LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: ***Thank you for your service, protection and sacrifice***

DECEMBER 2021

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY FOR LAW ENFORCEMENT UNDER SECTION 1983: QUALIFIED IMMUNITY ORDERED FOR LAW ENFORCEMENT OFFICER WHO ESCORTED A MEMBER OF THE PRESS AWAY FROM A DIALOGUE WITH A PROTESTER BASED ON THE OFFICER'S UNDERSTANDING OF THE NEED TO MAINTAIN SEPARATE ZONES FOR PROTESTERS AND COUNTER-PROTESTERS

In Saved Magazine v. Spokane Police Department, ___ F.3d ___ , 2021 WL ___ (9th Cir., December 9, 2021), a three-judge Ninth Circuit panel rules that a Spokane police officer did not violate clearly established case law under the First Amendment Free Speech clause in the officer's effort to maintain a police plan to maintain separate protester and counter-protester zones. The Ninth Circuit panel's Opinion is described as follows by a Ninth Circuit staff summary, which is not part of the Court's Opinion:

> The panel affirmed the district court's dismissal of an action brought pursuant to 42 U.S.C. § 1983 by Afshin Yaghtin and Saved Magazine alleging that Spokane police officers violated plaintiffs' First Amendment rights when they prevented Yaghtin, acting as a journalist at a public event, from "engaging in dialogue with a protester" under threat of arrest.
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> In June 2019, the Spokane Public Library hosted a children's book reading event called "Drag Queen Story Hour." Because the library event proved controversial, the police separated 150 protesters and 300 counter-protesters into separate protest and

> counterprotest zones near the library. Yaghtin arrived at the event wearing a press badge and identified himself to police officers as a member of the press. Yaghtin alleges he was assigned a police "detail" to accompany him through a crowd of counter-protesters out of concern that he was "fake press."
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> While Yaghtin was walking through the counterprotest zone, he began to converse with a counter-protester, who had asked him whether he was the person that had previously advocated for the execution of gay people. Officer Doe [an unnamed Spokane PD officer] interrupted the exchange, and then escorted Yaghtin through the counter-protest zone.
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> The panel held that Officer Doe was entitled to qualified immunity under the second prong of the qualified immunity analysis, which asks whether the constitutional right was clearly established at the time of defendant's alleged misconduct. The panel noted that plaintiffs did not challenge a city ordinance or permit scheme, and they expressly did not challenge the Spokane Police Department's use of separate protest zones.
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> Instead, plaintiffs' challenge was directed at Officer Doe's enforcement of these zones. The panel was not aware of any precedent that would alert Officer Doe that his enforcement would violate clearly established First Amendment law. Considering the lack of any precedent to the contrary, it was not unreasonable for Officer Doe to believe that it was lawful for him to examine the substance of Yaghtin's speech in order to enforce the separate protest zone policy.
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> The panel [also] held that the City of Spokane could not be held liable because even assuming Spokane police officers violated Yaghtin's First Amendment rights, nothing in the complaint plausibly alleged a policy, custom, or practice leading to that violation. Plaintiffs' allegations amounted to no more than an "isolated or sporadic incident" that could not form the basis of liability under Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

Some of the analysis in the Ninth Circuit Opinion explaining the panel's reasoning behind granting qualified immunity to the individual office reads as follows:

> It is of course true that government officials may not exclude persons from public places who are engaged in "peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express." . . . "It is equally plain that the fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views 'whenever and however and wherever they please.'" . . . The question for our purposes, however, is much narrower: Was the right asserted by Yaghtin so "clearly established" that "a reasonable officer would have known that his conduct violated" that right? . . .
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> Applying a typical First Amendment framework to Plaintiffs' claim leaves us with the proverbial task of trying to fit a square peg in a round hole. In most cases where restrictions on speech are challenged pursuant to the First Amendment, we ask whether a legislative act, such as a city ordinance or permit scheme, unconstitutionally infringes on speech. . . . But Plaintiffs do not challenge a city ordinance or permit scheme, and they expressly do not challenge the Spokane Police Department's use of separate protest zones. Instead, Plaintiffs' challenge is directed at Officer Doe's enforcement of

these zones. We are not aware of any precedent that would alert Officer Doe that his enforcement would violate clearly established First Amendment law.

Our decision in Grossman v. City of Portland is instructive on this point. 33 F.3d 1200 (9th Cir. 1994). In Grossman, we granted qualified immunity to an officer because his "allegedly unconstitutional action" was simply to enforce "an ordinance which was duly enacted by the city council." . . . Although we concluded that the ordinance violated the First Amendment, the officer's enforcement of that ordinance was not clearly unconstitutional. . . . This is because law enforcement officers may generally reasonably assume that "policies or orders promulgated by those with superior authority" are constitutional unless those policies or orders are "patently violative of fundamental constitutional principles." . . . . In Grossman, we granted qualified immunity to the officer even though we concluded the ordinance was unconstitutional because the ordinance "was not so obviously unconstitutional as to require a reasonable officer to refuse to enforce it." . . . . Here, Plaintiffs do not even allege that the underlying protest zone scheme was unconstitutional, much less "patently" unconstitutional.

The D.C. Circuit's qualified immunity decision in Kroll v. United States Capitol Police, 847 F.2d 899 (D.C. Cir. 1988), is also persuasive. In Kroll, the plaintiff sued a group of police officers for allegedly violating his First Amendment rights when they arrested him for protesting a ceremony to welcome Olympic torchbearers without a permit. . . . Even though the officers considered the content of the plaintiff's message to determine that it "conflicted with the spirit" of the event, the D.C. Circuit held that the officers were entitled to qualified immunity. . . . The court noted that based on the underlying facts of the case, the officers could have "reasonably believe[d] that they were enforcing a valid permit system," and an officer could reasonably conclude that to enforce "a permit system inevitably requires taking cognizance of content." . . . Making judgments about "the message being conveyed by a particular demonstrator," is inherent to implementing a permit system because otherwise officers "would have been authorized to issue permits, but do nothing when counterdemonstrators chose to intrude into the area of the 'permitted' activity and carry on their efforts to communicate a different (or indeed possibly conflicting) message." . . . .

Our decision in Grossman and the D.C. Circuit's reasoning in Kroll apply here. Plaintiffs do not challenge the constitutionality of dividing protestors and counter-protestors into separate zones. Consequently, it would make little sense to conclude that Officer Doe violated clearly established First Amendment law by enforcing the separation of persons expressing particular views within those zones. A reasonable person in Officer Doe's position could have concluded that the Constitution permitted his relatively modest efforts to prevent Yaghtin from provoking counter-protestors in their designated zone, even if his actions involved restricting Yaghtin's speech. As with the officers in Kroll – who, it should be noted, took the more heavy-handed approach of arresting the plaintiff, ... – Officer Doe determined that Yaghtin's speech was contrary to the purpose of the counter-protestor zone and prevented him from engaging further on those certain topics.

[Court's footnote 3: *To emphasize, we need not, and do not, address the antecedent question of whether the Spokane Police Department's separate protest zone scheme was constitutional because Plaintiffs have expressly declined to challenge this issue. Accordingly, we have no policy or legislative scheme to review.*]

> Considering the lack of any precedent to the contrary, it was not unreasonable for Officer Doe to believe that it was lawful for him to examine the substance of Yaghtin's speech in order to enforce the separate protest zone policy. . . . The fact that there was an underlying, uncontested governmental scheme distinguishes this case from others where officers acted entirely on their own initiative and arbitrarily restricted speech. . . . Consequently, Officer Doe is entitled to qualified immunity on the second prong of [qualified immunity analysis under Pearson v. Callahan, 555 U.S. 223 (2009)].

[Some citations omitted]

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WASHINGTON STATE COURT OF APPEALS

DIVISION ONE PANEL HOLDS IN A FIRST AMENDMENT FREE SPEECH RULING THAT, ON THE TOTALITY OF THE CIRCUMSTANCES, THERE WAS NO "TRUE THREAT" AND HENCE NO HARASSMENT UNDER A SEATTLE ORDINANCE WHERE (1) A MAN DRIVING BY A POLICE OFFICER AFTER DARK WITHOUT LIGHTS ON POINTED A FINGER AT THE OFFICER CAUSING THE OFFICER TO BELIEVE THAT THE MAN WAS POINTING A GUN, (2) THE DRIVER YELLED "FUCK THE POLICE" AS HE DROVE BY, AND (3) THE OFFICER WAS REASONABLY FEARFUL FOR HIS SAFETY BECAUSE THE OFFICER BELIEVED THE DRIVER HAD POINTED A GUN AT HIM; THE COURT OF APPEALS APPARENTLY CONCLUDES AS A MATTER OF LAW THAT THE EVIDENCE CANNOT SUPPORT THE TRIAL COURT'S FINDING AND CONCLUSION THAT THAT A REASONABLE PERSON DOING WHAT THE DEFENDANT DID WOULD UNDERSTAND THAT THE OFFICER WOULD PERCEIVE THAT THE ACTIONS AND WORDS OF DEFENDANT WERE MEANT BY DEFENDANT AS A SERIOUS EXPRESSION OF A THREAT

State v. Johnson, ___ Wn. App. 2d ___ , 2021 WL ___ (Div. I, December 27, 2021)

LEGAL UPDATE EDITOR'S COMMENT: The ruling by the Division One panel interprets the "true threat" requirement of the Free Speech provision of the federal constitution's First Amendment. The "true threat" requirement does not allow criminal sanctions against persons for communicative actions or statements that are perceived by others as threats, but that are not intended by the person uttering as "true threats." The Johnson Court apparently concludes as a matter of law that no reasonable person who did what defendant Johnson did would perceive that the officer who was the focus of Johnson's words and actions would believe that Johnson was seriously expressing a threat to the officer's safety. Therefore, the Court of Appeals concludes that the trial court could not lawfully find, based on any view of the evidence, that Johnson made a "true threat" under the record in this case. Accordingly, the Court of Appeals concludes that defendant should not have been convicted of harassment under the City of Seattle ordinance under which he was prosecuted. The Court of Appeals appears, in my view, to have erred in its analysis, due to, among other errors (1) not adhering to the standard of review of trial court factual determinations in "true threat" analysis, and (2) not correctly applying the objective (reasonable person) standard for "true threat" analysis.

For what it is worth, I also believe that the U.S. Supreme Court would not reach the same legal conclusion if the High Court were to ever consider the same Freedom-of-Speech-no-true-threat argument under essentially identical evidence. Consider a hypothetical where all of the facts are the same, except that Johnson or another night-time finger-

pointer (1) is driving by Governor Inslee or President Biden with his car lights off, (2) points his finger in a manner that the Chief Executive reasonably perceives is the pointing of handgun and dives for cover, and (3) instead of shouting "fuck the police," the defendant shouts "fuck all tyrants." I doubt that the outcome of that case would be the same as the outcome (to date) in this case.

Also, I believe that if the "target" of the finger-pointing were not a government official (consider an estranged spouse shouting at his mother-in-law "fuck you bitch"), then the outcome would be different even in the approach taken in this case by the Division One panel of judges who decided the Johnson case.

I remind readers that, as stated in the closing boilerplate paragraphs of every issue of my monthly Legal Update, any views that I express in the Legal Update are solely my own, and that my Comments are not intended as legal advice. Law enforcement officers should seek direction from their agency legal advisors and their local prosecutors' offices.

Facts and Proceedings below: (Excerpted from the Court of Appeals Opinion)

> Around 9:45 PM on May 26, 2012, Seattle Police Officer [A] responded to a 911 call reporting a fight on Rainier Avenue South. When [Officer A] got near the location, he exited his vehicle and walked north on the street. He noticed a gold Ford Explorer with its headlights off driving north on the other side of the street. The Ford slowed as it approached him, and the "driver yelled 'fuck the police' as he looked at [Officer A] and held his left hand next to the driver's door with an object or his finger pointed at [Officer A] as if it was a firearm." Afraid that the driver might be pointing a firearm at him, [Officer A] "quickly moved into the shadows and behind a telephone pole."
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> The car then "sped off northbound" but shortly thereafter stopped at a red light. At [Officer A's] request, approaching police officers stopped the car. [Officer A] kept the car in his sight and saw that the driver kept his arm out of the car window until he was stopped. The officers searched the car and its occupants and arrested the driver, Johnson. The police report indicates that no firearms were found. At the precinct, Johnson stated that someone else in the car had yelled at the officer.
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> On May 27, 2012, the City of Seattle charged Johnson with one count of harassment. In February 2013, the City and Johnson entered an agreed order to continue the case. Under the agreed continuance, if Johnson complied with certain conditions for two years, the City would dismiss the charge. If Johnson failed to comply with the conditions, however, the court would determine his guilt based solely on the facts in the police report, which Johnson stipulated to.
>
> Johnson later admitted that he had violated the terms of the agreed continuance. The Seattle Municipal Court reviewed the police report and found Johnson guilty of harassment on December 8, 2017. Johnson appealed to the King County Superior Court, and in January 2019, the court remanded for the municipal court to enter findings of fact and conclusions of law explaining its verdict.
>
> On June 13, 2019, the municipal court again found Johnson to be guilty of harassment on the grounds that Johnson threatened to cause bodily injury or to substantially harm

> [Officer A], and that [Officer A] had reasonable fear that he was about to be shot. Johnson appealed to superior court again, and the superior court affirmed. . . .

[Some paragraphing revised for readability]

ISSUE: Under the U.S. constitution's First Amendment Freedom of Speech clause, considering the totality of the factual circumstances in this case, did defendant Johnson make a "true threat" for purposes of the City of Seattle harassment ordinance where: (1) Johnson was driving by a police officer after dark without lights on and pointed a finger at a police officer causing the officer to believe that Johnson had a gun, (2) Johnson yelled "fuck the police" as he drove by, and (3) the officer was reasonably fearful for his safety?

ANSWER BY THE COURT OF APPEALS: No, considering all of the circumstances – including the facts that (A) the person threatened was a government employee and Johnson was thus making a form of protest against the government; (B) Johnson did not stop or approach Officer A but instead continued driving north throughout the interaction; and (C) Johnson kept his arm hanging out of the window of the car as he continued to drive and then immediately stopped at a red light – the circumstances are more suggestive of a casual encounter or idle talk than a serious threat, even though it was reasonable for Officer A to fear for his personal safety when he saw the gesture. Johnson could not have reasonably believed that his conduct would be perceived by the officer as threatening bodily harm.

In other words, the Court of Appeals concludes from the totality of the allegations in the officer's report (which was the entirety of the evidence in this case) that the only factual determination that can be made is that a reasonable person in Johnson's situation would not think that his actions and words would frighten the officer as a serious expression of a threat, even though the officer reasonably perceived that Johnson was simulating the pointing of a gun.

Result: Reversal of King County Superior Court decision that affirmed a Seattle Municipal Court conviction of Artemas D. Buford Johnson.

Status: Time remains for the City of Seattle, which submitted a compelling brief in the Court of Appeals, to submit (A) a request for reconsideration to the Court of Appeals or (B) a Petition for Discretionary Review to the Washington Supreme Court. I will monitor the docket for Court of Appeals Docket No. 81627-6-I, and I will provide status update in the January 2022 Legal Update.

ANALYSIS BY THE COURT OF APPEALS: (Excerpted from the Court of Appeals Opinion)

> Former Seattle Municipal Code (SMC) 12A.06.040(A)(2) (2012) provides that a person is guilty of harassment if they knowingly threaten:
>
> > a. To cause bodily injury immediately or in the future to the person threatened or to any other person, or . . . .
> >
> > d. Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety, and

e. The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

[LEGAL UPDATE EDITOR'S NOTE: The Johnson Court notes below – in language that I have bolded – that the relevant language of the ordinance is the same as language in the Washington harassment statute, RCW 9A.46.020.]

We first note that sufficient evidence supports the court's conclusion that Johnson's conduct placed [Officer A] in objectively reasonable fear of bodily harm as required by former SMC 12A.06.040(A)(2)(e). Because this is a statutory question and does not "necessarily involve the legal determination whether the speech is [constitutionally] unprotected," we view the facts in the light most favorable to the City rather than undertaking an independent review. [State v. Kilburn, 151 Wn.2d 36, 52 (2004)].

The record establishes that [Officer A] was out at 9:45 PM by himself, a car without headlights drove by, the driver yelled at him, and [Officer A] thought he had seen an object that might be a firearm. [Officer A] then "quickly moved into the shadows and behind a telephone pole, fearing the pointed object might be a firearm." Considering these circumstances, a reasonable fact finder could conclude that Johnson's conduct placed [Officer A] in reasonable fear of bodily harm.

Next, we determine whether Johnson threatened [Officer A]. A law such as this ordinance that "criminalizes pure speech . . . must be interpreted with the commands of the First Amendment clearly in mind." Kilburn, 151 Wn.2d at 41 (internal quotation marks omitted) (quoting State v. Williams, 144 Wn.2d 197, 206-07 (2001)). "The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

To comply with these constitutional guarantees, the harassment ordinance "must be read as clearly prohibiting only 'true threats,'" which are not protected speech under the First Amendment because of the overriding state interest in protecting individuals from the fear of violence, preventing the disruption that this fear causes, and preventing the possible threatened violence from occurring. Kilburn, 151 Wn.2d at 43 **(analyzing identical language in RCW 9A.46.020)** (quoting Williams, 144 Wn.2d at 208). We use an objective test to identify whether speech is a true threat: **"'[a] true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm.'"** Williams, 144 Wn.2d at 207-08 (second alteration in original) (internal quotation marks omitted) (quoting State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998)).

"A true threat is a serious threat, not one said in jest, idle talk, or political argument." Kilburn, 151 Wn.2d at 43. "[T]he nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." State v. C.G., 150 Wn.2d 604, 611, 80 P.3d 594 (2003). "[I]t is not just the words and phrasing of the alleged threat that matter, but also the larger context in which the words were uttered, including the identity of the speaker, the composition of the audience, the medium used to communicate the alleged threat, and the greater environment in which the alleged threat was made." State v. Kohonen, 192 Wn. App. 567, 580 (2016).

A discussion of Washington precedent is instructive. In Kilburn, our Supreme Court reversed Martin Kilburn's harassment conviction after concluding that he had not made a true threat. In that case, Kilburn, an eighth grade student, was chatting and laughing with a classmate at the end of the school day and looked at a book with military men and guns on it. Half smiling, Kilburn turned to the classmate and said that he was "going to bring a gun the next day and shoot everyone, beginning with her. Then he began giggling, and said maybe not her first."

The classmate testified that Kilburn sometimes made jokes, that they had never had a fight or disagreement, and that she later wondered whether he was joking. The Supreme Court determined that despite the classmate's further testimony about being freaked out and later deciding that he must have been serious, because "a reasonable person in Kilburn's position would foresee that his comments would not be interpreted seriously," the comment was not a true threat.

In State v. Locke, 175 Wn. App. 779 (2013), the court affirmed Robert Locke's conviction for threatening former Governor Christine Gregoire. Locke had sent two e-mails to Governor Gregoire through a form on her website: the first said he hoped one of her family members would be "raped and murdered by a sexual predator," and the second said that she "should be burned at the stake like any heretic." Both times, Locke entered "Gregoiremustdie" into the field for his city. Locke then used a form on the Governor's website to invite Governor Gregoire to an "event," the subject of which was "Gregoire's public execution" and at which she would be the "Honoree." He listed his organization as "Gregoire Must D[i]e" and indicated that the event would be held at the Governor's Mansion, would last 15 minutes, would have an audience of more than 150, and that the media would be invited.

The court concluded that neither of the first e-mails were unprotected speech, noting that although the speech was violent and upsetting, its passive phrasing "blunt[ed] the implication that Locke [was] threatening to do this himself." However, in analyzing the event invitation, the court concluded that the "increasingly specific and detailed" nature of the communications threw "the threat into higher relief and translate[d] it from the realm of the abstract to that of the practical."

The court also noted that United States House Representative Gabrielle Giffords had been shot by a gunman 17 days earlier and that the rapid progression of Locke's communications would lead the governor to take the invitation seriously. Finally, unlike in Kilburn, "Locke had no preexisting relationship or communications with the governor from which he might have an expectation that she would not take his statements seriously." Based on all the contextual information, the court concluded that Locke's invitation was a true threat.

Here, we conclude that the evidence does not establish that Johnson made a true threat. Whether Johnson's speech was a true threat directly determines whether his speech was unprotected, so we engage in an independent review of the crucial facts. We start by looking to the words Johnson spoke: Johnson's statement did not itself express any intention to cause harm, but instead was a generalized and political statement of animosity.

[Court's footnote 4: *The City disagrees that Johnson's statement was political speech. While pointing at [Officer A] as if he had a gun may not have been political, Johnson's speech itself clearly "relat[ed] to government, a government, or the conduct of government affairs" and expressed a pointed opinion to that effect. Political, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1755 (2002). Johnson also notes that "fuck the police" may be a reference to "Fuck tha Police," a "wellknown police protest song." State v. Boettger, 310 Kan. 800, 821, 450 P.3d 805 (2019), cert. denied, 140 S. Ct. 1956 (2020); N.W.A., Fuck tha Police, on STRAIGHT OUTTA COMPTON (Ruthless /Priority Records 1988*)].

We have noted that "criticism, commentary, and even political hyperbole towards and about public servants" is political speech that "is at the core of First Amendment protection 'no matter how vehement, caustic[,] and sometimes unpleasantly sharp.'" State v. Dawley, 11 Wn. App. 2d 527, 539 (2019) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). The trial court therefore appropriately concluded that Johnson's language itself was protected speech. However, Johnson also pointed at [Officer A] as if he had a firearm, expressive conduct that does imply violence.

[Court's footnote 5: *Because Johnson stipulated to the police report, we assume that he did point an object or his hand as if it were a firearm. This is despite the seeming inconsistency that [Officer A] could not see Johnson's hand well enough to tell whether he was holding an object, but nonetheless could see that it was pointed "as if it was a firearm.*"]

[LEGAL UPDATE EDITOR'S COMMENT: In footnotes 5 and 6, the Court of Appeals panel appears, at least in my assessment, to not fully accept that the Court is required to accept the police report as the sole evidence in the case.]

The City correctly notes that mimicking the firing of a gun has been considered threatening in other contexts and jurisdictions. See, e.g., Haney v. U.S., 41 A.3d 1227, 1234 (2012) (defendant miming shooting a gun at a witness and mouthing "I'm going to fuck you up" could reasonably be considered a threat). We must therefore examine "all the facts and circumstances" to determine whether Johnson's conduct constituted a threat in this case. C.G., 150 Wn.2d at 611.

The circumstances here do not convince us that Johnson's speech and conduct together constituted a true threat. Johnson did not stop or approach [Officer A], but instead continued driving north throughout the interaction. Furthermore, Johnson kept his arm hanging out of the window of the car as he continued to drive, and then immediately stopped at a red light. These facts are more suggestive of a casual encounter or idle talk than a serious threat.

[Court's footnote 6: *We also note that there is no clarification as to whether Johnson actually mimed shooting a gun or merely pointed his hand in a manner that was evocative of a gun, which would give more information about the extent to which Johnson's conduct clearly expressed violence*.]

The City disagrees and points out that the reaction of the recipient can be informative in determining whether a statement was a true threat. See Kohonen, 192 Wn. App. at 582 (concluding that tweets did not constitute true threats in part because "not one of the people in J.K.'s intended audience . . . perceived the tweets to be serious threats."). As

we have noted, Johnson's statement and conduct placed [Officer A] in reasonable fear for his safety.

However, the fact that [Officer A] was afraid is not determinative: the true threat inquiry asks whether there is sufficient evidence that a person in Johnson's position would "'foresee that [his] statement would be interpreted . . . as a serious expression of intention to inflict bodily harm.'" Williams, 144 Wn.2d at 208 (second alteration in original) (quoting Knowles, 91 Wn. App. at 373). Here, [Officer A] was afraid because he thought he might have seen a firearm, but Johnson did not have a firearm and **there is no suggestion that he should have anticipated that [Officer A] would think he had one**. Therefore, the fact that [Officer A] was afraid does not indicate that Johnson's conduct rose to the level of a true threat.

[LEGAL UPDATE EDITOR'S COMMENT: I am not clear on what the Court means in the bolded clause in the immediately preceding paragraph of the Court's Opinion. It seems to me that a reasonable person in Johnson's circumstances – pointing his finger as if he were pointing a gun from a moving car – would be aware that law enforcement officers are aware that officers around the country are periodically attacked – note the 2009 murders of police officers in Lakewood, Washington – and that officers are therefore necessarily vigilant regarding possible attacks.]

The City notes that [Officer A] and Johnson did not know each other, and that the lack of a preexisting relationship supported the court's determination of a true threat in Locke. However, in that case, Locke clearly knew who the governor was and was making detailed threats against her specifically, and the lack of a preexisting relationship meant that the governor had no reason to assume the threats were frivolous. 175 Wn. App. at 793-94.

Here, the interaction was more random: Johnson saw a police officer while he was driving and expressed animosity toward police officers. He did not stop or approach [Officer A], and there is no suggestion that he knew or was targeting this specific police officer. The communication here was lacking the specificity or pointedness that was present in Locke and that made the governor take the invitation to her own execution seriously.

As Johnson drove away, [Officer A] had no reason to think that Johnson intended to come back to find or harm him specifically. Thus, although there was no preexisting relationship like the one in Kilburn that would have enabled [Officer A] to believe the threat was frivolous, there was also a lack of personal connection that would lead [Officer A] to believe that Johnson was targeting him personally.

The City claims that Johnson driving at night without lights shows that he was attempting to prevent his identification, but there is no evidence that this is the case as opposed to nonfunctioning headlights or forgetfulness. The City also contends that Johnson's "precipitous flight from the scene and his later attempt to shift the blame to one of his passengers shows his awareness of the threatening nature of his conduct." However, given that Johnson was driving throughout the interaction, immediately stopped at a red light, and only blamed one of his passengers after being arrested for what he had said, we are not convinced that these actions show he knew that his conduct was threatening.

The record here does not establish beyond a reasonable doubt that a reasonable person in Johnson's position would "'foresee that [his] statement would be interpreted . . . as a serious expression of intention to inflict bodily harm.'" Williams, 144 Wn.2d at 208 (second alteration in original) (quoting Knowles, 91 Wn. App. at 373). Therefore, the speech does not rise to the level of a true threat and there is insufficient evidence to support Johnson's conviction.

[Court's footnote 7: *We also note that because there is insufficient evidence that Johnson actually made a true threat, there is necessarily insufficient evidence that he "knowingly" did so under former SMC 12A.06.040(A)(2)*]

[Some case citations omitted, others revised for style; one footnote omitted; some paragraphing revised for style]

SUFFICIENCY OF EVIDENCE OF MALICIOUS MISCHIEF UNDER CHAPTER 9.48A RCW: EVIDENCE THAT DEFENDANT DID NOT OWN PROPERTY THAT HE DAMAGED IS SUFFICIENT TO PROVE (1) THAT THE PROPERTY WAS "PROPERTY OF ANOTHER," AND (2) THAT DEFENDANT HAD NOT "OBTAINED THE EXPRESS PERMISSION OF THE OWNER OR OPERATOR OF THE PROPERTY"

In State v. J.A.V., ___ Wn. App.2d ___ , 2021 WL ___ (Div. III, December 23, 2021), Division Three of the Court of Appeals rejects a sufficiency-of-the evidence challenge to a juvenile court adjudication of malicious mischief in the third degree. J.A.V. unsuccessfully argued that the State had not established that the property that he damaged was "property of another," or that he had not "obtained the express permission of the owner or operator of the property" to do what he had done.

In key part, the Division Three panel's legal analysis in J.A.V. is as follows:

> RCW 9A.48.090 outlaws malicious mischief in the third degree. The statute provides two alternative means of conviction. Pertinent to J.A.V.'s charge, it states:
>
> > (1) A person is guilty of malicious mischief in the third degree if he or she: . . . .
> >
> > (b) Writes, paints, or draws any inscription, figure, or mark of any type on any public or private building or other structure or any real or personal property owned by any other person unless the person has obtained the express permission of the owner or operator of the property, under circumstances not amounting to malicious mischief in the first or second degree.
>
> RCW 9A.48.090 (emphasis added).
>
> We note that the federal district court held RCW 9A.48.090 unconstitutional as applied to a county resident's act of writing chalk messages on sidewalk leading to the county commissioners building because the commissioners failed to apply restrictions on defacement in a viewpoint-neutral fashion. Bledsoe v. Ferry County, 499 F. Supp. 3d 856 (E.D. Wash. 2020). We are not bound by United States District Court's decisions and adjudge the decision inapposite to J.A.V.'s prosecution.
>
> A. Owned by Any Other Person

J.A.V. first argues that the State failed to present any evidence regarding who owned the agricultural tunnel and thus the State failed to prove an element of the offense of malicious mischief. We agree that the State did not show who owned the tunnel, but we conclude that the State proved beyond a reasonable doubt that J.A.V. did not own the tunnel.

The State needed to prove only the latter fact. The statutory chapter of RCW 9A.48 defines "property of another" as "property in which the actor possesses anything less than exclusive ownership." RCW 9A.48.010(1)(c) . . . . The State need not identify the titleholder of the property. Commonwealth v. Smith, 17 Mass. App. Ct. 918, 456 N.E.2d 760, 761 (1983); State v. Bednarski, 1 Wis. 2d 639, 85 N.W.2d 396, 398 (1957).

Even if this court might not convict on the evidence submitted by the State, we must affirm if a rational trier of fact could find beyond a reasonable doubt that someone other than J.A.V. owned the agricultural tunnel. Police officer testimony informed the juvenile court that J.A.V. sprayed paint in a closed "ag tunnel" on a rural county road.

J.A.V. did not live in the vicinity of the tunnel. J.A.V. would likely not own real estate at his age. J.A.V. and his friend drove to the site as a lark in the middle of the night. J.A.V. fled the scene when law enforcement arrived. A reasonable trier of fact could find the satisfaction of this element of the crime.

B. Express Permission of the Owner or Operator

J.A.V. next argues that the State failed to prove beyond a reasonable doubt that he lacked permission to paint the tunnel.

No court has yet considered whether the phrase "unless the person has obtained the express permission of the owner or operator of the property" provides an element of or defense to a charge of malicious mischief in the third degree. The parties dispute as to whether J.A.V. or the State carries this burden.

We do not decide this dispute, however, because, even if we impose the burden on the State, the State still prevails. We reach this same conclusion based on the facts and inferences therefrom that support the finding that J.A.V. did not own the agricultural tunnel. A rational trier of fact could find that the State showed beyond a reasonable doubt that J.A.V. lacked permission to spray paint the agricultural tunnel.

[Some citations omitted, others revised for style; some paragraphing revised for readability]

Result: Affirmance of Kittitas County Superior Court juvenile adjudication of J.A.V. for malicious mischief in the third degree.

DIVISION TWO OF THE COURT OF APPEALS RULES THAT THE WASHINGTON SUPREME COURT'S RULING IN BLAKE THAT STRUCK DOWN AS UNCONSTITUTIONAL THE FORMER STATUTE PROHIBITING MERE POSSESSION OF CONTROLLED SUBSTANCES ALSO REQUIRES INVALIDATION OF THE FORMER STATUTE BARRING POSSESSION OF 40 GRAMS OR LESS OF MARIJUANA WHILE UNDER 21 YEARS OF AGE

In State v. A.L.R.H., ___ Wn. App. 2d ___ , 2021 WL ___ (Div. II, December 7, 2021), Division Two of the Court of Appeals extends the Washington Supreme Court ruling in State v. Blake, 197 Wn.2d 170 (2021) that struck down the former provisions in chapter 69.50 RCW prohibiting mere possession of controlled substances. The A.L.R.H. Court concludes that the rationale Blake requires invalidation of the former provisions in chapter 69.50 prohibiting possession of small amounts of marijuana by persons under 21 years of age. In key part, the analysis by the A.L.R.H. Court is as follows:

> A.L.R.H. argues that his adjudication for possession of 40 grams or less of marijuana while under the age of 21 must be vacated because the possession statute under which he was found guilty is unconstitutional and void following the Supreme Court's holding in Blake. The State argues that Blake does not apply here because possession of 40 grams or less of marijuana while under the age of 21 carries a less severe punishment than the statute that was held unconstitutional in Blake. The State's argument fails because our Supreme Court in Blake did not hold that the statute was unconstitutional because of the severity of the punishment; rather, our Supreme Court held the possession of a controlled substance statute unconstitutional because the statute "criminalize[d] innocent and passive possession" of controlled substances. 197 Wn.2d at 195.
>
> . . . .
>
> In Blake, our Supreme Court concluded that the strict liability drug statute, former RCW 69.50.4013(1) (2017), was void because it "criminalize[d] innocent and passive possession" of controlled substances and thus violated the due process clauses of the state and federal constitutions. Blake held that it was not possible for the court to avoid the constitutional issue by interpreting the statute "as silently including an intent element" because the Supreme Court had previously held that the legislature intended drug possession to be a strict liability felony.
>
> Former RCW 69.50.4014 (2015) provided that "any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor." Following the Supreme Court's decision in Blake, the legislature amended RCW 69.50.4014 to provide that "any person found guilty of knowing possession of forty grams or less of marijuana is guilty of a misdemeanor." LAWS OF 2021, ch. 311, § 10 (emphasis added). When the legislature "chang[es] the language of a statute, the Legislature is presumed to intend a change in the law." . . . .
>
> Here, A.L.R.H. was adjudicated under former RCW 69.50.4014, which provided that "any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor." This statute, like the statute held unconstitutional in Blake, did not contain an element of intent, and thus it "criminalize[d] innocent and passive possession" of controlled substances. Blake,197 Wn.2d at 195.
>
> Like the statute that was held unconstitutional in Blake, former RCW 69.50.4014 cannot be read "as silently including an intent element" because the legislature amended RCW 69.50.4014 to include that intent element shortly after the Supreme Court's decision in Blake. 197 Wn.2d at 174; LAWS OF 2021, ch. 311, § 10. Had the statute already included an element of intent, the legislature would not have needed to add the word "knowing." . . . .

> Because former RCW 69.50.4014 did not include an element of intent, silent or otherwise, it "criminalize[d] innocent and passive possession" of controlled substances and, thus, violated the due process clauses of the state and federal constitutions. Blake, 197 Wn.2d at 195. Therefore, former RCW 69.50.4014 is unconstitutional and void, and it cannot support A.L.R.H.'s adjudication. . . . Because convictions based on unconstitutional statutes must be vacated, we reverse and remand to the juvenile court to vacate A.L.R.H.'s guilty adjudication.

[Some citations omitted, others revised for style]

Result: Reversal of Cowlitz County Superior Court conviction of A.L.R.H. for Juvenile Court adjudication for possession of 40 grams or less of marijuana while under the age of 21.

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BRIEF NOTES REGARDING DECEMBER 2021 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

The one entry below addresses the only December 2021 unpublished Court of Appeals opinion that fits the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. The crime of conviction is italicized, and the description of the holdings/legal issues are bolded.

State v. Nikolay Ivanovich Kalachik: On December 14, 2021, Division Three of the COA agrees with the challenges of defendant grounded in the Sixth Amendment Right to Confrontation and Evidence Law to his Clark County Superior Court conviction for *first degree rape*. The Kalachik Court rules that the trial judge committed prejudicial error in admitting into evidence the hearsay statements of the defendant's non-testifying victim/accuser to (1) a police officer, and (2) to a sexual assault nurse examiner (SANE).

With regard to the non-testifying accuser's statements to a police officer, **the Court of Appeals rules that the statements satisfy the requirements of the "excited utterance" exception to the hearsay rule (ER 803(a)(2)). However, the statements are not admissible under the extensive case law interpreting the Sixth Amendment Right to Confrontation because**

there was no ongoing emergency, and the purpose of the questioning, considering all of the circumstances, was investigatory.

With regard to the non-testifying accuser's statements to the SANE, the Court of Appeals rules that the statements do meet the requirements of (1) the "excited utterance" exception to the hearsay rule (ER 803(a)(2)), (2) the medical treatment or diagnosis or treatment exception to the hearsay rule (ER 803(a)(4)). The Court of Appeals chooses not to address the issue of whether the hearsay statements would be admissible under the Sixth Amendment Right to Confrontation.

The Opinion of the Court of Appeals in Kalachik is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/373461_unp.pdf

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. For information about access to the Criminal Justice Training Commission's Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

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