"SHERI'S SIDEBAR" Authorities, Tips, Random Tidbits and "WHO KNEW?" Edition #25
2/23/2024

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

The theme of today, of the past two weeks is Righteous Indignation…Do we work in a Justice System or only a Legal System? Does it depend only upon the actors in position around us? Or does our position, behavior, and actions force, create, and encourage change?

I was asked this recently by a few people. These are some of the rules I use to temper my charming personality and rapid fire cutting wit when I am in the courtroom.

Dalton's Three Roadhouse Rules:

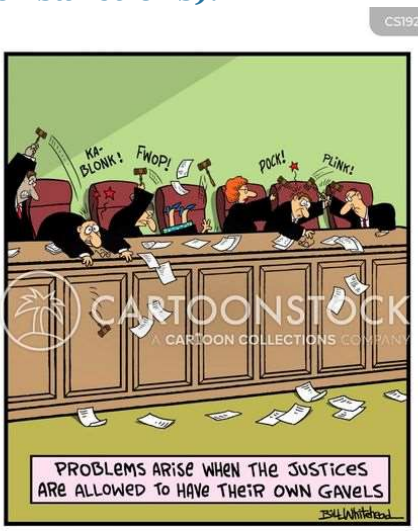
1) **Never underestimate your opponent; expect the unexpected.**
   a. So, when the deputy prosecutor, who is "*held to a higher standard"* shows up to trial in … what appears to be this year's top designs from "STRUT & TEASE: The Bare Essentials Runway Extravaganza," straight from the Las Vegas Brothel tour… CLEAR 6" ACRYLIC HEELS and all … still do not underestimate that somewhere between the 3" of fabric and 6" of acrylic there may be a strategy or piece of evidence that will bite you in the butt if you are busy rolling your eyes and snickering.



(Photo Credits from the US Sun, this is alleged to be a real attorney, who dresses this way for court, and sees

nothing wrong with it.). https://www.the-sun.com/lifestyle/6591403/bad-lawyer-dress-short-skirt/

2) **Take it outside, never start it inside (unless it's absolutely necessary, i.e. ask for sanctions).**



- For our purposes, it means, don't make it personal.
- Don't start something in the box that is personal, take that outside – don't let the personal attacks of an immature or unethical deputy prosecutor (or prosecutor in a robe on the bench) negatively affect the way you represent your client.
- Remember, when you are in the box, you are there defending the client, not yourself, unless absolutely necessary.
- After court, if the defense panel and the prosecutor's office want to play a good old game of Red Rover, have at it. Consent and waivers baby, consent and waivers!

3) **Be nice.**
   a. **As defense attorneys, we have to be resilient, be tough but appear gentile and unfazed – just like we ask our clients to**

appear to the jury. Remember you are here to do a job, for your client, don't take it personally, it's the case.

i. The jury judges us too.
ii. We all know the Judge also judges us, and not fairly.
iii. If a Judge is particularly fair, defense counsel walks in with maybe a 60/40 bias, with the lean favoring the State.
iv. Anyone who does not believe this is true has not changed sides.
    1. It has happened to every attorney I know who has changed sides, regardless of which side they changed to, and even when they have changed and then changed back; the State always has favor, even when the law is unambiguously supporting defense counsel's argument.

4) If the State is huffing and puffing, slinging spit, yelling, pounding the table and stomping, BE NICE.
    a. Don't interrupt, except to object when needed.
    b. Don't argue with the State, let them rant.
    c. Then when it is your turn and the State interrupts, you can say, Your Honor, I let them speak without interrupting, I would like to have the same courtesy.
        i. Remember, the rules of courtesy in court obligate you to speak to, and to only address the Court, not opposing counsel.
        ii. The Judge will respect you for this.
        iii. The Jury will also notice and respect you for this.
        iv. Respect earned by the jury is mitigation earned for your client.
        v. It shouldn't be, but human nature dictates that it is.
        vi. Similarly, when you allow the State to make an ass of him/herself, that goes against the State and how the jury feels about their evidence and case.

"Certainly you're entitled to justice, if you can show that you deserve it."

"A word to the wise, counselor: Anymore of these tiresome displays of ethics, and I'll have you jailed for contempt."

1) **Are you aware that a client's Constitutional Right to Confrontation is lost if not raised/objected and preserved at or prior to trial?**

- Generally, an error can be raised for the first time on appeal if it is a manifest error involving a constitutional right. *See e.g. State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), RAP 2.5(a)(3).

- However, related to the Right to Confrontation, the United States Supreme Court in *Melendez–Diaz* and *Bullcoming* made clear that the confrontation right is lost if it is not timely asserted at or before trial. *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *Bullcoming v. New Mexico, ––– U.S. ––––,* 131 S.Ct. 2705, 2709, 180 L.Ed.2d 610 (2011),

- "[W]hen the United States Supreme Court 'has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.' *Marmet Health Care Ctr., Inc. v. Brown,* ––– U.S. ––––, 132 S.Ct. 1201, 1202, 182 L.Ed.2d 42 (2012)." *State v. O'Cain*, 169 Wn. App. 228, 247–48, 279 P.3d 926, 935–36 (2012)

2) **When is someone going to challenge the rule that juries can overhear, or the State can improperly admit into evidence any inadmissible testimony or photo they want, *as long as the judge tells the jury to disregard it because "it is presumed jurors follow these instructions"*?**

   a. There is scientific proof humans do not follow those instructions, even if they might follow the instruction not to share the information with the other jurors, if the inadmissible evidence was not received during court.

   b. Who even came up with the theory that any person in the entire human species could follow that instruction?

It is but a legal fiction of some person's imagination that any human could! If anyone is ready to fight this fight, there is science now, and there are legal articles, as well as research. See e.g. Linda J. Demaine, In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence, 16 Geo. Mason L. Rev. 99, 102–03 (2008).

"Most people think they just appear out of thin air! But the truth is, there's a great deal of very hard work involved!"

"The Court finds itself on the horns of a dilemma. On the one hand, wiretap evidence is inadmissible, and on the other hand I'm dying to hear it."

"THE JURY IS INSTRUCTED TO PRETEND THEY DIDN'T HEAR THAT."

3) What about this one, where a juror can come forward, tell the world that she was bullied during deliberations into stating a verdict that was not her own, into lying during the polling into stating a verdict she did not believe was appropriate, and that she did not agree to the guilty verdict but as coerced to say otherwise – yet that is not grounds for a new trial because "assertions were based on juror's mental processes during deliberations and therefore, were inhered in jury's verdict."

State v. Reynoldson, 168 Wn. App. 543, 277 P.3d 700 (Div. 2 2012)).

4) Are you aware which test applies to a motion to join offenses, which test applies to a motion to join defendants and which test applies to a motion to sever? Why is it important? Because if the State argues the wrong test, you have to tell the court, explain the correct test and beat the correct elements.

Joinder rule is CrR 4.3 (a) OFFENSES (b) DEFENDANTS

State v. Martinez, 1011245(Consolidated w/101279-9) (Jan. 18, 2024)

- *State v. Moses* is the relevant test for joinder of defendants. *State v. Moses*, 193 Wn. App. 341, 360, 372 P.3d 147, *review denied*, 186 Wn.2d 1007 (2016)
    - Instead, the court considered the *Moses* factors for determining specific prejudice when multiple defendants request severance. That case clarified that specific prejudice resulting from joinder of a defendant's trial with a codefendant may be demonstrated by showing:
      "(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive;
      (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt;

(3) a co-defendant's statement inculpating the moving defendant;
(4) or gross disparity in the weight of the evidence against the defendants."

- *Moses*, 193 Wn. App. at 360 (internal quotation marks omitted) (quoting *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995)).
- *Moses was considering severance so should be read in conjunction with requirements for joinder in CrR 4.3b*

- *State v. Bluford* is the relevant test for joinder of offenses, but not for joinder of defendants. *State v. Bluford*, 188 Wn.2d 298, 305, 393 P.3d 1219 (2017).
  - [the *Bluford*] factors relate to the risk of prejudice where an individual defendant offers different defenses to different counts, detracting from the credibility of the defenses, or where multiple charges against an individual defendant invite the jury to cumulate evidence or infer a criminal disposition. *They are not necessarily the same risks of prejudice likely to be present in a joinder-of-defendants situation*.

5. How often do our higher courts find Outrageous Government Misconduct? Not often enough, or not as often as it occurs, in my opinion. I was surprised to actually come across some cases the other day while researching other issues.

Oh, I love it, first one is from my hometown; and Pam Loginsky was still a Deputy Prosecutor in Port Orchard appearing on behalf of or with the County Prosecutor on the appeal. Defense counsel on this **first ever WA Case where Defense Won the Outrageous Government Misconduct Argument** was **none other than our beloved John Ziegler**, along with also well-known Defense Counsel Bill McCool.

...outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431–32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). For the police conduct to violate due process, the conduct must shock the universal sense of fairness. *Id.* at 432, 93 S.Ct. at 1643. Whether the State has engaged in outrageous conduct is a matter of law, not a question for the jury. *United States v. Dudden,* 65 F.3d

1461, 1466–67 (9th Cir.1995). *See State v. Hohensee,* 650 S.W.2d 268, 272 (Mo.App.1982) (citing federal cases).

State v. Lively, 130 Wn.2d 1, 19, 921 P.2d 1035, 1044 (1996).

Following *Russell [1973 US Supreme Court Case],* nearly every federal circuit court and many state courts, including Washington, have recognized that the State's **1045 conduct may be so inappropriate as to violate due process. *See United States v. Harris,* 997 F.2d 812, 815 (10th Cir.1993); *Commonwealth v. Nelson,* 446 Pa.Super. 240, 666 A.2d 714, 719 (1995); *State v. Shannon,* 892 S.W.2d 761, 765 (Mo.App.1995). However, as noted by both parties, **no Washington decision has yet held that a defendant's due process rights have been so violated.**

State v. Lively, 130 Wn. 2d 1, 19, 921 P.2d 1035, 1044–45 (1996)

In determining whether police conduct violates due process, this court has held that the conduct must be so shocking that it violates fundamental fairness. *State v. Myers,* 102 Wash.2d 548, 551, 689 P.2d 38 (1984); *State v. Smith,* 93 *20 Wash.2d 329, 351, 610 P.2d 869, *cert. denied,* 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). A due process claim based on outrageous conduct requires more than a mere demonstration of flagrant police conduct. *Myers,* 102 Wash.2d at 551, 689 P.2d 38. Public policy allows for some deceitful conduct and violation of criminal laws by the police in order to detect and eliminate criminal activity. *State v. Emerson,* 10 Wash.App. 235, 242, 517 P.2d 245 (1973). Dismissal based on outrageous conduct is reserved for only the most egregious circumstances. " **'It is not to be invoked each time the government acts deceptively[.]' "** *United States v. Sneed,* 34 F.3d 1570, 1577 (10th Cir.1994) (quoting *United States v. Mosley,* 965 F.2d 906, 910 (10th Cir.1992)); *see also State v. Pleasant,* 38 Wash.App. 78, 83, 684 P.2d 761, *review denied,* 103 Wash.2d 1006, 690 P.2d 1174 (1984).

State v. Lively, 130 Wash. 2d 1, 19–20, 921 P.2d 1035, 1045 (1996)

THERE ARE MANY VARATIONS OF STANDARDS FOR WHICH OUTRAGEOUS GOVERNMENT MISCONDUCT CRITERIA APPLIES ACROSS THE NATION

We agree with those courts which hold that in reviewing a defense of outrageous government conduct, the court should evaluate the conduct based on the "totality of the circumstances." *United States v. Tobias,* 662 F.2d 381, 387 (1981), *cert. denied,* 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982); *State v. Hohensee,* 650 S.W.2d 268 (Mo.App.1982). **Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind "proper law enforcement objectives—the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness."** *People v. Isaacson,* 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (N.Y.1978); *2243 *Bogart,* 783 F.2d at 1438. **The government conduct may be so extensive that even a**

predisposed defendant may not be prosecuted based on "the ground of deprivation of due process." *Hohensee,* 650 S.W.2d at 271 (quoting *United States v. Bagnariol,* 665 F.2d 877 (9th Cir.1981)).

State v. Lively, 130 Wn.2d 1, 21–2243, 921 P.2d 1035, 1046 (1996)

In evaluating whether the State's conduct violated due process, **we focus on the State's behavior and not the Defendant's predisposition**. *United States v. Luttrell,* 889 F.2d 806, 811 (9th Cir.1989). There are **several factors which courts consider** when determining whether police conduct offends due process: whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, (*Harris,* 997 F.2d at 816); whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, (*Isaacson,* 406 N.Y.S.2d at 719–20, 378 N.E.2d at 83; *Shannon,* 892 S.W.2d at 765); whether the government controls the criminal activity or simply allows for the criminal activity to occur, (*United States v. Corcione,* 592 F.2d 111, 115 (2d Cir.), *cert. denied,* 440 U.S. 975, 99 S.Ct. 1545, 59 L.Ed.2d 794 *and* 440 U.S. 985, 99 S.Ct. 1801, 60 L.Ed.2d 248 (1979)); whether the police motive was to prevent crime or protect the public (*Isaacson,* 406 N.Y.S.2d at 719–20, 378 N.E.2d at 83; *Shannon,* 892 S.W.2d at 765); and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice." *Isaacson,* 406 N.Y.S.2d at 719, 378 N.E.2d at 83; *United States v. Jensen,* 69 F.3d 906, 910–11 (8th Cir.1995), *cert. denied,* 517 U.S. 1169, 116 S.Ct. 1571, 134 L.Ed.2d 669 (1996).

First, we examine whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity. When dealing with drug-related crimes, courts recognize that it is particularly necessary to allow for the use of aggressive law enforcement mechanisms, such as using paid informants to infiltrate criminal organizations and enterprises or providing contraband or other necessary items to further the criminal activity. *United States v. Simpson,* 813 F.2d 1462 (9th Cir.), *cert. denied,* 484 U.S. 898, 108 S.Ct. 233, 98 L.Ed.2d 192 (1987); *Harris,* 997 F.2d at 818.

State v. Lively, 130 Wd.2d 1, 2243, 921 P.2d 1035, 1046 (1996)

To condone the police conduct in this case is contrary to public policy and to basic principles of human decency. The Defendant had just turned 21 and was raising two small children alone. She became addicted to cocaine and alcohol at age fourteen. Although she had stopped using drugs at fifteen, when she found she was pregnant, she continued to drink heavily. After attempting alcohol withdrawal on her own, she admitted herself into a detox program and followed up with attendance at AA/NA meetings. She relapsed, however, and thereafter entered and successfully completed a 28–day inpatient program. Again, she sought the support of AA/NA meetings. She was emotionally upset, however, and attempted suicide. Within weeks of her suicide attempt she met the police informant, Desai, at an AA/NA meeting. Despite her lack of criminal history or any information connecting the Defendant to criminal conduct, she was targeted by the police

informant. A few weeks later she was living with the informant, who took advantage of her addiction and extreme emotional reliance to involve her in police sponsored drug activity.

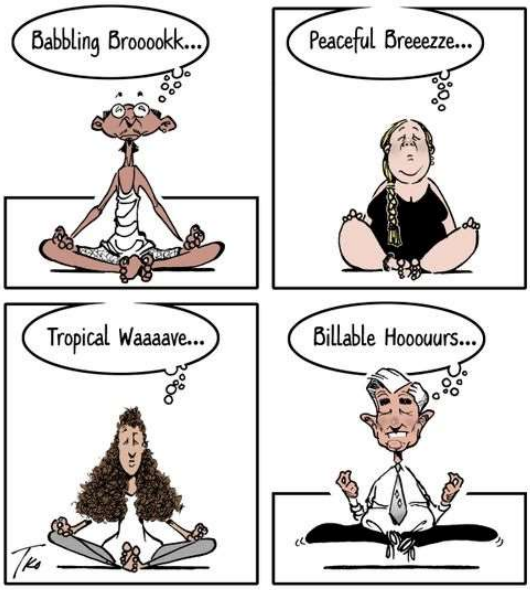
State v. Lively, 130 Wd.2d 1, 27, 921 P.2d 1035, 1048 (1996)

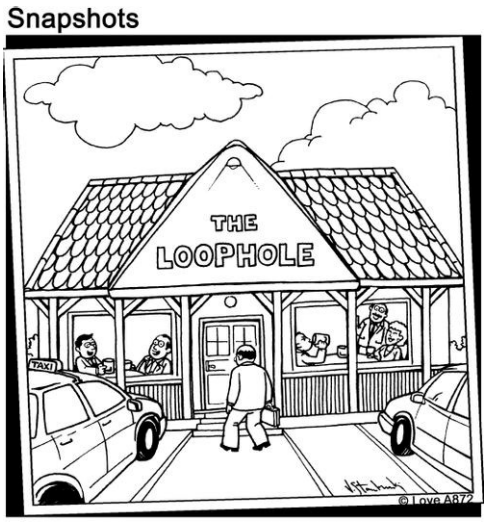
GREAT WORK ZIEGGIE! This case has been cited 553 times, primarily for entrapment but also for outrageous government misconduct.

"We love your results. We're just a teeny bit concerned about your methods."

Have a great weekend everyone. Thank you for being indignant with me for a while. Try to unwind this weekend… Go someplace you love to hangout…

"I always have a hard-time unwinding when I'm trying a big case."





A popular hangout for attorneys.

Sheri

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