OREGON DEPARTMENT OF PUBLIC SAFETY STANDARDS AND TRAINING

LEGAL UPDATE – SEPT/OCT 2024

***State v. Carmello*, 335 Or App 373 (2024)**

- This case was a **child sexual abuse** trial during which the defendant objected to the prosecutor and investigators' **use of the words "disclose" and "disclosure"** when discussing the child victim's reports and allegations of sexual abuse. The defendant argued that those terms constituted impermissible vouching because they insinuated that the witness and/or prosecutor believed the report.
- As a reminder, **"vouching" testimony occurs when one witness comments on the credibility of another witness' statement**. This is strictly prohibited at trial and can be a basis to exclude a person's testimony altogether or even cause a mistrial or reversal. The vouching rule is the reason why the state and witnesses can no longer use the word "victim" during trial, and there have been many more appeals in recent years involving arguments that other terms should also be prohibited as vouching.
- In this case the court did not agree with defendant. Use of the word **"disclosure" in this trial was clearly meant to be synonymous with "report," "statement," and "allegation."** However, the court did note that it will evaluate this kind of appeal on a case-by-case basis, focusing on the context in which the word was used to determine if it was meant to be a vouching statement.

***State v. Silver,* 335 Or App 377 (2024)**

- This was a **Disorderly Conduct 2** case in which the defendant was creating a disturbance alongside a roadway, causing motorists to become distracted and slow down their path of travel, resulting in noticeable traffic buildup. Defendant appealed, arguing that the evidence was insufficient to prove Disorderly Conduct.

- The court agreed. For Disorderly Conduct 2, **the term "obstruct" means to physically impede traffic in some way**. This does not require a person to obstruct all lanes of traffic or bring traffic entirely to a halt, however, there must be SOME amount of physical obstruction in the roadway. In this case, the defendant caused vehicular traffic problems, but there was no evidence on the record that he ever entered the roadway when doing so. Conviction reversed.

***State v. Anner,* 335 Or App 388 (2024)**

- Defendant was convicted of **Attempted DCS Meth, PCS Meth, ID Theft, and FIPO**. On appeal, he challenged the sufficiency of the evidence for his Attempted DCS and PCS convictions.
- Facts: A police officer pulled over defendant for driving an unregistered vehicle, which he claimed belonged to his girlfriend. The officer noticed a blue drawstring bag behind the driver's seat with a Ziploc bag sticking out of the top. Defendant denied that the bag contained drugs. Defendant also lied to the officer about his name, after which the officer learned he had an outstanding warrant for his arrest. The officer arrested defendant. The blue **bag contained a Ziploc bag with 20.78 grams of methamphetamine, a Ziploc bag with 0.39 grams of cocaine, several other small, empty Ziploc bags, several checks, and a scale**. The arresting officer testified that this was indicative of DCS; based on his training and experience, a user amount of meth is between 0.2 to 0.5 grams.
- Defendant first claimed the state failed to prove possession – the court disagreed. Generally, it is correct that "mere proximity" cannot prove constructive possession. **Constructive possession** was proven in this case based on the totality of the facts: defendant was **the sole occupant in the vehicle, the blue bag was stashed behind his seat, and by denying there were drugs in the bag, he showed that he was aware of its contents.**
- Defendant also claimed that it was "plausible" he only possessed those items for personal use, so the Attempted DCS conviction was improper. The court again disagreed – the amount and variety of substances, plus their packaging and presence of small bags and a scale, is sufficient to show an intent to deliver. **NOTE: Under the recent change in law (HB 4002), this fact pattern could now constitute a *completed* DCS (under the "possession with intent" theory) rather than just an attempt.**

***State v. Wilson*, 335 Or App 401 (2024)**

- This was a **DUII case**. On appeal, the defendant challenged the admissibility of his refusal to take a breath test.
- Facts: Defendant was arrested for DUII. The arresting officer needed to determine whether to take defendant to the Cottage Grove jail, where he would take a breath test, or the Lane County Jail, where he would be taken if he refused. The officer pulled over and discussed the issue with defendant**, asking if he would be willing to take a breath test. Defendant said he would not**, and he was transported to the Lane County Jail.
- The Court agreed, the conversation the officer had with defendant, particularly the questions of whether defendant **"wanted to" or was "willing to consent to a breath test," were improper under *State v. Banks***, 364 Or 332, 434 P3d 361 (2019). In Banks, the court held that evidence of a breath test refusal was inadmissible where an officer asked: "Will you take a breath test?" The phrasing of the question **could be interpreted as either purely a request for physical cooperation (which would make the refusal admissible) or as a request for constitutionally significant consent to search**, which would make the refusal inadmissible. The phrasing in this case mirrors *Banks* almost identically, and the court therefore found it improper to admit the refusal evidence.

***State v. Salah*, 335 Or App 576 (2024)**

- This was a **domestic violence Harassment** case. Police were dispatched to a DV call at a residence, and when they arrived, defendant answered the door and went outside. Defendant told police he would talk to them on the patio, and gave the impression that he did not want officers to speak to the victim, who was still inside with the children. Officers stated they would need to speak with everyone. Moments later, police heard the victim yelling in Somali from inside the house. The front door was still open and they could see the victim was inside, pointing at defendant, visibly upset and crying, but they could not understand what she was saying. She did not appear to by visibly injured. An officer entered the house, shut the door and began trying to speak to the victim. Through the use of language line interpretation, the officer was able to get a statement about defendant's harassing conduct and took photos of evidence inside the house.

- Defendant argued that the evidence obtained inside the home should be suppressed because the officers did not have any exception to the warrant requirement that would have permitted their entry, and that no one gave them permission to enter.
- The court disagreed. In this case**, implied consent was given from the victim that allowed the officer to enter the house.** Generally, consent to enter a residence can be given by any cohabitant who lives there. This consent can be overcome if another cohabitant expressly forbids entry. The victim in this case was attempting to communicate with police, pointing at defendant, and allowed the officer who entered to follow her deeper into the home and conduct an interview. At no point did the victim refuse to provide information or give any indication that she did not want the officer inside. Based on those circumstances, the officer reasonably acted on her implied consent to enter, and closed the door to ensure that the parties were separated during any communications. Furthermore, **the defendant did not make any express objection to the officer's entry into the home** based on the available testimony or camera footage. Thus, officer entry was justified under consent and the evidence obtained inside was admissible.

***State v. Fitch*, 335 Or App 556 (2024)**

- Defendant was convicted of **Unauthorized Use of a Vehicle**. He appealed, arguing that the state provided insufficient evidence that he acted with the applicable culpable mental state for the crime.
- Facts: Defendant was involved in a car crash, and when police arrived they discovered the car had been reported stolen several weeks earlier. When question about the vehicle, defendant claimed he bought it from "some Mexican dude" who he approached in a random parking lot. Defendant could not provide a bill of sale or title, and when police called the RO of the car, they stated that they did not know defendant and were unaware of any sale. Later, the RO would find various other registration-type documents with multiple names, likely left there by defendant.
- The crime of UUV requires that a person knowingly takes or operates a vehicle while recklessly disregarding the risk that the rightful owner does not consent to use of the vehicle. Prior to a legislative change in 2019, UUV was construed to require proof that the defendant KNEW the owner did not consent, which made the crime difficult to prove in most cases, because a person could say they borrowed the car from a friend and the friend didn't tell them it was stolen.

- In this case, defendant first asked the court to apply the former "knowing" standard, despite the legislative amendment requiring only recklessness. The court declined that request. Second, the defendant argued that even under a recklessness standard, there was insufficient evidence. The court disagreed. **Based on defendant's "dubious" story, his inability to provide adequate paperwork, the owner's statements, and the suspicious documents found in the car, there was enough evidence to prove recklessness.**

***State v. Rodriguez-Delao*, 335 Or App 700 (2024)**

- This was a **DUII case** in which the main point of contention was the primary officer's **testimony about the defendant's HGN test**. The defendant argued at trial and on appeal that the court should not have admitted the evidence in light of various procedural errors on the part of the trooper.
- Facts: The defendant was suspected of DUII but was not located by police until he had already driven to his home. Once contacted, he agreed to FSTs and a breath test. During the Horizontal Gaze Nystagmus (HGN) test, defendant showed six out of six possible clues. He showed additional signs of impairment on the other FSTs and was arrested. He provided a breath sample showing he had a .12% BAC.
- Problems arose at trial during the trooper's testimony about the HGN test. The trooper acknowledged **that he had not asked all of the standard pre-test questions before beginning the FSTs; he had specifically neglected to ask defendant about any preexisting medical conditions**. The trooper admitted the was a procedural mistake, but stated that he had no reason to believe there were any medical concerns that would have affected the results of the test. The state argued that the preliminary questions could provide additional context for HGN, those questions don't have any actual impact on whether the nystagmus is observed during the test.
- The court reversed the conviction. Because the questions are a specific step in proper administration of the test, and because HGN is scientific evidence requiring an appropriate foundation, **the failure to conduct the test in accordance with both scientific literature and the OAR instructions rendered the test evidence inadmissible**. HGN evidence often has significant impact on a jury's verdict, and the trooper and prosecutor relied on it in making conclusions and arguments in this case.

- **Takeaway: do not skip, combine, gloss over, or change the order of any of the required steps during FSTs, DRE examination, or breath testing procedures.** Scientific evidence will always be held to the strictest standards of admissibility and many judges will err on the side of excluding it if there is any reason to doubt the validity of how it was obtained.

***State v. Wilcox*, 335 Or App743 (2024)**

- Defendant was convicted of Felon in **Possession of a Restricted Weapon** after two butterfly knives were located in his backpack during an inventory search by police. Defendant argued that the search of the backpack should be suppressed because they had no probable cause to seize or search his bag.
- Facts: Defendant was being disruptive at the hospital, clearly highly impaired and refusing medical treatment. Medics called police who decided to take custody of defendant in order to bring him to a detox facility. Defendant had a backpack with him that officers inventoried, where the knives were found. **Defendant argued that ORS 430.399, the statute that authorizes seizing a person to take them to detox, does not authorize seizure or search of their property.** Defendant also argued that *State v. Fulmer*, 366 Or 224 (2020), requires officers to **give individuals a chance to remove personal property prior to an inventory search**, which police did not do in this case.
- The court upheld the search. Although ORS 430.399 does not directly authorize seizure or search of evidence during a detox hold, in this case **the officers were also relying on Washington County Code Ordinance** (WCCO) 9.12.040 which does require seizure and inventory search of property in such situations. Additionally, the court held that the ***Fulmer* case did not apply here, because a person who is being taken into a detox hold is inherently in an incapacitated state**. The notice requirement in Fulmer is premised on a competent individual's ability to take possession of their property, and an incapacitated person would not have that degree of competence.
- Takeaway: make sure you are well-versed in any local ordinances or internal policies that authorize inventory searches. In this case, if the officers hadn't been able to rely on the ordinance, the search likely would have been impermissible.

***State v. Zarazura*, 334 Or App 741 (2024)**

- Defendant was convicted of **Stalking** and filed an appeal arguing that there was insufficient **evidence of "multiple contacts"** and he therefore could not be convicted of that crime.
- Facts: Defendant and his recent ex (E) were at defendant's house. They had just broken up, defendant was exhibiting unstable behavior, and E decided to leave which defendant objected to. When E went to drive away, defendant jumped onto her car to prevent her from leaving, then blocked her from backing up, then reached through the window and stole her keys. E started screaming, trying to make noise so that defendant's landlord would hear and help her. E went back inside the house and tried to open defendant's hand to get her keys back. He said, "Oh, this is going to get violent, isn't it?" E agreed to watch a movie, then again tried to leave. Defendant started hitting himself in the head as hard as he could, tried to block the door, and started flipping furniture and destroying things. E drove away toward her home, and got a text message from defendant that said, "I'm on my way. I'm on I-5." She could see defendant's vehicle catching up to her. Defendant repeatedly called E, screaming into the phone. He drove alongside her, into oncoming traffic and pulled in front of her, braking to try and force her to stop. After 22 calls, defendant told E that it would end only if she called the police. He continued following and harassing her all the way to the police station.
- Defendant argued that the state couldn't prove "repeated unwanted contacts" for purposes of Stalking because, **in his view, there was only one uninterrupted course of conduct.**
- The court disagreed. There were **at least two separate courses of conduct** in this case: the events that occurred at the house, when E felt she was not safe to leave, and the events that occurred on the road. These were distinct because they were separated by a brief period where E felt she could leave and began driving home – that belief was interrupted by defendant's decision to text and begin following her. The distinct break in contact for that brief time created at least two separate acts.
- Note: the court also made a point of hinting that different ***types*** of contact (e.g physically following someone versus texting/calling versus preventing someone from leaving) could be sufficient to show "repeated contacts" even if they occur during one course of conduct. In a stalking investigation, both temporal breaks and varied types of contact are important evidence.

***State v. Andrews*, 335 Or App 59 (2024)**

- Defendant was convicted of multiple counts of **Sex Abuse 1** for abusing a 13-year-old child. He appealed, arguing that the court should have suppressed statements he made during an out of custody interview because **he was not read his *Miranda* rights, and in his view, the interview was done under compelling circumstances** which required *Miranda*.
- Facts: Defendant was suspected of molesting his 13-year-old stepdaughter. He went to the police station voluntarily, where he was interviewed by a plainclothes detective in an interview room. The door was left open, defendant was never handcuffed, and he was told he could leave at any time. He was never Mirandized. During the interview, defendant attempted to explain the child's disclosures by claiming the acts were unintentional because he was "sleepwalking." The detective pointed out inconsistencies in defendant's story and told him that by contrast the victim's account was consistent. The detective said: "I'm being straight with you, that—that you had some lapses in judgment and that you did these things and that you knew you did them." The detective suggested that maybe something had happened in defendant's life that would cause him to "deviate," and told the defendant that "acknowledging what truthfully happened" and admitting his mistake might help him later. Defendant said the incidents were a mistake and should not have happened but maintained his sleepwalking defense. The detective stated that he didn't believe defendant was being completely truthful and urged him to consider the trauma the victim was going through. After 92 minutes, defendant said, "I'm done," and the detective allowed him to leave.
- Defendant argued the entire interview occurred under compelling circumstances. The state argued that none of the interview was compelling. The court landed somewhere in the middle. **An interview can be considered "compelling" for Miranda purposes based on four factors: (1) location, (2) length, (3) any coercive or authoritative conduct by police, and (4) the defendant's ability to leave the encounter.** The court found that factor 1 "slightly" favored defendant's argument, because he was in a police station. Factor 2 favored the state based on prior case law. Factor 4 strongly favored the state. The court found that factor three, however, was neutral until late in the interview, when it turned in defendant's favor. In the court's view, pressing defendant on details, calling out inconsistencies, appealing to his morality and issuing an "unequivocal accusation" that defendant committed the acts caused the interview to become coercive, despite the other factors. **Once the detective told defendant that he "did these things and knew you did them," *Miranda* warnings were required and defendant's remaining statements should have been suppressed.**

***State v. Moore*, 335 Or App 74 (2024)**

- Defendant was convicted of various **firearms offenses.** On appeal, he argued that the court should have suppressed evidence obtained via search warrant on the basis that the warrant failed to establish probable cause.
- Facts: defendant, along with two other individuals, robbed and assaulted the victim and stole his vehicle. When the victim initially spoke to police, he reported he had been "pistol whipped" during the event and officers saw he had visible injuries. In reality, the victim had been punched in the head (not pistol whipped) by one of the assailants, threatened with a gun, and robbed. The victim ultimately admitted he had lied about the pistol whipping, and also admitted to police that he had hit the assailants' truck with a baseball bat during the incident. Officers obtained a search warrant to search various buildings, vehicles and a cell phone for evidence related to the offense, largely based on the victim's statements.
- The defendant argued on appeal that **the search warrant should not have been granted because there was no probable cause in light of the victim's unreliability.**
- The court disagreed**. The reliability of a witness can be established by: (1) corroborating evidence found by police, (2) the witness' acknowledgement of the potential liability for making false statements, and (3) the witness willingly making statements against his own interest.** In this case, all three factors were present. Although the victim admittedly lied about a fact, other facts were corroborated by evidence known to police. Additionally, the victim's acknowledgement that he lied and admission to engaging in his own aggressive conduct during the event exposed him to possible liability, further solidifying his credibility.

***State v. Britt,* 335 Or App 91 (2024)**

- Defendant was convicted of **Assault in the Second Degree.** One of his arguments on appeal was that there was insufficient **evidence of "serious physical injury"** to sustain a conviction.
- Defendant assaulted his neighbor (K) by knocking him to the ground and repeatedly kicking K in his head and upper body. Five days later, K went o the emergency room where he was questioned, examined and given CT scans of the head and chest,

showing fractured ribs, a subdural hematoma, and a concussion. At trial, there was medical testimony that ribs can take up to three months to heal, which had cause significant pain and impacted K's sleep for several months. The nurse also testified that K's ongoing headaches would be a sign that he suffered from post-concussive syndrome from the attack. The defendant argued that the evidence was insufficient to prove a "serious physical injury" based on those facts.

- **To prove a serious physical injury, there must be evidence that the victim suffered (1) a substantial risk of death, (2) serious or protracted disfigurement, or (3) protracted impairment of health.** The court's opinions on what evidence constitutes "protracted impairment of health" have varied, and in recent cases the court has found that concussive symptoms are not protracted unless there is substantial evidence of the frequency and severity of symptoms. In this case, the court found that the **victim's complaints of four months of headaches and up to 8 months of sleep disturbance, when combined with the expert's testimony were sufficient.**

***State v. Goode*, 335 Or App 108 (2024)**

- Defendant was convicted of **sodomy, sex abuse, strangulation and menacing.** On appeal, he argued that the court should have suppressed evidence found via search **warrant in defendant's Facebook Messenger account**.
- Facts: In 2019, the victim disclosed multiple incidents of abuse by defendant over a long period of time, beginning in 2012. The victim stated that defendant had used Facebook Messenger to communicate his sexual attraction to her. Police applied for a search warrant requesting messages relating to sexual abuse or explicit topics during the 2012-2018 time frame. Relevant messages were located and were offered as evidence during the trial. Defendant argued that the warrant was not sufficiently specific or particular, that the warrant was overly broad, and the messages should not have been admitted because they were impermissible character evidence.
- The court disagreed. The warrant and its affidavit detailed the basis for the requested information and established probable cause. **The requested information was limited by both subject matter and time**, and did not exceed the scope of what the officer's probable cause covered. The type of evidence obtained through the warrant was admissible to show the defendant's sexual predisposition under *State v. McKay*, even if it was character evidence.

- Takeaway: two points the court made that are notable: (1) **warrants for third-party records** do not have the same high standard of protection as warrants to search an individual's personal digital device (like in State v. Mansor); and (2) testimony or evidence that ***the affidavit was incorporated into the warrant*** allows the court to consider not only the text within the four corners of the warrant itself, but also the information sworn to in the affidavit when making a probable cause/specificity determination. The affidavit should always be copied and physically attached to the warrant when the warrant execution takes place, so that the court can incorporate it for its analysis.

***State v. Eggers*, 372 Or 789 (2024) and *State v. Mullin*, 372 Or 809 (2024)**

- These were both DV Harassment cases. The sole issue before the court was whether the trial court erred in imposing a firearms prohibition on the basis that DV Harassment is a "qualifying misdemeanor" per the federal Violence Against Women Act (VAWA). The Court of Appeals said no, and reversed the trial court's ruling. The state appealed to the Supreme Court.
- The Supreme Court agreed with the trial court. The VAWA, which has been codified in ORS 166.255, has typically been considered to apply to DV Assaults but not necessarily Harassment, because the prohibition applies to crimes involving "physical force." When looking into the legislative history, however, the court determined that the prohibition was designed to cover acts that would constitute common law "battery," which does not require the injury level force of Assault 4 and refers to acts of offensive physical contact. Thus, DV Harassment should require the same firearms prohibitions as other "qualifying misdemeanors."

***State v. Giron-Cortez*, 372 Or 729 (2024)**

- Defendant was convicted of **Assault 3** under the theory of "recklessly causing physical injury by means of a deadly or dangerous weapon **under circumstances manifesting extreme indifference to the value of human life."** He appealed, arguing that although his conduct was reckless, the "extreme indifference" element had not been met. The trial court and Court of Appeals rejected his argument and affirmed his conviction. He appealed again to the Supreme Court.

- Facts: Defendant was in bar seated with two other men at a high-top table. He was armed with a loaded handgun and was speaking very animatedly, miming gunshots with his hands. Defendant then pulled the gun from his waistband and displayed it laying flat in the palm of his hand, with the barrel pointed toward other patrons. Defendant then took the weapon in his hand with his finger near or on the trigger, and attempted to put it back in his waistband. The gun discharged, striking defendant in the leg and sending a bullet through another patron's foot.
- The court held that in this case, the conduct was not sufficient to reach the "extreme indifference" prong. The court agreed, and defendant admitted, his conduct was reckless, but not more.
- The court took a **deep dive into what extreme indifference means,** noting that it is not defined in the ORS. "Circumstances manifesting extreme indifference" is an element that must exist *in addition to* recklessness. The legislature did not intend for all reckless uses of a deadly weapon to be per se "extreme indifference." The legislature intended for "extreme indifference" to encompass only the "highest or the greatest possible degree" of lack of concern for the risk that a defendant's conduct might cause the death of another person. It is not the circumstances themselves that manifest extreme indifference, but rather it is the conduct of a defendant that fulfills this element. The court is looking for the so-called "depraved mind." When it comes to firearms related cases: **"A finding of extreme indifference will require, at a minimum, conduct such as shooting a firearm in the direction and range of other people or, at least, as relevant here, conduct or circumstances that materially increase the risk of an accidental discharge in the direction and range of others."**