WASHINGTON DEFENDER ASSOCIATION

PRACTICE TOOL | **6/2/2023** | Sheri M. Oertel

SHERI'S SIDEBAR – EDITION # 7

Happy Friday everyone.

I am back again with things I wish I had known during practice, things that have changed, interesting tidbits, and random tips for practice. Welcome back to:

SHERI'S SIDEBAR

Let's do our best for the clients!

We may be all they have.

1. **Do you know the requirements to request a missing witness instruction, or to object to the State getting it?**

   The Missing witness doctrine is applicable when:

   - First, the doctrine applies only if the potential testimony is material and not cumulative.

   - Second, the doctrine applies only if the missing witness is particularly under the control of the one party rather than being equally available to both parties.

   - Third, the doctrine applies only if the witness's absence is not satisfactorily explained. For example, if the witness is not competent or if testimony would

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incriminate the witness, the absence is explained and no instruction or argument is permitted.

- Finally, the doctrine may not be applied if it would infringe on a criminal defendant's right to silence or shift the burden of proof.
    - The State and or law enforcement cannot argue that because a defendant did not tell the police something (if the defendant had invoked their right to silence or to counsel) that what they are now testifying to at trial would be allowed.

State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267, 278 (2008)(finding it was improper for the trial court to grant the State the missing witness instruction for witnesses who would have only corroborated the defendant's story but were not alibi witnesses because defense has no burden to produce any evidence (except related to affirmative defenses)(*citing State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991).

- **A criminal defendant has no burden to present evidence, and it is error for the State to suggest otherwise.** *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830, 843 (2003)(see also *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991)). However, under the missing witness doctrine, the defendant's theory of the case is subject to the same scrutiny as the State's. *State v. Contreras*, 57 Wash. App. 471, 476, 788 P.2d 1114 (1990).

- The State may point out the absence of a "natural witness" when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable. *Blair*, 117 Wn.2d at 485–86, 816 P.2d 718. The State may then argue, and the jury may infer, that the absent witness's testimony would have been unfavorable to the defendant. *Id*.

- We have previously found the **limitations on the missing witness doctrine are particularly important when, as here, the doctrine is applied against a criminal defendant.** *Blair,* at 488. First, the doctrine applies only if the potential testimony is material and not cumulative. *Id*. at 489. Second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. *Id*. at 488, 490. Third, the doctrine applies only if the witness's absence is not satisfactorily explained. *Id*. At 489. For example, if the witness is not competent or if testimony would incriminate the witness, the absence is explained, and no instruction or argument is permitted. *Id*. at 489–90, 816 P.2d 718.**Finally, the doctrine may not be applied if it would infringe on a criminal defendant's right to silence or shift the burden of proof.** *Id*. at 491, 816 P.2d 718.

  State v. Montgomery, 163 Wn.2d 577, 598–99, 183 P.3d 267, 278 (2008).

2. CITATIONS THAT MAKE ME FEEL WARM AND FUZZY INSIDE TO USE IN MOTIONS. 

a. "A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. As a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant." *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 47 (2011)(citing *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

b. "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *State v. Case,* 49 Wn.2d 66, 71, 298 P.2d 500 (1956) (quoting *People v. Fielding,* 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Thus, a prosecutor must function within boundaries while zealously seeking justice. *Case,* at 71. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551, 556 (2011).

c. We presume prosecutors act impartially 'in the interest of justice.' *State v. Loughbom*, 196 Wn.2d 64, 69, 470 P.3d 499, 503 (2020)(citing *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)). At the same time, *we expect prosecutors to " 'subdue courtroom zeal,' not to add to it, in order to ensure the defendant receives a fair trial."* *Id*., at 69-70; citing *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (quoting *Thorgerson*, 172 Wn.2d at 443, 258 P.3d 43). Justice can be secured only when a conviction is based on specific evidence in an individual case and not on rhetoric. *State v. Loughbom*, 196 Wn.2d 64, 69–70, 470 P.3d 499, 503 (2020)(emphasis added).

d. As we have previously and repeatedly acknowledged, prosecutors play a special role in *ensuring the integrity of our justice system*. They not only serve in a quasi-judicial role as an officer of the court but *they also serve as a representative of the people with the duty to seek impartial justice for both the guilty and the innocent*. *State v. Bagby*, 200 Wn.2d 777, 787–88, 522 P.3d 982, 990 (2023)(emphasis added)(citing *State v*. *Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)(citing *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

3. Remember to object to (and preserve the objection for appeal if the court rules in opposition to your objection) these improper arguments:

a. "The war on drugs." See e.g. *State v. Echevarria*, 71 Wn. App. 595, 597, 860 P.2d 420 (1993); *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995); *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). All find "exhortations to join the war against crime or drugs" are impermissible error…[all] appeals to the war on drugs during trial constitutes prosecutorial error.

Finally, *State v. Ramos* further supports a finding that appeals to the war on drugs are improper. 164 Wash. App. 327, 263 P.3d 1268 (2011). As with *Neidigh*

and *Perez-Mejia*, the prosecutor in *Ramos* did not expressly mention the war on drugs. Instead, the State asked the jury to convict the defendant "in order to prevent 'the coke dealers' from engaging in 'drug activity' at Sunset Square." *Id*. at 337, 263 P.3d 1268. In rejecting this language, the *Ramos* court cited *United States v. Solivan* as evidence that a prosecutor may not urge a jury to "convict in order to protect the community, deter future law-breaking, or other reasons unrelated to the charged crime." *Id*. at 338, 263 P.3d 1268 (citing *U.S. v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)). The excerpt from *Solivan* forcefully denounced appeals to the war on drugs, reasoning that " '[t]he fear surrounding the War on Drugs undoubtedly influenced the jury' " and that the prosecutor's comments were designed " 'to arouse passion and prejudice and to inflame the jurors' emotions regarding the War on Drugs by urging them to send a message and strike a blow to the drug problem.' " *Id*. at 339, 263 P.3d 1268 (quoting *Solivan*, 937 F.2d at 1153). Thus, while the prosecutor in *Ramos* did not specifically invoke the war on drugs, the court's lengthy references to *Solivan* indicate that it strongly condemned such rhetoric. *State v. Loughbom*, 196 Wn.2d 64, 71–72, 470 P.3d 499, 504 (2020)

   i. **How many times have you heard/seen this though? And how many times does the court allow it "because it is argument" not prejudicial or irrelevant. PRESERVE OBJECTIONS FOR APPEAL. You may get a new trial or dismissal depending on other errors.**

b. The state cannot ask witnesses to identify a defendant by "nationality" or race or ethnicity during trial, and cannot compare white witnesses with BIPOC defendants in derogatory ways in argument. *State v. Bagby*, 200 Wn.2d 777, 887-88 (2023)(citing *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551, 556 (2011).

c. Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *State v. Case,* 49 Wn.2d 66, 71, 298 P.2d 500 (1956) (quoting *People v. Fielding,* 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Thus, a prosecutor must function within boundaries while zealously seeking justice. *Id. A prosecutor gravely violates a defendant's Washington State Constitution article I, section 22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial stereotypes or racial bias to achieve convictions*. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551, 556 (2011)(emphasis added).

4. **Are you aware that if a client enters a speedy trial waiver in one county, then those charges are refiled in another county, the waiver does not transfer to the second county? *State v. Hamilton*, 121 Wn. App. 633, 90 P.3d 69 (2004).**
    a. This means when you do a global resolution between counties where one county dismisses and the other county files that charge with their charge to resolve, the waiver of speedy trial on that count does not go with it. Whatever speedy remains transfers.
    b. So, if the prosecutor in county 1 dismisses prior to county 2 refiling, check SOL and speedy in county 2. They may not be able to refile.
    c. This requires maintaining contact for this communication with the defense attorney in county 2 for the heads up on remaining speedy; or if you are the county 2 attorney, you have a duty to check for SOL and speedy violations in county 2 for your client.

5. **Did you know…a misdemeanor arrest warrant authorizes police to enter a residence to execute the arrest warrant.**

    Under both federal and Washington State law a felony arrest warrant gives the police the authority to enter the house of the accused for a brief period of time. *State v. Hatchie*, 161 Wn.2d 390, 395–96, 166 P.3d 698, 702 (2007); see also *Payton v. New York,* 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

6. **How many of you have seen this gesture inside of a courtroom?**  **Are you aware that it "typically" means the person doing this gesture is either nervous, anxious, or upset?**
    a. Are we watching the body language of our opposing party attorney, their witnesses, our witnesses?
        i. Unless we are working on a time limit, SLOW DOWN during trials and hearings. Assess witnesses and the jury to see if you need a strategy change. This is the same strategy when deciding whether or not to object. If it doesn't hurt your case, you may not want to object. However, if you know it flummoxes the DPA and will cause them to stumble presenting the case, and the objection is sustainable, you may want to object regardless. Immature DPA's who take things personally, in my experience, are the same ones who charge high and refuse all reasonable negotiations. These are the ones I was in trial with most often.
    b. Are we supporting our witnesses so they are not nervous when testifying?

        Remember the first day you walked into a courtroom and had to talk. Our clients and our witnesses are not comfortable testifying in court, being the center of attention. When we prep them, don't just prep them with

what we will ask and what to expect. Prep them with stress relievers too.

c. The National Center on Domestic Violence, Trauma, and Mental Health have identified emotions in children related to various finger holding. I recognize the thumb holding one in several courtrooms and attorneys who are anxious. I have used it too! 😊
    i. If a person holds these fingers, with either hand (same or opposite), it has this attached emotion:
        1. Pinky: Feeling bad
        2. Ring finger: Worried
        3. Middle finger: Mad
        4. Index finger: scared
        5. Thumb: Anxious, nervous or upset

7. Are you aware that judges are limited in what things they can take judicial notice of?

ER 201:

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. *A judicially noticed fact must be one not subject to reasonable dispute* in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

- This means judges can take notice of things under 1 or 2 but not if subject to reasonable dispute.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

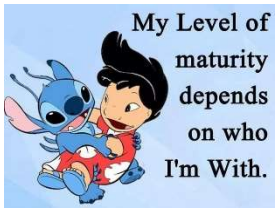
Judges cannot take judicial notice of the nature of PTSD and its similarity to trauma suffered by witnesses in the present case. State v. Way, 88 Wn. App. 830, 946 P.2d 1209 (1997); § 201.03 Illustrative cases – Inadmissible, 5 Wash. Prac., Evidence Law and Practice § 201.03, pg. 140 ER 201:3(g), (6th ed.).

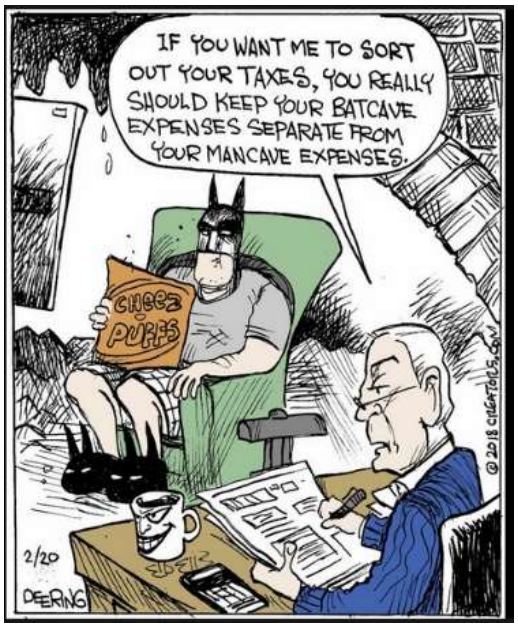
Judges cannot take judicial notice of findings or any recollection of what was said in earlier trial/hearings over which the judge presided. *Vandercook v. Reece*, 120 Wn. App. 647, 86 P.3d 206 (2004); § 201.03 Illustrative cases – Inadmissible, 5 Wash. Prac., Evidence Law and Practice § 201.03, pg. 140 ER 201:3(h), (6th ed.)

IMPORTANTLY, Judicial notice is distinguished from a judge's personal knowledge. "A judge may not dispense with the requirement of formal proof simply because s/he already knows something is 'true'." A judge who does so becomes a witness in a case effectively, in violation of Rule 605. § 201.04 Personal knowledge of judge distinguished, 5 Wash. Prac., Evidence Law and Practice § 201.04, pgs. 140-141 (6th ed.).

ALSO IMPORTANT TO KNOW: Judicial notice can be requested or taken on the appellate court's own initiative on appeal. *See e.g. State v. Balzar*, 91 Wn. App. 44, 954 P.2d 931 (1998).

8. Do you not frequently wonder what happens in my world over a period of 2 weeks to arrive at such random, yet useful tidbits of information??





I love this last one, the original poster is a civil rights lawyer! I am sure it is coincidence I found it in the same timeline as working on ER 201. 😐

Have a fantastic and beautiful weekend all!

Sheri