SHERI'S SIDEBAR EDITION #26 3/8/2024
IMPORTANT COUNTERMAN v. COLORADO INFORMATION #5

Happy SATURDAY everyone. I was traveling yesterday afternoon so this week's edition was actually intended to be sent on Saturday. I can't even blame technology – only the lack of a desktop running back at the office which could send things in my absence

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

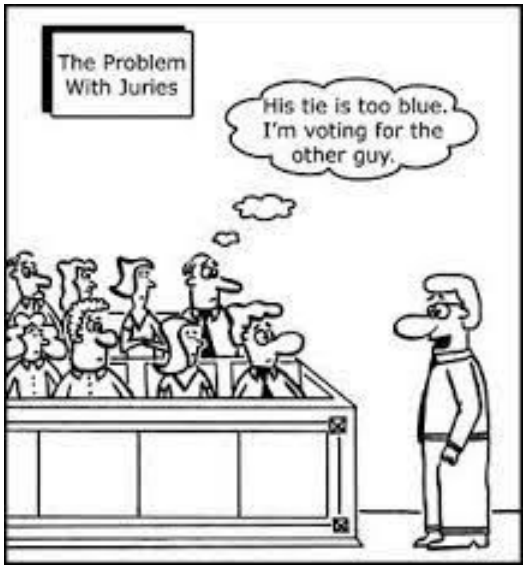
Today's theme is perspective and perception.

Perspective is defined as: a particular attitude toward or way of regarding something; a point of view. Is perspective objective, neutral, or subjective? Is the term itself viewed positively or negatively? Is there a legal simile? Bias perhaps? Doesn't the term bias always have a negative connotation? Isn't that why we add modifiers like implicit and subconscious to the term, meaning, you have it but maybe it isn't your fault?

As a lawyer, it's essential to understand the power of perception, the weight of judgment, and the significance of words and persuasion in advocating for your client.

Who has seen this occur? What about when the Court treats an out of county attorney differently *only because* they are out of county?

Have we all not seen this perspective happen? I have seen it be 100% *inaccurate* and the older guy in a sloppy suit wipe the floor with the younger, slick attorney in the $1,000 Italian suit. It happened to be that attorney's schtick, to catch attorneys off
guard.



What about this one? Anyone ever talk to the jury after trial and have them *crush your faith in the legal system* by saying something like this?

1. **Are you aware of the only time (I can think of currently) when perception or perspective, including a bias, matters the most but about which you as an attorney can do nothing, unless it is outright admitted AS BIAS?**

The Court cannot consider matters which "inhere in the jury verdict." (inhere means exist essentially or permanently within).

- Jurors can come out after the verdict and state the verdict was made because the jury didn't understand or follow the jury instructions, the law, admit they made a verdict based on a witness they didn't like, based on the witness being dressed like a slob, or acting like a jerk. Unless the juror who had an actual bias admits BIAS, or the defendant can prove prejudice, (or can prove outside evidence or other factors like that were involved), *the higher courts have repeatedly held the trial court cannot consider any facts which relate to any juror's "motive, intent, belief, or the effects of the facts on the juror's mental process" to provide a new trial*.

See e.g.

- In considering juror misconduct, *the court cannot consider matters which inhere in the verdict, including facts which relate to a juror's motive, intent, belief, or the effects of facts on the jurors' mental process*. § 4610. Jury deliberations, 13 Wash. Prac., Criminal Practice & Procedure § 4610 (3d ed.). ***State v. Whitaker***, 6 Wn.App.2d 1, 429 P.3d 512 (Div. 1 2018), *review granted in part*, 193 Wn.2d 1012, 443 P.3d 800 (2019)(held juror stating after medical examiner testimony, "I hope they fry the fucking bastard" inheres in the verdict, defendant could not show prejudice, not abuse of discretion to deny new trial).

- *State v. Marks*, 90 Wn. App. 980, 955 P.2d 406 (1998) (any misunderstanding of the jury in applying missing witness instruction inhered in the verdict).

- *State v. Hill*, 19 Wn. App. 2d 333, 495 P.3d 282 (Div. 2 2021), *review denied*, 199 Wn.2d 1011, 508 P.3d 675 (2022) (during deadlocked deliberations on one of the counts, *a juror advised the court that the juror was being threatened by another juror who said that karma should come back at the juror and that someone should harm the juror in the same manner as the crimes committed*; *no juror misconduct proven by defendant*; *mere expressions of frustration, temper, empty threats*, **[haven't we had clients charged for crimes for less than this?]** and strong conviction against contrary views of another juror *are insufficient to establish a claim of juror misconduct*; heated conduct inhered to the verdict; no abuse of discretion in denying request for mistrial).

  The facts of the case include:
  CASE perspective #1:
  On August 31, 2019, Hill walked into Urban Bud dispensary. Hill had consumed several alcoholic drinks that afternoon and evening. Upon entering

Urban Bud, Hill stopped just inside the door at a podium that acted as a "security check-in station." 3 Report of Proceedings (RP) at 214. Hill began to write on a clipboard on the podium, erroneously believing it was a sign-in sheet. Alvaro Salaverry, in his position as security guard, was in charge of checking customer identification before allowing them in the store. Salaverry was not at the station when Hill entered, but returned and asked Hill to leave; Hill refused and eventually attempted to walk past Salaverry into the store. Salaverry grabbed Hill by his back pocket, pulling him backward, and causing him to fall. They struggled, and at one point Salaverry attempted to drag Hill out of the front door. Eventually, Salaverry restrained Hill by kneeling on his back or shoulder. *State v. Hill*, 19 Wn. App. 2d 333, 336, 495 P.3d 282, 284–85 (2021).

Other Description #2, quickly drafted within a few minutes:

The client had been drinking and went into bud dispensary. When he arrived at the door, there was no security guard to check his identification, which he was aware is a legal requirement to enter the bud dispensary. However, he saw a clipboard at the doorway and mistakenly believed the clipboard at the unmanned security checkpoint was a sign in sheet. So, in order to follow the law to be identified prior to entry, he began writing on the paper on the clipboard to sign in. The security guard who had been off on a "frolic and detour" of his required duty at the door where he was to be checking ID's, eventually returned while my client was attempting to sign himself in. Rather than explain to my client his error, the security guard instantly demanded my

client leave. There is no signage at the door about not being allowed in the store if you have had any alcoholic beverages, and it is not illegal to be in any store after only having consumed alcohol. In fact it is unclear whether the client was asked to leave for mistakenly signing the security man's clipboard or for having the odor of alcohol on his breath. The client refused to leave, having done nothing wrong. He attempted to walk past the security guard, who immediately physically grabbed the client by the back pocket, roughly pulled him backward hard enough that it took my client forcefully to the ground. They struggled, with the security guard trying to physcially drag the client out the door, while also on top of him. Ultimately, the security guard improperly restrained my client by kneeling with his full weight on my client's back or shoulder pinning his chest to the ground.

- **Additional facts related to jury issue:** Then the manager heard the commotion, more occurred and the intoxicated and now furious client engaged in some not as wise behavior. Had some common courtesy or proper training of security been in place, the entire thing could have been prevented, in my perspective. The more important facts include there was another struggle which included security performing what must have been a poorly attempted chokehold, a bite on a forearm resulting in security throwing the client to the ground again, which in the drafting opinion is described as "releasing" the client but the next statement indicates the client got up off the floor, and some kicking which grazed security's nose.

WHY ARE THESE FACTS IMPORTANT?

- 1) One juror made the statement that someone should harm the other juror in the same manner as what occurred in the case. Those facts of injury occurred. Charges included MM3, Burglary and, you guessed it: Felony Harassment.
  - Yet, the court held this was insufficient to find juror misconduct. Ok, we have to consider true threat, if it was a criminal charge. However, juror misconduct is not a criminal

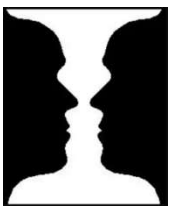
charge – it should be more like hostile environment, shouldn't it? Jurors are to engage in sharing their opinions and considering the evidence, not making any kinds of personal attacks against each other!

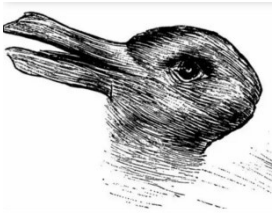
- 2) Perception and perspective.
  - Look at the differences in the language used related to the facts described and the picture painted, or emotions raised. See how you can be effective or more persuasive in your arguments; wording of your questions, whether direct or cross exam; phrasing in motions; persuasive story telling in opening; and closing. That is a training for another day.

See e.g**. Kneeling on the back of a defendant *can be, in certain cirumstances*, police brutality**. In the case of *Cortesluna v. Leon*, 979 F.3d 645 (9th Cir. 2020), a panel of judges on the Ninth Circuit recently held that the force used by a police officer was *excessive when* the officer kneeled on the back of a *prone, non-resisting* criminal suspect *so hard that the officer caused injury*.

- It looks like required elements for excessive force/police brutality include: 1) officer kneeling on the back; 2) prone and NON-RESISTING suspect; and 3) injury caused by the officer kneeling on the suspect's back. There are probably cases you can use this to argue in WA. jurisdictions. If you do, absolutely do not let the State phrase the narrative with a police report like #1 when you can set the narrative to the court or jury with something that takes more than a few minutes significantly better than #2 above!!

2. **How many of us when you look at those two-dimensional wack-a-doodle optical illusion black and white pictures can see both of the images?**





Do you see a vase or the faces? And what does that tell a psychologist about your perspective or personality? What if you can see both?

The determining fact is actually which you see first, although some people cannot see both images in every optical illusion image on these tests. On this particular test, known as Rubin's Vase, if you see the face first, you notice even the smallest detail in an object. Your vision focuses on the entire object instead of what lies in the bigger picture. People who see the face first are said to be good decision makers.

Those who see the vase first are said to be quick decision makers. They see the bigger picture and rest their decision based on that without going into other details.

Both can be good for an attorney at different times in a case, depending on what you are doing at that particular moment. It is about perspective.

The rabbit or the duck? Research shows that women and older participants tend to see the rabbit first. However, the majority of people see the duck, and a large portion of people can switch between both animals. People who can switch and see both the fastest, on average were able to find an average of 3 more uses for everyday objects. Odd right? Who knew. There you go, another random tidbit.

3. **Are you aware that *BRADY* is not your only impeachment method or manner of attacking credibility for officers? The perspective that Brady applies to impeachment sometimes throws both parties. See if you can use this information under Brady or as a public records request. Either way, it is impeachment evidence that you should be seeking and using in cases if any officer on any of your client's cases attended this training!**

    a. **Alternatively, are you aware that under *Brady* the State has to provide you impeachment evidence?**

- Many thanks to the Amazing Suzanne Lee Elliot for forwarding the articles and resources to WDA and Sarah H to sending them to my attention about the NJ-WA "Street Cop" training Information.
- This training is still occurring, despite the investigation; despite cases being dismissed; despite some officers being terminated from the program and their positions with the police force for their involvement with this program and actions therein.

➢ You can find the full report on the WDA website here: https://defensenet.org/?p=18150

Per an article summarizing the report, these are some of the things noted during the investigation of just one "Street Cop" Training event

which occurred in October 2021 in Atlantic City **where Washington Police Officers are documented to have attended.**

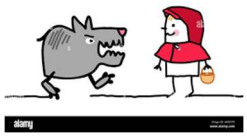
- ✓ "The teachings at the conference were shameful and indefensible," Cherry Hill Police Chief Robert Kempf told the New Jersey Monitor.

- ✓ Warren Township Lt. Rob Ferreiro taught strategies to detain motorists longer than constitutionally allowed, made lewd comments about women, and talked about giving officers and their families favorable treatment, according to the report.

- ✓ Robbinsville Sgt. Scott Kivet illustrated the car stop of a Black motorist with a picture of a monkey, made lewd and derogatory comments about women, and encouraged attendees to focus on finding drugs in cars rather than writing traffic tickets, according to Walsh's report.

See if you catch this one… First the report shows per the investigation what the *Prosecutor Presenting said and did* during the training. THEN what the Office Spokeswoman tells the reporter what the Prosecutor *meant*, as if *WE are all*…

Shane Morgan is a lieutenant in the Camden County Prosecutor's Office who was asked to **present at the 2021 conference** as a last-minute substitute for a presenter who fell ill, office spokeswoman Donna Weaver said. **In that training on "Flipping Informants," he used an image "demeaning to transgender and non-binary people" and called his jurisdiction "the hood and the woods,"** according to Walsh's report. **"He is deeply disturbed by the fact that his comments and actions [*WERE INEVSTIGATED & HE WAS CAUGHT MAKING THOSE PREMEDITATED, THOUGHT OUT & REHEARSED* IMPROPER STATEMENTS WHICH THE PUBLIC NOW KNOWS] have offended or demeaned anyone. *This clearly was not his intention*," Weaver said.** [TO GET CAUGHT]. "Unfortunately, ***his limited actions have been mischaracterized*** and grouped together with the outrageous and offensive actions of Street Cop as a whole."_

- For anyone unaware, Camden County is in New Jersey, where the primary minority population is African American, followed closely by Hispanics – according to the 2021 data, the two groups made up 88.3% of the population demographic.
- Gee, I wonder how Mr. Morgan meant "hood in the wood" then if the investigation just mischaracterized it?  ??

PLEASE SOMEONE, ONE ATTONEY IN EACH COUNTY - Do a public record request in your jurisdiction. OR DO A DISCOVERY MOTION OR MOTION TO COMPEL UNDER BRADY – THIS IS IMPEACHMENT EVIDENCE DISCOVERABLE UNDER BRADY!

Get all of the officer names for each agency: Sheriff, City Police, Reserve Officers, CO's if they went, Crossing Guards, Any Possible Law Enforcement related officer who may have attended this (Atlantic City October 2021) or any other "Street Cop" training event, get their names, agency, title/position level. Either share it on listserv or send a list of 1) City/County, 2) Names with 3) title/position, and 4) Agency, and to me and I will post it publicly on the website so everyone can share it to use for impeachment.

NOTE/TIP: They cannot say they don't have to provide this information because they would have to "create a document." They don't have to make a list if they don't want to. They have documentation of some kind for every officer because it is training, and the City/County paid for it; and/or there are time off slips; and/or there are County/City auditor documents for per diem etc. There are documents they can provide demonstrating each officer attended this specific training.

4. **Are you aware that a WPIC is not binding law? It is drafted by a committee. It can be and has more than once been deemed inaccurate - despite having the general approval of the Supreme Court!**

   Because the State often argues that it is binding law, and some courts believe it. It is not.

See e.g. *State v. Studd,* 137 Wn.2d 533, 545-546, 973 P.2d 1049, 1054–55 (1999), *as amended* (July 2, 1999)(WPIC 16.02 discussion was structurally inaccurate, leading to erroneous impression of the law to the jury).

The question shared by each of these six cases is whether a jury instruction that was clearly erroneous in its statement of self-defense law should alone be grounds for a new trial. The instruction complained of by *Studd, Cook, McLoyd, Bennett* and *Fields* is based on WPIC 16.02. In *LeFaber* we reversed a conviction due to the erroneous impression of self-defense law created by an instruction that we wrote was similar to, but "lacking the glaring structural difficulties of," WPIC 16.02. *LeFaber*, 128 Wn.2d at 902, 913 P.2d 369. Our holding was based upon the fact that "[a] jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." *LeFaber*, 128 Wn.2d at 900, 913 P.2d 369 (*citing State v. McCullum*, 98 Wn.2d 484, 487–88, 656 P.2d 1064 (1983); *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). **"The structure of WPIC 16.02 could mislead a jury because the imminent danger requirement is set off by a separate number and thus lacking connection to the reasonable belief qualifier."** *LeFaber*, 128 Wash.2d at 902, 913 P.2d 369 (*citing State v. LeFaber*, 77 Wn.App. 766, 771, 893 P.2d 1140 (1995*), rev'd on other grounds by*, 128 Wn.2d 896, 913 P.2d 369 (1996**)). We now make explicit what was implicit in that commentary: WPIC 16.02 is not the "manifestly clear instruction" that jurors require**. *LeFaber*, 128 Wn.2d at 902, 913 P.2d 369 (*citing State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

You have the duty to be aware of the jury instructions. If you as defense counsel propose the incorrect jury instruction, you create invited error and cannot later complain on appeal the requested instruction was given – "regardless of the circumstances." That means, even if you requested the PATTERN WPIC.

PRACTICE TIP:

- **This is why strategically, I NEVER propose any jury instructions unless I specifically need to.**
- **The Court often tries to say "both parties provide jury instructions to the court."**

- **Only the State has a burden/duty to do so. The State is prosecuting your client. You have no duty to provide the court jury instructions except for affirmative defenses.**
- **If you don't provide jury instructions, you cannot invite error.**
- **I ALWAYS propose the definition of knowledge because the WPIC is wrong. See below.**

"...we have also held that "[a] party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (quoting State v. Boyer, 91 Wash.2d 342, 345, 588 P.2d 1151 (1979)). Henderson also involved erroneous WPIC instructions proposed by a defendant and later complained of, and we held there that "even if error was committed, of whatever kind, it was at the defendant's invitation and he is therefore precluded from claiming on appeal that it is reversible error." Henderson, 114 Wn.2d at 870, 792 P.2d 514 (emphasis added). Henderson is directly on point. There can be no doubt that this is a strict rule, but we have rejected the opportunity to adopt a more flexible approach. See Henderson, 114 Wn.2d at 872, 792 P.2d 514 (dissent argues that "the doctrine should be applied prudently, with respect to the facts of each case," but acknowledges that "[t]his court's history of applying the doctrine of invited error with little analysis or discussion implies that the doctrine is strictly applied regardless of circumstances.") (Utter, J., dissenting) (citations omitted).

State v. Studd, 137 Wash. 2d 533, 546–47, 973 P.2d 1049, 1055 (1999), as amended (July 2, 1999)

NOTE: In the Henderson case defense proposed the WPIC instructions for Burg 2, CT1 and CT 2 – All were WRONG and could not be appealed by the appellate attorney because the Trial Attorney proposed those jury instructions. If that case had other errors, that error would be part of an IAC claim and potentially a malpractice claim as well. Additionally, we just do not want to do the wrong thing for our clients, especially if arguing the correct jury instructions could win an acquittal for our clients!

PRACTICE TIP:

- WE HAVE A DUTY TO KEEP UP WITH THE CASE LAW --- MAKE SURE IF THE WPIC IS INACCURATE YOU ARGUE FOR AN ACCURATE PRESENTATION OF THE LAW TO THE JURY
- If the court denies your proposed accurate jury instruction
  - make sure you get it filed, get the objection stated on the record – jury instructions are often

covered off the record – and get the objection preserved for appeal.

5. Did you know the Pattern Jury Instruction Committee has released a new WPIC for the definition of Threat post *Counterman v. Colorado*?

It is time to return to Counterman's case, though only a few remarks are necessary. Counterman, as described above, was prosecuted in accordance with an objective standard. See *supra*, at 2112 - 2113. **The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way**. For the reasons stated, that is a violation of the First Amendment.

Counterman v. Colorado, 600 U.S. 66, 82, 143 S. Ct. 2106, 2119, 216 L. Ed. 2d 775 (2023)(holding to not violate the First Amendment the definition of Threat must have both an objective reasonable person standard (or higher standard) for the person receiving the messages to interpret them as a true threat, and a reckless standard of mens rea for the speaker to be aware the statements could be understood as a true threat).

NEW WPIC 2.24 Threat—Definition
Threat means to communicate, directly or indirectly, the intent
[to cause bodily injury in the future to the person threatened or to any other person] [or]
[to cause physical damage to the property of a person other than the actor] [or]
[to subject the person threatened or any other person to physical confinement or restraint] [or]
[to accuse any person of a crime or cause criminal charges to be instituted against any person] [or]
[to expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule] [or]
[to reveal any information sought to be concealed by the person threatened] [or]
[to testify or provide information, or withhold testimony or information, with respect to another's legal claim or defense] [or]
[to take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding] [or]
[to bring about or continue a strike, boycott, or other similar collective action to obtain property that is not demanded or received for the benefit of the group which the actor purports to represent] [or]

[to do any [other] act that is intended to harm substantially the person threatened or another with respect to that person's health, safety, business, financial condition, or personal relationships].

To be a threat, a statement or act must occur in a context or under such circumstances **where a reasonable person, in the position of the speaker**, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in [jest or idle talk] [jest, idle talk, or political argument]. **In addition, the speaker must know of and disregard a substantial risk that the statement or act would be interpreted in that manner.**

ISSUES – PRACTICE TIPS – NOTES

- ***Counterman* said: It is ok to have an objective reasonable person standard for the person *receiving the messages* to find the messages threatening - if you also have a subjective *reckless* standard to safeguard for the First Amendment *if the speaker knew of and disregarded a substantial risk* that the messages would be viewed by the person receiving them (or a reasonable person) as a true threat.**

- ***THE NEW WPIC SAYS:***
  - **A person in the position *of the speaker* has the objective reasonable person standard to foresee that the statement s/he makes will be interpreted by someone else/the receiver as a true threat**
  - **AND at the same time, *the SAME PERSON in the position of the speaker also has the reckless standard* to know of and disregard a substantial risk that the statement would be interpreted that way.**

"I thought it was legal—I wrote it on a legal pad."

I can't....

Moving on.....The age-old question, so what now?

1. **DO NOT PLEAD GUILTY TO HARASSMENT CHARGES IF YOUR CLIENT IS A NON-CITIZEN, EVEN WITH LEGAL STATUS.**
    a. **Harassment is now an aggravated felony with serious Immigration Consequences**
    b. **Contact WDA IMMIGRATION or an Immigration Attorney for information!!**
    c. Here is the online adult intake form for WDA Immigration: https://defensenet.org/online-adult-immigration-intake-form/
    d. Because they need all of the information requested, here is where you can find a pdf form you can print and take with you to meetings so you have all of the questions to ask your client so you can fill out the form: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwim5MG-3-

CEAxW4FjQIHZanAzwQFnoECBIQAQ&url=https%3A%2F%2Fdefensenet.org%2Fwp-content%2Fuploads%2F2022%2F06%2FAdult-Intake-Form-REVISION.pdf&usg=AOvVaw0jSzz5kznwUk1b1LGvxpIH&opi=89978449

2. **Know your jurisdiction and use strategy! It is your duty to your client!**
    a. If in your jurisdiction every time you propose a jury instruction that is different than the WPIC, the court denies your proposed instruction despite all authority and citations…
        i. it is your duty to **take every case with a WPIC 2.24 Threat instruction to trial.**
    b. **Because this is what will happen:**
        i. The State will propose ALL the standard WPIC's for jury instructions.
        ii. You as defense counsel will NOT propose ANY jury instructions because now you know better if you have been doing this in the past; with the exception of:
            1. Any affirmative defense jury instructions; and
            2. Any jury instructions there are no WPICS for; and
            3. Any jury instructions where the WPICS are wrong.
                a. **In this case you know that WPIC 2.24 for Threat is wrong.**
                    i. You do have to propose an instruction because you are aware it is wrong.
                    ii. Otherwise, you can also be accused of lying in wait if you knew the instruction was wrong and did not propose the correct instruction.
                    iii. Also, you need to have the record to flag the issue for appeal.
                    iv. Unfortunately, not all of the appellate attorneys read Sheri's Sidebar, although some do – **Hi KRS and other Appellate Attorneys** 😊
                    v. I do not know which Appellate Attorneys are aware yet that this jury instruction is not correct.
                    vi. Remember because most jury instruction review is performed off the record, when you return to the record --**make sure your objection to WPIC 2.24, defense proposed jury instruction with citation to Counterman on the bottom is filed, denial of defense proposed jury instruction, and the preservation of the objection get on the record** if this is done off record, that will also put the red flag up to the Appellate Attorney that the First Amendment has been violated under *Counterman v. Colorado*, supra.

PROPOSED JURY INSTRUCTION WITH CITATION FOR THREAT
https://defensenet.org/?p=18181

** CLIENTS WITH PRIOR HARASSMENT CONVICTIONS ARE ELIGIBLE FOR RELIEF POST *COUNTERMAN* **

The Supreme Court has not received a case and there is no across the board relief yet.

This might be another *Blake* type of relief or it could be an individualized burden to seek post-conviction relief.

Due to offender scores AND due to the immigration and other legal status consequences of a conviction of harassment (with the definition of threat) is IMPORTANT TO SEEK RELIEF. How and When is the question.

If you have a harassment charge for a non-citizen client, it is very important that you speak to the WDA Immigration Team about the charge. Similarly, if you have questions about a prior harassment conviction for a non-citizen client, please also contact them.

3. Because the prior standard of threat for harassment in WA convicted clients at a lower mens rea level than *Counterman* says is Constitutionally required under the First Amendment, there are cases currently being argued in the higher courts to see if all convictions might be vacated and whether the time bar will apply.

a. Some attorneys are arguing the statute itself is unconstitutional.
    i. RCW 9A.46.020 has no mens rea for the speaker/actor.
    ii. Case law previously found the mens rea was negligence. *Counterman* requires the reckless standard.
    iii. Under RCW 10.73.100(2) if the statute a person was convicted under is unconstitutional, there is an exception to the time bar.
    iv. This would work like Blake cases – and would be vacates across the board as unconstitutional convictions, as well as provide for an attorney to be appointed to people, for notice and their cases to be gathered up rather than the entire burden being put on them.

b. I know there is at least one more type of argument as well.
    i. I am not sure which of the types of relief it would provide.
    ii. I believe one of these cases is being heard in May.

c. Other attorneys are arguing insufficiency of the evidence due to the higher standard not having been met.
    i. Although that also has an exception to the time bar under RCW 10.73.100(6) due to a material and substantial change in the law, the primary difference would be that the burden would be on each individual to figure out they have a prior harassment conviction, which is eligible, find an attorney that they won' t get for free because it is not a constitutional issue like Blake, file a motion for each conviction, and to see to withdraw the plea and go through the process that way – which means very little relief for indigent clients.

6. **Are you aware the knowledge WPIC is wrong? Yes, you are because you are smart and can read!**
    - I personally would not find that accurate since what goes back to the jury are the WRITTEN INSTRUCTIONS. I think the WA higher Courts are incorrect in so finding, and the issue needs taken to the US Supreme Court if need be. The WRITTEN JURY INSTRUCTIONS MUST PROVIDE THE FULL AND ACCURATE LAW WITHOUT HAVING TO RELY ON ORAL ARGUMENT.

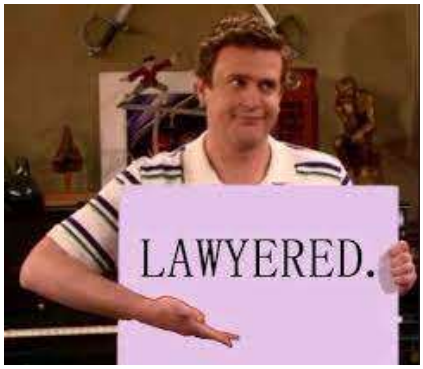
    a. **Proposed Jury Instruction for Knowledge found here: https://defensenet.org/?p=18178**

    Here is why it is wrong – I will post the *Knapstad* motion on the website that I got this except from and provide the link here as well. If you are wondering, I have won with this *Knapstad* a dismissal for a Rendering Criminal Assistance to Murder 1 and a dismissal for multiple counts for Violations of Felony DV NCO violations and Bail Jump.

    WITH THE REQUIREMENT OF ACTUAL, SUBJECTIVE, PERSONAL KNOWLEDGE the State must prove beyond a reasonable doubt by law – Unless your client made a statement to police or someone else that the State has as a witness, can get as a witness, or has statements that can come in under some exception to hearsay - you can file and win a *Knapstad*.

    BUT SEE - THERE ARE SPECIAL RULES ABOUT HEARSAY IN *KNAPSTAD* TOO. Be smart with strategy.
    If there are unknown, unnamed witnesses, hearsay is not allowed in *Knapstad*, the Court cannot consider it – did you know that? However, if the State can get those witnesses, do not file the *Knapstad* because it is dismissal without prejudice. You will broadcast some strategy, tell the State who they are missing and strengthen their case. Only if there is no way for the State to get what they are missing should you file it. In my case, my client didn't talk. I have to say it was probably only the first or second out of THOUSANDS who did not say a single word to the police or anyone else. Nothing could be used against him.

Practice Tip: This is one of those cases where it pays to find unpublished case law to match facts of your case or to illustrate how the higher courts rule in ways that the Court in your jurisdiction would never believe. I especially like noting the same division or same county if I am pulling an educational brief, or let's face it if I am poking the prosecution for doing the same crap 20 years later. One time I got to cite something like 3-5 cases from the same Division, same County, Same DPA.



<u>*Knapstad* & hearsay:</u>

The state's ability to prove the prima facie case is not dependent upon the facts asserted to the court, but only upon those facts that would be admissible at trial. *Id*., at 503, *citing Marquis* at 105. "In evaluating a *Knapstad* motion*, a trial court cannot treat hearsay as if it were substantive evidence* in making a prima facie case determination." *Id*. (emphasis added). Any statements or facts that the trial court determines are not admissible must be excluded from consideration in making the determination on whether or not the state can produce evidence sufficient to establish a prima facie case. *Id*., at 503-04, ER 104, CR 56(e). The distinction in a *Knapstad* motion hearing is that the hearsay affidavit of the prosecutor (and defense attorney) can be reviewed by the court,

to determine which facts would be admissible at trial if testified to by the specific person reporting the fact to the state, and to determine if the state meets the burden of establishing the prima facie case of each essential element of the crimes as charged in the information using only the evidence deemed admissible. *Id*., at 504. Statements of a third party, reported to the state by yet another party, are hearsay, are not admissible, and would be excluded by the court from consideration in the determination of the prima facie case. *Id*., at 503.

If you have a Rendering Criminal Assistance case, you may be able to file a Knapstad or win the case with the correct jury instruction. READ THE MOTION Elements 3 & 4 are particularly sticky for the State.

Knapstad & knowledge:

Although the RCW, and jury instruction language, describe the intent of knowledge in the "reasonable person" standard, which is an objective standard, the Supreme Court and Appellate Courts have made clear in case after case, ***the state must prove beyond a reasonable doubt that the defendant subjectively knew*** the person committed the crime ***and*** that ***the defendant subjectively knew*** that the person was being sought by law enforcement because they had committed such crime. See e.g. *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980); *State v. Ford*, 33 Wn. App. 788, 658 P.2d 36 (1983); *State v. Jones*, 13 Wn.App.2d 386, 463 P.3d 738 (Div 3 2020); *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

The Courts analyze the RCW and jury instructions objective language to mean that, there is a permissible presumption allowing, but not requiring, the jury to use the reasonable person standard to find constructive knowledge. *Jones*, at 404. That constructive knowledge can then be evidence to use towards a finding of subjective knowledge. *Id*. ***However, constructive knowledge alone is not sufficient to convict.*** *Id*. (emphasis added). In fact, it has been held prosecutor misconduct for the state to argue they only need to prove constructive knowledge, or that the objective standard of knowledge is sufficient proof of the mens rea element of knowledge. *Id*. "Despite the objective definition of "knowing" under RCW 9A.08.010(1)(ii), Washington case

law demands a subjective standard of knowledge when the State must prove the mens rea of "knowledge" in order to convict the accused of a crime. *State v. Allen*, 182 Wash.2d at 374 (2015); *State v. Shipp*, 93 Wash.2d 510, 515-16 (1980)." *Id*.

KNAPSTAD MOTION HERE:

https://defensenet.org/?p=18182

SEE ALSO DIV. 3 Just cited this Knowledge Standard in January 2024 *State v. Taylor*, 541 P.3d 1061, 1070 (Wash. Ct. App. 2024)**: BUT ONLY PARTIALLY CORRECTLY**

"Our Supreme Court's precedent requires the State to prove a subjective standard of "actual knowledge" whenever the State must prove the mens rea of knowledge. *Allen,* 182 Wn.2d at 374, 341 P.3d 268; *State v. Shipp*, 93 Wash.2d 510, 515-17, 610 P.2d 1322 (1980). Despite this, Washington courts allow the jury to be instructed, as was Mr. Taylor's jury, of a permissible presumption of actual knowledge by a finding of constructive knowledge. *State v. Jones,* 13 Wash. App. 2d 386, 404-05, 463 P.3d 738 (2020). *Despite this permissive presumption, the jury must still find subjective actual knowledge*. *Id.* at 405, 463 P.3d 738."

This is why the jury instruction alone is insufficient. The WPIC states the constructive knowledge which is defined by the WPIC as being permissively being presumed, is sufficient to convict. Although that is allowed to be instructed to the jury, additional instructions should be given; and the state cannot argue that is sufficient to convict. Because it is not sufficient to convict, it should not be the only instruction which goes to the deliberation room with the jurors since they don't get a transcript of the closing arguments!

I don't think the middle line is accurately analyzed. The Court allows constructive knowledge to be found via permissible presumption. Actual subjective knowledge cannot be presumed. Whichever clerk wrote this for Justice Pennell did not analyze correctly. In fact, the middle line contradicts that last line directly; and the middle line directly contradicts what *Allen* and *Jones* say. **Actual subjective knowledge cannot be presumed – it must be proven. Remember that an Appellate Court case does not overrule binding Supreme Court Precedent, which both *Jones* and *Allen* are; so cite to them properly.**

7. **Has anyone ever gone through what *we tend to deem the perfunctory job* of polling the jury only to have one or more jurors indicate to the question, "Is this your verdict?" ANSWER NO?**

Remember today's theme was perspective and perception.

I have. Once. The juror was being bullied in the jury room. Had I not polled the jury, we would not have known. The judge admonished the other jurors for coming out when the one juror, and then it turned out two jurors did not agree with the guilty verdict and sent them back to continue deliberating. Instead of a guilty verdict, it resulted in a hung jury a few hours later with more voting for acquittal than guilty by that time. Last I heard, the State still had not refiled.

Sometimes, it's easy to dismiss seemingly perfunctory tasks as unnecessary or trivial. While these tasks may appear routine, they serve a crucial purpose in safeguarding the interests of our clients. What may seem perfunctory at first glance could, in fact, be the crucial step that makes all the difference in their case. We must remember that we never want to find ourselves in a situation where a seemingly insignificant oversight proves costly for our client. Being thorough and diligent in every aspect of our representation is not just about meeting expectations; it's about ensuring the best possible outcome for our clients.

Ok now that I have been your with tidbits of

exceptionally useful things this time, please say ! And join me in !!

HAVE A HAPPY WEEKEND ALL!

Sheri

Sheri's Sidebar Editions are archived here: https://defensenet.org/resource-category/sheris-sidebar/