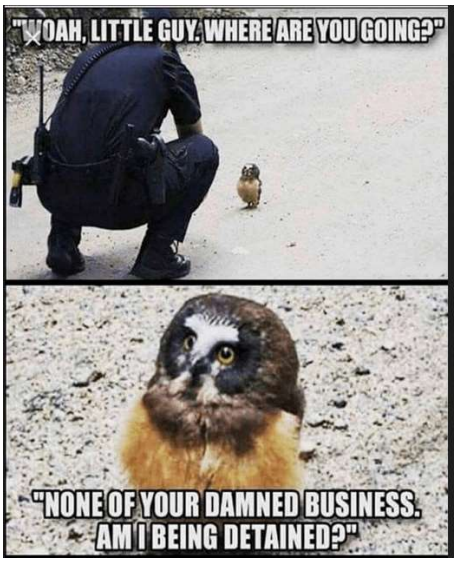
WASHINGTON DEFENDER ASSOCIATION

**PRACTICE TOOL** | 3.24.2023 | Sheri M. Oertel

# SHERI'S SIDEBAR

## In today's news, the ongoing issue of unwanted police contact...


1. **CrR 3.5: Did you know that Miranda warnings must be provided *on the recorded interview* for admissibility at trial or motions? Strict compliance with this is required for admissibility of the interview**. Note, the statute hasn't been updated since 2011, but by definition of "video and/or sound recordings," the statute applies to body worn camera video recordings of arrested persons, i.e. not required of BWC interactions prior to arrest.

   See e.g. *State v. Courtney*, 137 Wn. App. 376, 382, 153 P.3d 238, 241 (2007)(interpreting the privacy act requirements under RCW 9.73.090:

   (b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. **Such video and/or sound recordings shall conform strictly to the following:**



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(i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

**(iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her *shall be included in the recording*;**

**[multiple cases were determined the video interrogation was not admissible due to the strict compliance requirement to this, even if Miranda warnings were given, and waived in writing prior to the start of the recording!]**

(iv) The recordings shall only be used for valid police or court activities; …

Generally, the privacy act applies only to private communications. *See id.* at 192, 102 P.3d 789. There is no reasonable expectation of privacy for persons in custody undergoing custodial interrogations. *Lewis v. Dep't of Licensing,* 157 Wn.2d 446, 467, 139 P.3d 1078 (2006). But the legislature has enacted provisions in the privacy act that govern the conditions under which police may make recordings of suspects *during custodial interrogations*. *Id.* at 465–67, 139 P.3d 1078; RCW 9.73.090. ***Such recordings must strictly comply* with statutory provisions to ensure that consent to the interrogation is capable of proof and to avoid a "swearing contest" regarding whether such consent actually occurred.** *State v. Cunningham,* 93 Wn.2d 823, 829, 613 P.2d 1139 (1980).

RCW 9.73.090(1)(b) requires that an arrested person must be fully informed of his or her constitutional rights at the beginning of the recording, and that this statement must be included in the recording. **In order to satisfy this statutory requirement, a recorded statement must include a complete statement of the accused's *Miranda* rights.** *State v. Mazzante,* 86 Wn. App. 425, 428, 936 P.2d 1206 (1997). Here, Mr. Courtney was never informed of his rights on the recording of his custodial interrogation, even though he had signed a *Miranda* waiver of his rights prior to the recording. This recording violated the privacy act.

Mr. Courtney asserts that the officers' violation of the privacy act required the suppression of not only the videotaped confession, but all of the evidence derived from it. He bases his argument largely on RCW 9.73.050, which requires suppression of any information obtained in

violation of provisions of the privacy act. The derivative evidence Mr. Courtney asks this court to suppress includes the murder weapon that was located as a result of Mr. Courtney's confession.

But a violation of section .090 of the privacy act does not require suppression of derivative evidence. *Lewis,* 157 Wn. 2d at 472, 139 P.3d 1078. The portion of the act requiring suppression of derivative evidence only applies to private conversations; and, as previously noted, custodial interrogations are not private conversations. *Id.* at 471–72, 139 P.3d 1078. Instead, **it is only the recordings themselves that are inadmissible.** *Id.* at 472, 139 P.3d 1078. *State v. Courtney*, 137 Wn. App. 376, 382–83, 153 P.3d 238, 242 (2007)

2. **Did you know there is a statute requiring police to keep *dash cams* on during the entirety of an event?**

**Do we have an argument that police do not get to limit recordings of "events" with body cam/dash cam based on the cost of storage?!**

Related to the above, look at RCW 9.73.090(1)(c):

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) **must be operated simultaneously with the video camera** when the operating system has been activated for an event. **No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event.** Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.

… A law enforcement officer ***shall*** inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

- For those jurisdictions new to AXON/BWC/Dash Cam storage and police policies for BWC, many jurisdictions have policies limiting when an officer must have the BWC on

due to the cost of storage charged by AXON. Many jurisdictions do not require BWC to be turned on during a search warrant! WHAT? You mean the time when evidence might be compromised or planted is not mandated to be recorded by many department policy because it costs too much to save the data? **REQUEST A COPY OF YOUR JURISDICTION'S POLICY.** The policy online is often general and not the same as the policy given for officers to follow.

- This appears to indicate once a dash cam is turned on for an event, it must remain on for both video and audio "during the recording of an event." NO LIMITATIONS. Again, this law has not been updated since 2011 so I would argue legislators would intend this to apply to BWC Video as well, especially since BWC is often activated and Dash Cam is not. This is in part due to the poor quality of microphone reception for Dash Cam (See any traffic stop from WSP when there is wind or fast traffic!). Additionally, in the current age, the microphone and BWC are a combined unit!! Argue it applies to BWC as well as dash cam no differently than when the State began to use new technology evidence against our clients which was not considered at the time of the writing of the rule or statute.
- This puts the burden on the law enforcement agency to retain all related BWC, Dash Cam, Interview recording whether or not defense requested it within the auto delete time period (typically 90 days).

** NOTE: WDA is in the process of creating training on AXON and BWC Video as part of a discovery series of webinars. Stay tuned, release anticipated later this summer or fall.

3. **Are you aware that outside of exigent circumstances, police officers are required to inform people (witnesses, suspects, community members) that they are being sound recorded by dash cams/cameras mounted to patrol cars? RCW 9.73.090(c)**

Clearly this was originally written for WSP who had car mounted cameras and microphones on their uniform. However, it is a valid statute and will under plain language apply to any law enforcement dash cam. I would argue that it also applies to BWC which were not widely used in 2011. In fact, this argument is supported by the fact that it was only effective January 1, 2022 that BWC became required for law enforcement interviews under RCW 10.122.03. WSP is the only agency I have ever heard the warning given. It should apply equally to officers and agencies now using BWC technology instead of dash cam video only with a mic on the uniform.

**Exigent circumstances is defined:**

The exigent circumstances exception to the search warrant requirement applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence. Const. Art. 1, § 7. *State v. Tibbles*, 169 Wn. 2d 364, 236 P.3d 885 (2010).

Exigent circumstances did not exist so as to justify warrantless search of defendant's car, from which trooper detected strong odor of marijuana during traffic stop for defective taillight; while there was probable cause that evidence of contraband would be found, defendant was not fleeing nor was there a showing that he presented a risk of flight, he was outside the vehicle when trooper searched it and state did not establish that destruction of evidence was imminent, and state did not establish that obtaining a warrant was impracticable.

- The exigent circumstance analysis is the totality of circumstances standard.
  In this context that means the delay to tell EACH person that they are being sound recorded would compromise officer safety, facilitate escape, or permit destruction of evidence. MOST contacts on BWC/Dash Cam do not have exigent circumstances. Therefore, arguably, most Dash Cam recordings (and arguably BWC Video/Audio) should be suppressed if the warning is not given on the recording.

4. **If you raise the necessity defense, make sure you argue, and propose a jury instruction supported by *State v. Spokane County District Court*, 198 Wn.2d 1, 491 P.3d 119 (2021); *State v. Ward*, 8 Wn. App.2d 365, 438 P.3d 588 (2019), *rev. denied*, 193 Wn.2d 1031, 447 P.3d 161 (2019).** Many thanks to the two lawyers who brought the issue and one of the cases to my attention so that we can all benefit from the shared knowledge!!

To raise the **necessity defense**, a defendant must show by a preponderance of the evidence that **"(1)** [the defendant] reasonably believed the commission of the crime was necessary to avoid or minimize a harm, **(2)** the harm sought to be avoided was greater than the harm resulting from a violation of the law**, (3)** the threatened harm was not brought about by the defendant, and **(4)** no reasonable legal alternative existed." *State v. Spokane Cnty. Dist. Ct.,* 198 Wn.2d 1, 12, 491 P.3d 119, 125 (2021)(citing *Ward*, 8 Wn. App. 2d at 372, 438 P.3d 588 (citing *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 18.02, at 292 (4th ed. 2016) (WPIC)); *see also State v. Vander Houwen*, 163 Wn.2d 25, 31-32, 177 P.3d 93 (2008)).

- The burden to DEMONSTRATE the preponderance standard for the necessity defense is on defense. However, the evidence itself can come from any source, including evidence put on by the state. See e.g. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).
- Whether the defendant's belief that his/her actions were reasonable calculated to be effective and were reasonable, for purposes of the necessity defense, is a factual question for the jury. (element #1 for necessity defense).
    - The jury decides whether the defendant's course of action was "reasonably necessary" based on the evidence.
- The Supreme Court says two things about the fourth element – Pay attention to the legal distinction to benefit your client's interests.
    - 1) Question of Fact for the Jury:
        - After offering evidence of prior attempts at legal alternatives, which resulted in no change (including protests, contacting legislators, and using the initiative process), because the efforts to implore the reasonable legal alternatives have previously failed, "this created a 'question for the jury' regarding whether these are actually reasonable alternatives given the specific facts in that case." The Supreme Court in *State v. Spokane County District Court*, at 14; citing the Appellate Court in *Ward*, at 376.
    - 2) Question of Law:
        - "If the legal alternative is only illusory, or unavailable at the moment it is needed, it is not a reasonable alternative." Spokane County Dist. Ct., at 14-15.
        - I would argue saying the entire issue was a question of fact for the jury was the Supreme Court citing the Appellate Court on a prior case *as part of their analysis*. However, the Supreme Court's determination/finding is:
            - if the legal alternative is not available, or is illusory, or is ineffective as demonstrated by prior attempts to use it, **then by law, it cannot be considered a reasonable alternative**.
        - That means the jury decides factually:
            - if the alternative was not available, or was an illusory alternative, or if it had been previously ineffective based on historical evidence provided by defense or the state.
        - If they say yes, the alternative was ineffective, illusory, or unavailable, **then as a matter of law it is not a reasonable alternative**.

- Once the factual question of ineffective previously, illusory, or unavailable at the time is found, then any alternatives described for those findings, **as a matter of law** cannot be used to prevent the necessity defense or to cause it to fail.
    - I would even request a special verdict form to spell out the factual and legal distinction to the jury clearly.

*WHY DOES IT MATTER IF YOU WIN THE ISSUE BOTH WAYS?*

- If it is a matter of law, you object every time the State mis-states the law, typically in closing, repeatedly.

- State DPA:
    - It doesn't matter that calling the police was ineffective 42 times previously because this is a rural area, with an understaffed police force, and it previously took 118 minutes for police to arrive, if they came at all.
    - What matters is there IS A LEGAL REASONABLE ALTERNATIVE, IT EXISTS. LOOK AT YOUR JURY INSTRUCTIONS, EXISTS IS IN THE LANGUAGE, AND THE DEFENDANT DID NOT TRY IT THIS TIME! THAT is what matters here!
- OBJECTION YOUR HONOR –
    - The State is misstating the law. These exact jury instructions have been clarified by the Washington State Supreme Court in *State v. Spokane County District Court* in 2021.
    - (Yes, your honor, I do have that citation for you, 198 Wn.2d 1, 491 P.3d 119 (2021).)
    - The Supreme Court has ruled that if the jury finds the prior attempts have been ineffective, illusory, or it is unavailable at the immediate time needed, then by law it is not a reasonable alternative. The jury needs to be clear which decisions are theirs, and if they determine the legal alternative has previously been ineffective, then by law they cannot vote that it was a legal REASONABLE alternative.

Also remember in closing to make clear to the jury the State's burden is to prove the elements of the charge beyond a reasonable doubt.

- If they did not meet that burden, you must find my client not guilty.
    - Don't let the State convince the Court that you cannot argue the State did not meet the burden of evidence because you are also arguing an affirmative defense. You cannot argue both DENIAL and an affirmative defense. However, the court must allow you on a constitutional basis to argue the State failed to meet the burden of proving its case beyond a reasonable doubt.

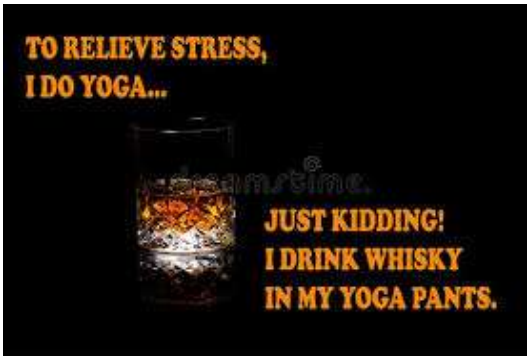
- If you find after deliberating on all of the evidence that the State met the burden of proving the charge beyond a reasonable doubt, then you must deliberate on the affirmative defense of necessity.
- Defense only has to raise the defense by the preponderance standard. It is a much lower standard than beyond a reasonable doubt. Preponderance just means "more likely than not." It does not mean 51%, only is it more likely based on the evidence, or not. (The state likes to emphasize that extra 1% in argument, misstating the legal burden, when any amount greater than 50% is sufficient.)
- If you find we have proven the requirements of the necessity defense by a standard or what we have shown is more likely than not to be what occurred, then you still must find my client not guilty, using the special verdict form indicating the affirmative defense of necessity was proven by a preponderance of the evidence.

Other preponderance versions: How do you explain a preponderance of the evidence to a jury?

- "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it. https://www.courts.ca.gov/partners/314.htm

- Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. https://www.law.cornell.edu/wex/preponderance_of_the_evidence

Remember, we are all in this together! **Feel free to reach out to WDA Resource Attorneys if you need help.** Relax, this weekend, you have earned it.




My desk coaster:

WDA RESOURCE ATTORNEY DIRECT CONTACT:

Felony cases everything through sentencing: sheri@defensenet.org

Misdemeanor cases: magda@defensenet.org

Post-Conviction, Resentencing, Redemption Project cases: cindy@defensenet.org

Incarcerated Parents Project: dadre@defensenet.org

The Immigration Project Intake Form: https://defensenet.org/case-support/wda-immigration-project/wdaip-case-assistance/

Juvenile Questions/Help: Sheri and Cindy

Have a restful weekend. Thank you all for stimulating my brain on a regular basis! Things that make you go hmmm….

Sheri