found $591 in cash in his wallet.

Ibarra-Erives was charged with unlawful possession of a controlled substance with intent to manufacture or deliver. During the State's case in chief, the prosecutor questioned the lead detective about the amount of drugs found in the backpack. The detective testified that each bindle of methamphetamine weighed 28 grams (1 ounce), and that the bindles of heroin weighed 24.6 grams, what the officer referred to as a "Mexican ounce." The prosecutor asked why the bindles of heroin were referred to as a "Mexican ounce," and the officer responded, *"I don't know what the answer is to why, but the term on the street is it's a Mexican ounce across the board, regardless of who is selling or buying 25 grams of a Mexican ounce."*

In their closing arguments, the prosecution twice referred to the bindles of heroin as having been packaged as a "Mexican ounce." The jury convicted Ibarra-Erives as charged and the court imposed the standard sentence of 16 months.

Ibarra-Erives appealed.

Analysis of the Court

On appeal, Ibarra-Erives argued that there was insufficient evidence to support the jury's determination that he constructively possessed a controlled substance. Ibarra-Erives also argued that the prosecutor committed race-based misconduct by using the term "Mexican ounce" to describe the packaged heroin.

For law enforcement purposes, we will focus on Ibarra-Erives' sufficiency of the evidence argument. However, it is worth noting that the court ultimately reversed Ibarra-Erives' conviction and ordered a new trial due to the prosecution's reference to the bindles of heroin as "Mexican ounces" because those statements could be seen as the prosecutor appealing to jurors' potential biases. Those statements undermined the presumption of innocence Ibarra-Erives was entitled to by urging the jury to rely on race-based suggestions, rather than the evidence, to connect Ibarra-Erives to the drugs in the backpack. **Law enforcement is therefore cautioned in using such race-based language to describe anything while in the presence of a jury.**

Sufficiency of the Evidence

Ibarra-Erives contended that the State only proved his mere proximity to the backpack but did not show that he exercised sufficient dominion and control over it or the apartment to support a conviction under a theory of constructive possession.

The Court of Appeals (the Court) noted that the State must produce evidence to satisfy every element of a criminal offense. The evidence would support a criminal conviction if any rational trier of fact could have found guilt beyond a reasonable doubt. When Ibarra-Erives raised his sufficiency challenge, he had to admit the truth of the State's evidence. That evidence and all reasonable inferences arising from it are viewed in the light most favorable to the State, and circumstantial evidence and direct evidence are treated equally.

Possession can be either actual or constructive. Actual possession requires an individual to have physical custody of an item. Constructive possession exists where the individual has "dominion and control" over the item.

The control does not need to be exclusive to the defendant to establish possession. And when a court determines whether an individual has dominion and control over an item, it examines the totality of the circumstances. **One factor courts consider is whether the individual could readily convert the item in question to their actual possession. Courts also consider physical proximity, though physical proximity, alone, does not establish constructive possession.**

Constructive possession may also exist if the individual had dominion and control over the broader premises in which the item was located. The Court noted that dominion and control over a premises creates a rebuttable presumption that the person also has dominion and control over items within the premises. However, **mere knowledge that an item exists on the premises does not amount to dominion and control.**

Ibarra-Erives argued that absent ownership, proximity alone does not amount to possession. Ibarra-Erives cited two cases in support of his argument.

In *State v. George*, the court concluded that the defendant, a back seat passenger, did not exercise dominion and control over a vehicle where the driver actually owned the car. In that case, the police also could not

forensically tie the passenger to the drugs found in the car and did not appear to have consumed them.

In another case, *State v. Callahan*, police searched a houseboat and found Callahan and an individual named Hutchinson in the living room, sitting at a desk with various pills and hypodermic syringes. A box of drugs was found on the floor between them. Hutchinson claimed he had been a guest on the boat for a few days. He denied owning the drugs, though he did admit to handling them. However, Hutchinson admitted to owning guns and a scale consistent with drug use that the officers found on the houseboat. **The court determined that Hutchinson did not exercise dominion and control over the houseboat because he did not live there as a tenant or subtenant, had no responsibility for maintaining the premises, and did not keep private items like clothes or toiletries there.** The court also noted that a fourth individual admitted that "the drugs belonged to him; that he had brought them onto the boat; that he had not sold them or given them to anyone else; and that he had sole control over them."

The Court in Ibarra-Erives noted many distinctions between the circumstances surrounding Ibarra-Erives' arrest and the arrests made in these two cases. The Court noted that the State presented **evidence of proximity coupled with other circumstances linking him to the drugs**. Unlike Callahan, **Ibarra-Erives had strong ties to the apartment which exceeded those of an overnight guest. (1) Not only did Ibarra-Erives admit to living in the room where the backpack and drugs were found, but he possessed paraphernalia used to smoke methamphetamine and an amount of cash that a detective testified was consistent with drug sales. (2) He slept in the bedroom where police found the backpack. And, (3) in that same bedroom, police found a pile of Ibarra-Erives' clothes and two bottles of prescription medication that Ibarra-Erives admitted were his.**

Considering the evidence in the light most favorable to the State, the Court concluded that a rational trier of fact could determine that Ibarra-Erives constructively possessed the backpack and its contents.

Training Takeaway

In this case, the Court found that there was sufficient evidence that Ibarra-Erives had constructive possession of the drugs found in the backpack to support his conviction for possession of a controlled substance with intent to deliver. The Court noted that Ibarra-Erives had paraphernalia used to smoke methamphetamine in his pocket and had an amount of cash that a detective testified was consistent with drug sales in his wallet. The defendant lived in the apartment and slept in the bedroom where the police found the backpack. Finally, Ibarra-Erives admitted that a pile of clothes and two bottles of prescription medication found nearby were his. Despite this evidence, the State had to retry Ibarra-Erives because the prosecution improperly appealed to the jury's potential prejudices.

Possession of a controlled substance can be either actual or constructive:

- **Actual possession requires the individual to have physical custody of the given item.**
- **Constructive possession exists where an individual has dominion and control over the item.**

Control over a controlled substance does not need to be exclusive to the defendant to establish possession, and physical proximity alone does not establish constructive possession.

Constructive possession of a controlled substance may exist if an individual has dominion and control over

the broader premises in which the controlled substance was located.

In determining whether a defendant had constructive possession of a controlled substance, dominion and control over the premises creates a rebuttable resumption that the defendant also had dominion and control over items within the premises. However, ***mere knowledge that the contraband exists does not amount to dominion and control.***

Ultimately, Ibarra-Erives was entitled to a new trial due to prosecutorial misconduct when the prosecutor referred to the bindles of heroin as a "Mexican ounce." It would not be a far stretch to imagine a case being remanded for a new trial if a testifying officer used language that might appeal to a jury's prejudices. Law enforcement is cautioned from using such language in the presence of a jury.

EXTERNAL LINK: View the Court Document

TOPICS: Extreme indifference vs. recklessness & Accomplice liability

Facts Summary

On October 20, 2018, Natosha Jackson was working as a bartender at a club in Lakewood, Washington. In the early hours of October 21, 2018, Jackson got into an argument with some men at the bar. Jackson walked away from the bar and asked her friend, Perry Walls, to watch out for her because she was being disrespected by the men. Jackson then went outside and saw her boyfriend, Terrence King, and King's friend, Denzel McIntyre, who had arrived at the bar to pick up Jackson. Jackson told King that she wanted to go home and went back into the club.

Inside the club, Walls confronted the group of men that Jackson had identified. The group included Avington, Darry Smalley, and Kenneth Davis. Some of Walls friends, already in the club, followed Walls over to the group. After a short verbal confrontation, punches were thrown, and the groups engaged in a short fight. The fight was pushed toward the door and people began leaving the club. Walls was upset over the fight and followed the group outside.

Outside the club, King recognized Walls and moved toward him. McIntyre approached King with Walls. Moments later, 30 shots were fired toward the club. King, Walls, McIntyre, and many of the other patrons tried to rush back inside the club. King was struck by two bullets and died inside the club. Walls was shot in the foot. McIntyre was shot in the buttocks. And a woman not involved in the altercation, Pearl Hendricks, was shot four times. Hendricks was left paralyzed from the chest down.

Charges

Avington was charged with one count of first-degree murder for King's death. He was also charged with three counts of first-degree assault for the injuries to Walls, McIntyre, and Hendricks. Avington was charged as both a principle and as an accomplice. Later, the State amended the charge to include a count of second-degree murder for King's death. The State alleged that for each charge the aggravating circumstances of committing an act with destructive and foreseeable impact on persons other than the victim.

Two others, Smalley and Davis, were also charged and they were set to be tried jointly with Avington.

Stipulation

The defendants moved to exclude any evidence that they were involved with a gang. The State offered to withdraw the gang evidence if the defendant's stipulated to their identities as the shooters and rely on self-defense. The defendants agreed and the State sanitized the record of any reference to gang related evidence.

The defendants and the State entered a comprehensive stipulation identifying the defendants in various surveillance videos used as trial evidence.

Trial

Avington and Smalley testified in their own defense. Avington testified that he had known Smalley for years, and that although neither of them intended to meet the night of the shooting, they ended up at the same club earlier in the night. Then they went as a group to the club in Lakewood.

Avington testified that he had never been to the club before. Avington said that he had a firearm with him and brought it inside the club. Avington first noticed Walls yelling and being belligerent while he was at the bar. Avington was not sure who Walls was directing his comments to, but then realized that Walls was addressing his (Avington's) group. The confrontation escalated and people began pushing. Avington testified that a punch was thrown, and he ended up involved in the fight. Avington attempted to leave the club and walk away from the situation, but the confrontation continued outside.

Avington testified that Walls confronted him outside the club. Avington testified that Walls threatened to kill him, pulled up his shirt, and displayed a firearm. Avington stated that he fired only to scare Walls and to keep Walls from shooting at him. According to Avington,

> *"I wasn't aiming at anything in general. I didn't even want to aim at [Walls]. I just shot to scare him away from me and the people who were around me at the time."*
>
> *…*
>
> *"I aimed away from him, actually. I just wanted to prevent him from doing anything further, for him getting a chance to shoot me or anybody I was around."*

Avington testified that he fired high and to the right. Avington claimed that he purposefully shot away from all the people. Avington admitted that his rounds could have struck the club, but they could not have struck people. Avington explained that he only wanted to scare Walls away from him.

After the shooting, Avington left the scene. Avington denied any discussion between him and Smalley prior to the shooting, and explicitly testified that he only knew what he did, not what anyone else was doing.

Surveillance video

Surveillance videos from the club and neighboring businesses were admitted into evidence. The club's security video captured the fight inside the club.

In the video, Walls can be seen posturing, pulling up his pants, and beginning to square off with the group. Avington threw a punch at someone next to Walls and multiple people ended up on the ground. Avington can be seen throwing punches at someone on the ground, and Avington can be seen punching Walls several times, with Walls fighting back. As the fight continued, several people involved in the altercation began running out of the club.

Video of the front entrance of the club showed the fight getting pushed outside. Walls and other patrons can be seen yelling and posturing at the entrance of the club. Walls exited the club, and the shooting began minutes later.

Video from outside the club showed Avington leaving the club and walking away. However, he turned around and started walking back to the club entrance. Avington re-engaged in the altercation with others outside the entrance and people still inside the club. Avington and other patrons moved away from the club entrance and into the parking lot as Walls exited the club.

Video from behind Walls shows him pulling up his pants and walking in Avington's direction. Walls appeared on video the entire time leading up to the shooting, and the video shows both of his arms were at his sides the entire time. When the shooting started, Walls can be seen running back into the club. This video does not show Avington.

A video from a neighboring business, however, shows Avington and Smalley at the time of the shooting. Avington stipulated that a photo taken from this video showed him firing multiple bullets while **standing square, facing forward** with his arms almost parallel to the ground and pointing forward. Smalley is to Avington's left, standing slightly behind him, firing 17 shots. The video showed that following the shooting, Avington and Smalley ran off in the same direction.

Jury Instructions

Avington proposed jury instructions for first degree manslaughter as a lesser included offense. The trial court denied Avington's jury instructions, stating that,

> "Mr. Avington's assertion, his testimony that he aimed away from people, in my view is not credible. The video evidence shows Mr. Avington holding the gun that he fired in a level fashion. It does not demonstrate that Mr. Avington was aiming that gun upwards and away from individuals as he testified, he aimed up and to the right. The video evidence doesn't support that assertion."

The trial court concluded that the jury could not rationally conclude that only first-degree manslaughter was committed. The trial court instructed the jury that Avington was guilty of all charges if the crime was committed by either Avington or an accomplice. The trial court's instruction on accomplice liability stated:

"A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he or she are an accomplice of the other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he either:

1. Solicits, commands, encourages, or requests another person to commit the crime; or

2. Aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not."

Verdict and Sentencing

The jury found Avington guilty of first-degree murder, second degree murder, and three counts of first degree assault. The jury also found that Avington or an accomplice was armed with a firearm for all of the offenses. The jury further found that the State proved aggravating circumstances on all charges. The jury entered the same verdicts against Smalley, and Davis was found not guilty of all charges.

The trial court imposed a high-end range sentence on each count and imposed the mandatory firearm sentencing enhancements. All terms of confinement were ordered to be served consecutively because all charges were serious violent offenses. In total, Avington was sentenced to 929 months of confinement.

Avington appealed.

Analysis of the Court

On appeal, Avington argued that the trial court committed an error by refusing to give his proposed jury instruction on first degree manslaughter as a lesser offense of first-degree murder by extreme indifference.

The Court of Appeals (the Court) observed that a defendant has a statutory right to have the jury instructed on a lesser included offense. Washington courts use a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser included offense. A defendant is entitled to an instruction on a lesser included offense if two conditions are met:

1. Each of the elements of the lesser offense must be a necessary element of the offense charged. This is called the legal prong.

2. The evidence in the case must support an inference that the lesser crime was committed. This is the factual prong.

Although this test is well established, the second prong of the test has caused some confusion among the lower courts. The Washington Supreme Court has explained the application of the factual prong of the test as follows:

> "The purpose of this test is to ensure that there is evidence to support the giving of the requested instruction. If interpreted too literally, though, the factual test would impose a redundant and unnecessary requirement because all jury instructions must be supported by sufficient evidence. Necessarily, then, the factual test includes a requirement **that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense."**

In order for a defendant to be entitled to an instruction on a lesser included offense, there must be some evidence presented which affirmatively establish the defendant's theory of the crime. If evidence permits a jury to rationally find a defendant guilty of the lesser offense, a lesser included offense instruction should be given.

Avington argued that the trial court improperly weighed the evidence and made credibility determinations. The Court noted that if a trial court's decision on a lesser included offense instruction is based on a factual determination, it reviews that decision for an abuse of discretion. Conflicts in evidence are questions of fact for the jury, not the trial court. It is improper for the trial court to weigh evidence when ruling on jury instructions. Quoting a previous case, *Fernandez-Medina*, the Court noted that, "when the appellate court determines if the evidence at trial is sufficient to support an instruction, it views the "supporting evidence in the light most favorable to the party that requested the instruction." If a jury can rationally find the defendant guilty of a lesser offense based on the evidence, then a lesser included offense instruction should be given.

First degree murder by extreme indifference requires that a person act with extreme indifference, an aggravated form of recklessness, which creates a grave risk of death to others, and causes the death of a person. On the other hand, **first degree manslaughter requires that a person recklessly cause the death of another**. "A person… acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

A defendant charged with first degree murder is entitled to a first-degree manslaughter instruction if there is some evidence that the defendant shot at an object rather than at a group of people. For example, in a prior case heard by the Supreme Court of Washington, the defendant fired several rounds toward a house party and the Supreme Court held that a rational jury could have found that the defendant acted with recklessness because (1) there weren't a lot of people outside the house, (2) no bullets or bullet strikes were found in the house where all the partygoers were, (3) most of the shots hit the side of the house or cars on the street and did not appear to land near people, and (4) testimony that the defendant shot from the street rather than closer to the house.

The Supreme Court determined that "the jury could have concluded that (the defendant) intended to scare those in the house by erratically firing his gun rather than aiming at the security people in the yard." The Supreme Court of Washington has also applied the same reasoning in a case where the defendant was charged as an accomplice for the drive-by-shooting of a van.

In Avington's case, the Court reasoned, Avington testified that he fired high and to the right. However, the Court concluded that the trial court correctly determined that no reasonable jury would have been able to rationally find that Avington acted recklessly rather than with extreme indifference. Avington's testimony was contradicted by video evidence showing him standing square to the entrance of the club and firing straight toward the entrance where the crowd was gathered. Further, Avington stipulated that the still photo from the video showed him standing square and firing straight ahead.

Avington's conviction was affirmed.

Training Takeaway

In Avington, the defendants tried to claim that they acted merely recklessly instead of with extreme indifference when they fired 30 shots at the crowded entrance of a club. The Court held that because the defendants stood square with the club entrance and held their firearms level before firing the shots, no rational jury could find that they simply acted recklessly, and thus they were not entitled to a first-degree manslaughter instruction.

First degree manslaughter requires that a person recklessly cause the death of another.

First degree murder by extreme indifference requires that a person act with extreme indifference, an aggravated form of recklessness, which creates a grave risk of death to others, and causes the death of a person.

A defendant charged with first degree murder is entitled to a first-degree manslaughter instruction if there is some evidence that the defendant shot at an object rather than at a group of people.

Evidence at a murder trial will be insufficient to support a finding that a defendant acted recklessly rather than with extreme indifference when firing shots at a crowded bar entrance. In this scenario, the defendant will not be entitled to a jury instruction on the lesser offense of first-degree manslaughter. Nevertheless, the totality of the circumstances will be considered.

EXTERNAL LINK: View the Court Document

Law Enforcement Digest – September 2022

TOPICS

- Cruel and Unusual Punishment Clause
- Anti-Camping/Anti-Sleeping ordinances
- Extreme indifference vs. recklessness
- Accomplice liability
- Actual vs. Constructive possession of a controlled substance

CASES

1. Johnson v. City of Grants Pass 20-35752, 20-35881 (September 28, 2022)
    a. Martin v. City of Boise
2. State v. Ibarra-Erives 82889-4-I (September 19, 2022)
    a. State v. George
    b. State v. Callahan
3. State v. Avington 55222-1-II (September 27, 2022)

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]